The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 1 April 2014

Session 4

Tuesday 1 April 2014

CONTENTS

JUSTICE COMMITTEE
11th Meeting 2014, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*John Pentland (Motherwell and Wishaw) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lloyd Austin (Scottish Environment LINK)
Tony Kelly (Justice Scotland)
Eric McQueen (Scottish Court Service)
Jonathan Mitchell QC
Lindsay Montgomery (Scottish Legal Aid Board)
Sheriff Principal Mhairi Stephen (Scottish Civil Justice Council)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 1 April 2014

[The Convener *opened the meeting at 10:02*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning and welcome to the 11th meeting of the Justice Committee in 2014. I ask everyone to switch off mobile phones and other electronic devices completely, as they interfere with the broadcasting system even when they are switched to silent. Apologies have been received from Alison McInnes.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take item 3, on consideration of its work programme, in private?

Members *indicated agreement.*

Courts Reform (Scotland) Bill: Stage 1

10:02

The Convener: Agenda item 2 is continuation of our stage 1 evidence taking on the Courts Reform (Scotland) Bill. This is our third evidence session on the bill. We will hear from two panels of witnesses. With the first panel, we will focus mainly on the bill's provisions that relate to judicial review. If the panellists want to move on to anything else afterwards, they should feel free to do so.

I welcome to the meeting Jonathan Mitchell QC; Tony Kelly, chair of Justice Scotland; and Lloyd Austin, convener of the governance forum, Scottish Environment LINK. I think that Mr Gibb of the Scottish Immigration Law Practitioners Association will join us later.

I invite questions from members.

Sandra White (Glasgow Kelvin) (SNP): Good morning, gentlemen. I want some clarification and perhaps some advice from you.

I note that, originally, more people supported the three-month time limit on applications for judicial review than were against it. People who opposed the three-month time limit and wanted it to be longer were concerned about the short timescale for legal aid and for housing, welfare and immigration cases, in particular. I have been involved in a number of immigration and asylum cases in which we have had to seek judicial review very quickly. Why is there concern about housing, welfare and immigration cases? What would the problems be?

Jonathan Mitchell QC: As you say, there has been a lot of support for having a very short time limit in that area. We have to look back at why people support that for part of an answer to your question.

It is a fact that the citizen keeps the state in order through judicial review. In a sense, it is the civil equivalent of criminal prosecution. If you did a survey in Barlinnie on whether there should be a three-month time limit on prosecution for crime, you would get a massive vote in favour of that.

The Convener: Strange, that.

Jonathan Mitchell: What we have is a massive vote by public authorities that they want to be immune from legal action. That is the whole point of having a three-month time limit or, indeed, any time restriction. It is so that if I, as a citizen, see that the state or a local authority is breaking the law and do not do anything about it in a fairly short period of time, nothing can be done about it. We

can see that very sharply in the way in which the proposed provision deals with continuing breaches of the law when the grounds first arose.

I will give a specific example. In 2003, under the Mental Health (Care and Treatment) Act 2003, the Parliament voted to bring in a right of appeal for patients who were held in excessive security. It voted that that would be done by 1 May 2006, but the right has never been brought in. That was the subject of a judicial review petition, which took until May 2008 to get to court. By 2012, the court had held, by standing order, that the Government was acting unlawfully in not implementing the right of appeal. We have reached April 2014 and nothing has been done. The statutory provision that the Parliament enacted remains not in force. This is something on which the Government can turn round and say to anyone who brings a case now, "You weren't in court within three months."

I come back to immigration and asylum cases. The proposed provision means that if I, as an asylum claimant, have a good claim that I should not be sent back to a country where I say I will be tortured but I do not bring that claim within three months, whether I can bring it after that period will be down to judicial discretion, for which there is provision. When it comes to whether I will be allowed to make that complaint, it will be a matter of keeping my fingers crossed, to use the old metaphor.

All this is being done, in effect, because of a claim that it is good public administration that people bring cases as soon as they can. There is no other parallel context in Scotland in which people are held to such limits. If I have a road accident, I have three years to claim. If I have a contract claim, I have five years to claim. Even under the Human Rights Act 1998 and the Scotland Act 1998 more generally, I have a year to claim. A three-month period is unique.

One has to ask why a three-month time limit is being imposed. When you ask why people are supporting it, you can see why it is being brought in: its purpose is to stop people making claims. The rationale is to cut down the very small number of judicial reviews that we have in Scotland at present by making it more difficult for people to get a judicial review into court. If it was not going to do that, there would be no purpose in having the provision at all and no point in having this discussion.

The Convener: How many judicial reviews do we have in Scotland? Do you have those statistics?

Jonathan Mitchell: It goes up and down year by year, but as a crude generalisation, there are approximately 300 to 350 a year, out of 5 million people. About three quarters or four fifths of those are asylum cases, which are subject to special core procedures that provide, in effect, for a more summary form of determination once they are in court. Leaving aside those cases, 50 to 60 judicial reviews a year, more or less, are brought by the 5 million people in Scotland—companies and so on, as opposed to asylum seekers. That is a tiny number of cases. Nevertheless, it is the very sharp end of a very big issue, which is operating the rule of law.

The Convener: Do any other witnesses wish to comment?

Tony Kelly (Justice Scotland): On a point of information, those figures are mentioned on page 4 of the written submission from Justice Scotland.

In relation to the number of respondents who supported the introduction of a time limit, on page 26 of chapter 12 of Lord Gill's civil justice review, Lord Gill says that just over 20 per cent of respondents to his review considered that a time limit should be introduced, so I do not think that an overwhelming majority seeks a three-month time limit.

The Convener: Besides, percentages do not always mean what they appear to mean.

Tony Kelly: Indeed.

Lloyd Austin (Scottish Environment LINK): I agree with Jonathan Mitchell's point that judicial review is the way in which citizens can challenge the state. From our point of view—we speak on behalf of the environment—we are very aware that the environment itself can never go to court. In relation to governmental or public body decisions that affect the environment, the European Union, the United Kingdom and Scotland are signed up to the Aarhus convention as a means of providing citizens, communities and non-governmental organisations with the right to seek review of those decisions.

The question of timing comes in to the right of those bodies. We agree that there is a preference for timeousness, but in some circumstances in which funding is an issue, whether we are talking about people getting legal aid or local community groups raising funds, there can be quite a few hurdles to overcome before they can go to court, and that can take more than three months. That is an issue for local community and campaigning groups and for individuals who are particularly concerned about environmental matters on behalf of the public interest.

As regards the number of judicial reviews that relate to environmental and planning issues, there is a useful research report by Neil Collar, a partner at Brodies, on the number and types of judicial reviews in the field of planning, in which he concludes that judicial review is "not a NIMBY's

charter". Although half the cases are brought by objectors, many of those are competitive commercial interests; they are not necessarily campaigning groups. I would certainly recommend that the committee look at that report.

The Convener: We will ask the clerks to get a copy of it for us.

Sandra White: As someone who tried to introduce a third-party right of appeal for community groups, I support groups having that right. I tried to do that through a member's bill, but I was unsuccessful.

The Convener: That reminds me of the old days.

Sandra White: Indeed. You supported that, convener.

We have been talking about the three-month time limit, and you mentioned that certain groups were more supportive than others. If the time limit should not be three months, what should it be?

Tony Kelly: We said in our submission that it is difficult to understand why the period of three months was chosen. The only real reason that we can identify is that there has been a complete read-across from England and Wales, but we are in an entirely different situation. England and Wales have a stringent time limit because of the volume of litigation that overran the administrative court down south. The time limit was introduced in an attempt to rein in the number of applications. We are nowhere near approaching a problem in relation to volume.

If pressed on a choice, we would say that perhaps the Human Rights Act 1998 and the Scotland Act 1998 provide a go-to for assessing what the time limit should be. I would not say that it is a well-worn avenue of litigation to use those acts, but at least litigants know that they have one year to get to court and that, if they do not get to court within one year, they will have a problem and will have to ask the court to exercise an equitable discretion.

If pressed, that would be an idea, but the primary question is, why choose three months? There does not seem to be a pressing need for a three-month time limit in this jurisdiction.

Jonathan Mitchell: That is right. If we have a time limit at all, three months is incredibly short. Realistically, it means that somebody must be teed up, and must have a solicitor who is teed up, within weeks, so that they can get the papers in order and get the case into court through counsel. One has to ask why the limit is three months, when it would be so much longer for anything else.

Behind that is a deeper question: why have a time limit on that at all? We do not have a time limit for prosecution of murder. We do not say to people, "It is just not fair; this happened 20 years ago." The reason that is put forward for why a time limit is needed is that it is to protect proper public administration and the rights of third parties, but why should we then say that, even if a time limit is not needed for the purpose of protecting proper public administration and the rights of third parties, we still need one?

I would have thought that we could have a completely differently written provision that said that, when there is an unfair prejudice to public administration or to third parties, that would be a bar to coming to court. You can see how that could happen—for example, in a planning case, if I wanted to challenge a grant of planning permission to my next-door neighbour when they had built, or if I wanted to challenge a decision by a local authority on last year's budget, when we were going into the next year—but why do we say, when an asylum seeker complains that a decision is being made that will result in them being sent back to be tortured, that there is a third-party interest to be defended? There simply is not. There is a baby and bath water problem here.

10:15

Lloyd Austin: If pressed, we would agree that the period of a year, which is used in a human rights context, could be an alternative limit.

I also agree that we need to ask why there should be a limit at all. Why not have a limit that is determined by the circumstances of the case? If someone was challenging a planning decision after the development has been built, that would be ludicrous. The circumstances of the individual, the community, the campaign group or the NGO, such as whether they have professional advisers in place at the time of preparing the case or whether they need to raise funds to pursue the action, should be taken into account when determining a timeous time period.

Margaret Mitchell (Central Scotland) (Con): Good morning, gentlemen.

Could you comment on the leave of court proposals and the two tests of sufficient interest and real prospect of success that are apparently being introduced to filter out unmeritorious cases, although there does not seem to be much evidence that there is a problem with unmeritorious cases? Is that the case?

Tony Kelly: The bar is pretty low at the moment. The court can exert some control over the cases that come in at first order stage. I am certainly aware of cases in which the judge requires to be addressed on whether there is a competent application to the supervisory jurisdiction.

The proposals in the bill would raise the bar quite considerably. The petitioner would have to satisfy the court that there were real prospects of success. Reading across to England, with the situation in which an analogy seems to have been drawn, the provision is used to weed out vexatious, hopeless or frivolous applications. We would certainly have no problem with a test to weed out those hopeless cases, but the proposal seems to represent quite a big jump up to the imposition of a real bar. The problem is that it is linked to the three-month time limit. If people rush to get to court to beat the time bar, their applications might well not be as fully prepared and capable of being fully argued at that stage. That would leak into the higher test being applied to those applications that are not fully worked up.

We do not have a particular problem with the proposal on standing. That seems to codify what has been stated by the Supreme Court. The sufficient interest test seems to be incredibly realistic and appropriate.

Jonathan Mitchell: The point about standing is right; in recent years, the law has been reformed by the courts, and that is recognised by the provision in the bill.

On the issue of weeding out, I see arguments on both sides. Of course unmeritorious cases should not proceed further, and I do not really have a problem with the idea that weeding should be done at an early stage. In fact, there have been reforms in court procedure in the past couple of years that have already brought that into effect without any need for statute as far as immigration and asylum cases are concerned. That was done as a template for more general internal reform.

As Professor Kelly says, the problem is with how the issue links in with the time bar. If people have to have all their skittles up and in a neat row within the three-month time limit, it might be quite difficult for them to satisfy a court that the case is one with good prospects. The present arrangement gives people a chance to make sure that their skittles are all up before somebody tries to knock them down.

That said, I do not really have a problem with the permission provisions as they stand. I do not think that it is a big one, but there is a problem with people bringing hopeless cases. The fact that it is not a big problem can be seen by the success rates. Traditionally, immigration and asylum cases have had a success rate of between two thirds and four fifths each year. We know that from looking at what happens on the expenses.

Of the minority of cases that do not succeed, there are some that should never have been brought. However, as has been said, the proposal has been lifted from England, where the courts get flooded with hopeless cases, a lot of which are brought by party litigants quite unscrupulously. You can tell from our numbers that we do not have a flooding problem. In a way, what we have is a solution that is searching for a problem. Nobody has identified that the problem of unmeritorious cases being brought is big enough to justify legislation. The measures are being brought forward on the theoretical basis that, if it is a problem in England, how could it possibly not be a problem here? Statistics show that it is not a problem here.

The Convener: Might there be displacement of cases? If there is a time limit in England but not in Scotland, might people decide to go to Scotland, where they would get a longer go?

Jonathan Mitchell: There could be, in theory. There are very few cases—but they do exist—in which people can, in effect, choose which court to bring a case in. For example, I have been involved in the case against the Lord Chancellor to strike down the introduction of fees in the employment tribunal. I act for the petitioners in Scotland and Unison is acting in a parallel case in England. There is a degree of competition, if you like, between the two countries in that instance, but such cases are very rare.

About two years ago, the Home Office was asked whether it could point to a problem of asylum seekers forum shopping between England and Scotland. It said in open court that it had researched the issue and that it had not found a single case in which somebody had done that.

In theory, it is true that people could come to court in Scotland after three months while they could not do so in England, but so be it. We face that theoretical issue in everything from divorce to road accident cases.

The Convener: I thought that it was worth asking about.

Jonathan Mitchell: Absolutely.

Margaret Mitchell: I wonder if Mr Austin would address article 9 of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which I think is called the Aarhus convention.

Lloyd Austin: Yes I will come to that. To answer the original question on sufficient interest and standing, we completely agree with the comments that have been made about the decisions that the courts made in the AXA General Insurance and Walton cases, which we believe should be continued.

On the leave to proceed stage, we can see benefits in the proposal, subject to certain

circumstances. The question of how high the hurdle is is important. It is good to weed out vexatious cases, but some cases that might benefit from a good argument might also get knocked out if the test is whether they stand a good chance of success. It is important that there is a balance. A first hearing could address preliminary points such as protected expenses orders and people's concerns about costs and could settle issues such as standing before the costs and expenses of the substantive arguments start racking up. That offers the opportunity to reduce the chilling effect on litigants.

Another issue is the right to an oral hearing or appeal if leave is refused. One of our sister organisations in England and Wales—Friends of the Earth—took action against the Secretary of State for Energy and Climate Change over the home renewables decision. Initially, it was refused leave to proceed but it won its appeal and, at the substantive hearing, it won the case. It is very important that there is a right to a hearing or an appeal if leave to proceed is refused.

Aarhus is our key concern in respect of the rights of litigants on behalf of the environment. The convention deals with a number of matters but, essentially, it says that communities, citizens and NGOs should have a right to have decisions that affect the environment reviewed. Article 9 specifies a couple of conditions. First, it is necessary for those communities, citizens and NGOs to have sufficient standing. I think that we have addressed that with the sufficient interest test. However, the three tests that are mentioned in article 9 relate to issues of timing, the process not being prohibitively expensive and the merits of the case. The bill and the discussions about judicial review address issues to do with costs and with timing, but not issues to do with the substantiveness of the review. That is an interesting issue, because judicial review is not designed to examine the merits of a case. Therefore, there is a question about whether judicial review should be adapted to meet the requirements of the Aarhus convention or whether there should be a lower court or a tribunal on the environment to do that.

Scottish Environment LINK's member bodies support the concept of an environmental tribunal or court that could carry out those substantive reviews. That tribunal or court could be a chamber within the new unified tribunals system, for example. I know that the Government is committed to reviewing the options for an environmental court—that was in the Government's manifesto—and we are looking forward to hearing about those when the time comes.

Margaret Mitchell: Is there a gap in how people can be represented? That is very much a live issue, given the huge numbers of people in various communities Scotland-wide who are objecting to incinerators and biomass developments.

Lloyd Austin: Yes, I would argue that it is a big issue. Individuals, communities and NGOs must overcome a number of hurdles in order to raise environmental points that we would argue are perfectly valid. In our opinion, those hurdles illustrate non-compliance with the Aarhus convention, whether because of issues with the right to a substantive review, because the cost is prohibitively expensive or because people are being frozen out by the time limit that we have been discussing.

Roderick Campbell (North East Fife) (SNP): Good morning, panel.

I refer to my entry in the register of members' interests: I am a member of the Faculty of Advocates.

I would like to return to some issues that have already been raised, one of which is standing. The decision of the Supreme Court in the AXA case has been mentioned. Since then, the inner house has considered matters further in the sustainable Shetland case, in which it reached the view that Donald Trump, in particular, may have been affected by the issues in the petition, but that he would not have been directly affected by them. It took on board comments by the Supreme Court that anyone who wishes to enter the process must be directly affected.

Are you all content that the question of whether someone is directly affected is a matter that the courts can determine? Does not the bill represent a legislative opportunity to consider that more fully?

Jonathan Mitchell: I think that that is right. Although the law is now in perfectly good shape and is perfectly clear, there seems to be a certain degree of uncomfortableness on the part of those who operate it, both in the courts and in Government, in recognising that. The sustainable Shetland case is an example of that.

Although the number of cases in question has not been large, there has been a steady enough flow of them to show that there is a bit of a problem with people claiming that a good defence is that someone does not have sufficient interest in a case because although the issue with which the case deals might affect the public generally, it does not affect them as an individual.

There are a number of examples. I mentioned the challenge to the non-introduction of the appeal right for mental health patients, which was

successfully challenged by the Scottish ministers all the way through the Court of Session on the basis that, because the right had not been introduced, the person concerned could not claim that his rights were being affected, as he did not have any rights in the first place. Ah ha! That would be a good point for a school debating society debate, one would have thought, but it actually succeeded in the Court of Session twice before being knocked out in the Supreme Court.

10:30

There are other examples. Whereas in England the Lord Chancellor accepted that there was sufficient public interest for the matter of the introduction of employment tribunal fees to be litigated, in Scotland the point was taken—albeit that it was thrown out of court—that there was no sufficient public interest for people to challenge the measure and the only people who could challenge it were individuals who had been stopped from raising a case, with the consequence that, until the scheme had been brought into force, no one would be able to challenge it.

There is a continuing undercurrent of people raising problems about standing; you are quite right about that. The difficulty is that we are talking about a difference of culture, not a legal problem. It is healthy that the Parliament should give what is in effect a rubber stamp of approval for the law as it has been declared by the Supreme Court, as it does in the bill.

Lloyd Austin: I agree with that. The law from the AXA case is clear, but I agree that there are issues and debates to be had about its application. I refer to what I said about cases in which the challenge relates to a decision that affects the environment. The environment cannot go to court, and it can always be argued that an individual, community or NGO who acts on behalf of the environment is not directly affected, because they are acting on behalf of not themselves but the public interest, in the context of what are deemed to be environmental concerns.

In promoting the Aarhus convention, the United Nations is saying, "Here is a public interest that we want to see having a say through individuals, community groups, NGOs and so on. It cannot litigate itself, therefore we want the ability for others to do so on its behalf." The application of the AXA test sometimes raises such issues.

Tony Kelly: I echo what Mr Mitchell has said. It is difficult to be prescriptive in the bill. The terms of the provision probably go as far as they can do.

There is a cultural difference between Scotland and down south in respect of litigation in relation to the public interest. There is a wealth of litigation in relation to which the English courts are more open and say, "This is not a busybody litigating for the sake of it; this is someone who is bringing a wrong before the court, to have the matter clarified and the interest declared." Up here, we seem traditionally to have taken a narrow view, even when the law appeared to have been freed up. The Court of Session took a very narrow view in AXA, which had to be opened up again and declared afresh. In the sustainable Shetland case, the courts have yet again taken a narrow view.

Widening up the matter in the bill might deprive the courts of any gatekeeper role in relation to the question of standing. We are content with the terms of the bill.

Roderick Campbell: Thank you for clarifying that.

On time limits, the bill provides that an application to the court must be made within three months or

"such longer period as the Court considers equitable having regard to all the circumstances."

We are a bit confused by the written submission from Justice Scotland, which implies that the bill gives the courts no

"equitable jurisdiction to waive the time limit".

Tony Kelly: I read that—

Roderick Campbell: I would be grateful for your thoughts on that and for the panel's thoughts on the provision that the time period for application for judicial review must be calculated from

"the date on which the grounds giving rise to the application first arise".

The Convener: Mr Kelly, perhaps you will respond to the first point before I bring in the rest of the panel on the broader point.

Tony Kelly: I read our submission with a bit of surprise. There clearly is an equitable power—

The Convener: Sorry. Did you say that you read your submission with a bit of surprise? Is your name at the bottom of it?

Tony Kelly: It is indeed—

The Convener: Dearie me. [*Laughter*.]

Tony Kelly: An equitable power is clearly given to the court in subparagraph (b) of section 1 of proposed new section 27A of the Court of Session Act 1988. The problem is that three months is the headline time limit and will become the default—that is certainly what happened in England. Even a day beyond three months, we will have to come to court to persuade it to exercise its equitable discretion.

As we have explained in our submission, we are concerned with the assessment of when the time starts, which is problematic with regard to

continuing breaches or a course of conduct. It is always with difficulty that the courts deal with such problems about the calculation of time limits.

The commencement of the time period in the bill is

"the date on which the grounds giving rise to the application first arise."

Mr Mitchell gave you a policy example of what that would mean, but the one that came to my mind was in relation to slopping out. That issue first arose in the 1960s, but it became justiciable in 1999 under the terms of the European convention on human rights under the Scotland Act 1998. So when are we saying that slopping out first arose? What would we say to individual litigants if they do not get to court within three months of their incarceration? When did the issue first arise for them? Would we have a continuing course of conduct with matters brought to court, reviewed and held to be a proper and judicial review? All sorts of problems are inherent in calculating the time limit, commencing from whenever the grounds first arise.

One can even see—dare I say it before the committee—judicial review of acts of the Scottish Parliament. I am not saying that there would be in all cases, but if there are sound reasons for judicially reviewing an act of the Scottish Parliament for being beyond its devolved competence and a challenge does not get to court within three months of that act being brought into force—if, for example, the issue suddenly occurs to someone four months after the act's commencement—the litigant would have a problem because the grounds first arose whenever the act came into force.

Lloyd Austin: The question about when the grounds arise underlines the need for greater flexibility on time limits. There are many cases involving local people, communities or campaign groups who did not know about a decision at the time when it was made. Indeed, it might take a couple of months before they realise what the impact on the local environment will be, but once they do, they organise and start fund raising and so on.

Jonathan Mitchell: Across the board—this is a generalisation to which there are exceptions—it is usually a necessity to have knowledge that you have an issue on which you can go to court before time starts to run. If I have been in a road accident but I do not know who ran into me, the time does not run until I could reasonably know who that individual was.

However, there is a more general problem that is important. Superficially, it is quite right to have the fallback provision of the court being able to deal with a matter equitably. The problem arises when one considers how the policy will work in practice and, with a tight time limit, the matter will be argued constantly.

I work for respondents just as much as I work for petitioners. Where a good case is being brought against my clients and I think that they will lose it if the court hears the matter on its merits, I would advise them that we need to give our attention to arguing that it is not equitable that the case should be allowed to be brought in the first place.

There will be satellite litigation. There will also be complete duplication in a lot of cases. First, we will have an argument about whether it is equitable that the case should be brought. After a case has got through, we will then have an argument about whether the case is well founded. That would not be too much of a problem if that were to happen only from time to time, but with such time limits, it will happen constantly.

Roderick Campbell: I assume that the panel is in agreement that, whatever the timescale, it wants to have a backstop equitable provision, which would be used less often if the original timescale was much wider.

Jonathan Mitchell: Absolutely.

Tony Kelly: Yes. The timescale also encourages people to go to court as their first reaction. Down south, there is a pre-action protocol that a petitioner must follow before they get to court. Having a blanket and stringent provision in the bill means that people will go to court and then turn around to find information to deal with the respondent. If there is a more generous time limit, perhaps coupled with a pre-action protocol, there would be communication with the respondent. For example, one might have an elucidation of particular bits of information that completely deprives one of one's right of action, clears the matter up or highlights a concession that avoids the necessity of court action.

Lloyd Austin: I completely accept Mr Mitchell's point about knowledge, although I would be concerned about the narrow interpretation that can sometimes be made of a local community or a local individual being deemed to know something. I refer to the McGinty case, which concerned the Hunterston planning decision. Mr McGinty was unable to challenge the national planning framework decision because he was deemed to have been aware of the consultation that took place, which had been advertised in *The Edinburgh Gazette* and not locally—

The Convener: We all read *The Edinburgh Gazette*.

Lloyd Austin: Well, exactly. Such narrow interpretation, along the lines of "He should have

known", is of concern to local people and communities.

John Pentland (Motherwell and Wishaw) (Lab): The Gill report recommends a three-month, short time limit. Diverse areas of policy can form the basis of a judicial review action. Should there be a one-size-fits-all approach? Should there be a single time limit for all types of cases?

Tony Kelly: It is pretty difficult to have a facts-and-circumstances time limit. That is the problem that prompted the new provision. We have a loose and vague time limit—mora. The difficulty is that the application of that varies according to the facts and circumstances. We are not opposed to the introduction of a time limit that would say, "This is it" and to people who get into difficulty having to invoke the equitable discretion of the courts.

The Convener: Which would mean a time limit of one year, I think you said.

Tony Kelly: If pressed, I would say one year, as that is something that we are conversant with. The one-size-fits-all time limit is not three months, as far as we are concerned.

Jonathan Mitchell: I think that Mr Pentland is right: it is a bit odd. Judicial review covers such a wide range of possible issues. At one extreme is a challenge to something national, such as a national planning policy; at the other is the single asylum claimant.

One line runs through this, which one could turn into a proper statutory provision, and that would be to talk about a time limit beyond which allowing people to bring a case would cause unreasonable prejudice to public administration or the rights of third parties—those words are off the top of my head, but a draftsman could formulate such a provision.

We have given examples involving planning permission and the like and I am sure that there are plenty of others. That would be a two-sizes-fit-all sort of provision. There are cases in which we have to consider third parties' rights or the general interests of the public, and there are those that make up the vast majority, in which we do not have to do that, but which involve a citizen complaining that they or the public have been affected by illegal acts of the state—I use "the state" in its widest sense.

The three-month provision says nothing about whether there is prejudice or whether there is a problem for third parties at all.

John Pentland: Might the time limit discourage efforts to settle cases, especially when legal aid is involved?

Tony Kelly: Certainly. I have alluded to that. The very stringent time limit means that people's first reaction is to get to court within the time limit, rather than finding out more first. We might get to the court on the eve of the time limit and seek further information from the respondents about the basis of the decision, which might mean that the application to the court disappears. It is much better if there is a more generous time limit, so that that is canvassed before we go to court—the petitioner's position is put to the respondent and an opportunity is provided to the respondent either to think about the matter, reconsider and concede, or to furnish further information regarding the basis of the decision that is under review.

Lloyd Austin: I agree with that. The procedures down south, involving letters before action or whatever they are called, enable people to get information and/or amendments to decisions that address their concerns. If the time limit, whatever it is, starts before those processes, people will end up in court, which would negate those negotiations or discussions. Something on the time limit would enable better discussions between parties.

10:45

Jonathan Mitchell: I make my living out of people litigating, so my selfish interest is in people jumping into court fast and the more, the better. However, from a public point of view, that is bad. Litigation ought to be seen as a last resort, not a first one. My normal advice to clients is to think twice, three times and four times before they go to court. The provisions in the bill mean that I will not say that; I will say "Jump in fast."

John Finnie (Highlands and Islands) (Ind): I had a series of questions for Mr Austin, but Margaret Mitchell covered them. However, I want to clarify a few things to do with costs with you, Mr Austin. You mentioned the McGinty case. The written submission from Friends of the Earth Scotland and the Environmental Law Centre Scotland states:

> "In response to legal action from the European Commission, the Government's moves to tackle the excessive cost of environmental litigation are limited to codification of rules of court for PEOs. However, the new rules in Scotland apply only to cases under the Public Participation Directive, and fall far short of providing for the kind of assurance against prohibitive expense required by the Aarhus Convention."

There is further mention over the page of what costs might or might not be reasonable given the level of median salary in the United Kingdom. Are you satisfied that the bill is compliant with the Aarhus convention?

Lloyd Austin: The bill itself will not make Scotland Aarhus compliant—definitely not. In some places, the bill take steps towards compliance, but it does not in other areas. Friends of the Earth Scotland and the Environmental Law

Centre Scotland have rightly raised the point that the bill does not fully address the issue of costs, among other issues.

John Finnie: Is there any aspect of the bill that could be altered in order to make the bill more compliant?

Lloyd Austin: Addressing some of the issues with time limits and standing that we discussed previously would do that. If some of the cost issues could be addressed, that would make us more compliant. However, there is still the very significant issue of the right to review the merits of a decision, which the bill does not address and—I think—could never address. That has to be done under the Government's proposed review of the options of environmental courts or tribunals, which the Government is committed to publishing before the end of this Parliament.

The bill makes a few tentative steps towards Aarhus compliance, but on its own it will never do everything.

John Finnie: The Aarhus convention has featured in a lot of the legislation that we have had cause to examine. Do you believe that there is a commitment from the Scottish Government to seek compliance with the convention?

Lloyd Austin: Sorry, but which Government?

John Finnie: I am talking about the Scottish Government.

Lloyd Austin: All Governments in the UK are required to comply with the Aarhus convention. In fact, all Governments in the EU are required to comply with the Aarhus convention because the EU is a party to it. I do not think that anybody from any Government has said that they will not comply with it, but I think that Governments have a different interpretation of it, which is a narrower—

The Convener: That is a diplomatic answer, Mr Austin.

Lloyd Austin: I think that they have a narrower interpretation than we do of what compliance means.

Jonathan Mitchell: Just on a technical point, I think that Mr Austin was earlier addressing the position of the British Government and not that of the Scottish Government, because the question of an environmental court or chamber is not applicable in Scotland, as far as I know. The UK Government obviously has its jurisdiction here, but we are talking about the Scottish Government.

On the point about expenses, I think that the opportunity has been missed to introduce the Aarhus rule for protective expenses orders in public interest litigation. The Scottish Government has been humming and hawing about that for a good few years. The Aarhus convention and European law have introduced a degree of protection for environmental claims against excessive expenses orders. We really ought to have the same for public interest litigation in general.

Lloyd Austin: The commitment that I was referring to was a Scottish Government one. It is in the Scottish National Party manifesto.

The Convener: You have read the SNP manifesto. Crumbs! That is more than I have done.

Lloyd Austin: The Cabinet Secretary for Rural Affairs and the Environment has said that the Government intends to publish an options paper on an environmental court before the end of the session.

Jonathan Mitchell: Sorry.

John Finnie: Given the review that we are looking at and the suggestion about greater specialisms, is there an opportunity to set up an environmental court on the back of the legislation?

Lloyd Austin: Yes. One of the options that the cabinet secretary will probably consider is whether there should be an environmental chamber in the new, broader tribunal system.

John Finnie: Thank you.

Christian Allard (North East Scotland) (SNP): I would like a little clarification. I heard all your answers, but am still not sure which way we are going with the time limit. Will a shorter time limit discourage or encourage the number of judicial reviews? I have heard conflicting views.

Lloyd Austin: I think that the short time limit that the bill will introduce will discourage communities and individuals and freeze them out. I think that there will be a chilling effect.

The Convener: I think that Mr Allard was looking for you to tell us what your time limit would be, if we can sum up. I know what Mr Kelly has told us.

Lloyd Austin: I think that, if we were pressed, we would go for a year, as others have said. However, we are very aware that there are different circumstances in different types of judicial review. I would support Mr Mitchell's idea of having some criteria by which those circumstances could be interpreted.

Jonathan Mitchell: There are pulls in both directions. As Mr Kelly said, some people will jump into court early because that is their only chance and they know that it is their only chance. Those are people who otherwise would have settled matters amicably without going to court at all. Other people will simply not get into court at all for a number of reasons.

It is a matter of complete speculation, because there has been no attempt to obtain evidence on it. As Professor Mullen pointed out, the problems of delays and of people coming into court slow are quite easily obtainable in the Court of Session records. My guess is that the first group will be relatively small and the second group will be relatively large. A lot of people will see a solicitor after six months of correspondence with the local authority and simply be told, "I'm sorry, but you've missed your chance." However, there will not be that many in the first group, who will jump into court first.

That is guesswork, because the system has set its face against obtaining real evidence of whether there is a problem. We in Scotland have preferred to set our face against getting evidence of what happens in practice.

Christian Allard: That is the answer that I was looking for. The shorter time limit will discourage the number of judicial reviews. That is your guess.

The Convener: And finally—as some television shows say—do the witnesses wish to make any comments on any other part of the bill? Please do not feel obliged to do so, because hearing your specialist views on judicial review has been very interesting.

Tony Kelly: I have nothing to add.

Jonathan Mitchell: I have a general point. We do not have enough judicial reviews in Scotland. I say that with a selfish interest, in a sense. It is extraordinary that a country of 5 million people, if we exclude the asylum seekers, can generate only around 50, 60 or 70 judicial reviews a year. People do not use the law enough to challenge state unlawfulness.

The Convener: I will take it that you are not touting for business. I appreciate that that is a disinterested point.

Jonathan Mitchell: I act against petitioners as much as I do for them.

The Convener: I understand.

Lloyd Austin: I simply underline the point that I made earlier about the environment not being able to litigate on its own and the rights of citizens to challenge decisions that affect the public interest in environmental protection. That is crucial. Judicial review is part of that but, as I discussed with Mr Finnie, it is not the only thing. Efforts beyond the bill will be equally important in ensuring those rights.

The Convener: You have made your pitch for a tribunal for environmental matters.

That ends the evidence session. I thank you all very much and suspend the meeting for five minutes, until 11 o'clock.

10:55

Meeting suspended.

11:00

On resuming—

The Convener: We move on to our second panel of witnesses, who will focus mainly on delivery of the provisions in the bill. I welcome Lindsay Montgomery, chief executive, Scottish Legal Aid Board; Eric McQueen, chief executive, Scottish Court Service; Sheriff Principal Mhairi Stephen, member, Scottish Civil Justice Council; and Roddy Flinn and Ondine Tennant, secretary and deputy secretary, Scottish Civil Justice Council. We shall move straight to questions.

Elaine Murray (Dumfriesshire) (Lab): We have heard evidence from other witnesses—

The Convener: Excuse me for interrupting, but I see that the Parliament's photographer has just come in. Do you mind having your photograph taken? It may be used against you in evidence.

Lindsay Montgomery (Scottish Legal Aid Board): Can we say no?

The Convener: You can. I would like the photographer to be quick and not to take too many pictures, because it makes a noise.

Elaine Murray: We heard evidence from other witnesses suggesting that the sheriff courts are currently having difficulty coping with all the business that is coming their way, and that civil cases, including family cases, are being pushed back. The bill seems to propose that additional work will come the way of the sheriff courts, but there is no additional resource being allocated, so my first question is to ask whether you believe that the sheriff courts can cope with that additional work without additional resources.

The Convener: It is a question about capacity. Sheriff Principal Stephen?

Sheriff Principal Mhairi Stephen (Scottish Civil Justice Council): It is a pleasure to be here, not just to represent the Scottish Civil Justice Council—the first statutory manifestation of courts reform, which is a good thing—but also because, as sheriff principal, I can perhaps answer the question from a practical point of view.

The whole focus of the Gill review, of which I was a member, was to deal with the problem of criminal business pushing to the side the important civil business of the court. The review's recommendations are designed to deal with that, so it is not really a good idea to look at the courts as they are at present. The whole reform programme is a series of interconnected measures that are designed not to isolate civil

business, but to give it its place and to put criminal business—particularly summary criminal business, which is big volume—to the summary sheriff, and to free up sheriffs to play to their strengths as lawyers in dealing with civil business in a more focused, case-managed and specialised way.

I am confident that the reforms in the bill will significantly change how sheriff court business is conducted, and will give the whole system the opportunity to deal with civil business and to increase civil business in a much more effective manner.

Eric McQueen (Scottish Court Service): We are not looking at physical capacity in isolation. It is part of the work that the Scottish Court Service has been doing over the past couple of years, and the work that we did on "Shaping Scotland's Court Services: A public consultation on proposals for a court structure for the future" was very much about how to get the court structures right for the reforms, how to invest in technology and services, and how to ensure that the system is affordable in the long term.

The Courts Reform (Scotland) Bill is the next milestone in the journey of reform and change that will happen over the next 5 to 10 years. There has been a lot of graphic language used about issues to do with court capacity. It is important to think about physical capacity and about how the resources are deployed. Three or four years ago we were running more than 31,500 sitting days in the sheriff courts annually. At the moment the figure is just under 29,000. Even if we allow for the courts that are now closing—which, to a certain extent, are supplemented by the capacity that is coming back from the High Court—there are still more than 2,000 court sitting days that we were using in the past and are not using at the moment, so physical capacity is less of an issue.

The point about deployment of resources is more key. It is clear that resources have reduced; that is partly because of the economic crisis, but it is also because of decreasing business volumes in recent years.

The civil court reforms are not, per se, about bringing in large amounts of new business, but are about how we distribute business differently. It is about dealing with the same levels of business but making sure that we deploy the levels of staff and judicial resource that we have at the moment more effectively and efficiently in the future. We think that the civil court reforms will help to take us down that road.

Lindsay Montgomery: I will pick up two points from that. First, apart from the bill, the huge range of work that is being done through the making justice work project, and the work that is being done by the Scottish Civil Justice Council, really should make civil business much more efficient than it is now. We expect real benefits in terms of a reduction in the cost of legal aid through that work.

Secondly, with the exception of civil legal aid cases, the reductions in civil business through the courts have been very marked and are continuing. In fact, civil legal aid is the only growth area, for a number of reasons. Those two things together will make a marked difference in the coming years in terms of management of the business and, from our point of view, of the cost that we pick up for a very large number of cases.

Elaine Murray: I want to go back to what the sheriff principal said. When the Sheriffs Association gave evidence a couple of weeks ago, it was suggested that the reforms should not be looked at as something that is happening now, but as something that will happen over a period of years. In terms of the resources, my understanding is that a summary sheriff will be appointed only when another sheriff retires, so you are not actually getting any additional support. How long will it be before the court system settles down and operates in this new and enlightened way?

Eric McQueen: Our planning assumption is that the move to what we might see as the optimum level of summary sheriffs could take anywhere between 5 and 10 years. Clearly, most of that will be dependent on the retirement profile of the existing sheriffs. For the vast majority, you are correct that replacement will be on that one-for-one basis. We expect a higher number in the first year, because stipendiary magistrates will transfer over and there will be a number of retirements during that year. After that, we expect a steady number—about 10 each year—to come in until we reach about 60 summary sheriffs.

At the same time—this is the one issue that has been forgotten—there will also be a transfer of resource from the Court of Session to facilitate the work that will be done at specialist courts in the future. For the sheriff appeal or personal injury courts, we will deploy temporary judge resources that will be allocated to the specialist courts as they are set up. The numbers of sheriffs who will sit at specialised courts will be additional to the simple one-for-one exchange that we will see over the longer term.

Elaine Murray: We have other legislation coming through—the Criminal Justice (Scotland) Bill. If it is passed in its current form there will be additional criminal work. If the requirement for corroboration is abolished, it is likely that more cases will come through. Is that factored into your calculations on the courts' likely workload?

Eric McQueen: That is all part of the plan; Lindsay Montgomery commented on that earlier. The reforms are largely about dealing with cases more quickly and effectively. Things may happen that will increase the work, but we hope that other things will balance that. As with all such things, where we are now and in future years will need to be kept under review.

The Convener: What increase in criminal cases have you factored in if the requirement for corroboration is abolished?

Eric McQueen: The estimates are that the increase would be about 6 per cent to 8 per cent, based on research that was done by the police and the Crown Office.

Sheriff Principal Stephen: On the transitional arrangements, it is generally thought that it may take about 10 years for the system to roll fully into place. However, it is important to realise that the bill underpins an important set of changes that have already begun—namely that people should not simply litigate at will and in the manner that they think is appropriate. The ethos now is that cases will be carefully case managed and that the court will control the pace and procedure of litigation, rather than—as has been the case in the past—the parties simply deciding to proceed quickly to proof or to do exactly what they want to do, which can be expensive for litigants and for the resources of the court.

The clear message is that the court will case manage civil litigation and will, in effect, thereby control the procedure, which is important. That is underpinned entirely by the bill. The Scottish Civil Justice Council is considering rules to implement that ethos.

The Convener: For the record, I ask you to expand on "case managed". Does that mean going through documents and processes, or does it also mean sheriffs being much more interventionist with cases? I am thinking of "Judge Judy" or something like that—banging heads together a bit, as Sheriff Wood would have it—but doing so gently, if I recall his words.

Sheriff Principal Stephen: Yes. Case management will apply at all levels—in the summary or simple procedure and in commercial cases, in which the commercial sheriff will deal with the case management hearing by videoconference or by telephone and say, "Right, I've got your case and the defence. What you really mean is that the issues are X and Y, and not all the peripheral matters." Such discussions will also involve agreeing documents, agreeing parts of the case and homing in on what litigants want the court to decide, rather than letting cases gather moss as they go on towards the hearing, in which people stray all over the place and into the long grass.

The Convener: I am trying to put "moss" and "long grass" together, but I get your drift.

Elaine Murray: Some concerns have also been raised about the information technology systems in the courts and whether they need to be upgraded. The financial memorandum has allocated only about £10,000 to that. Are sufficient resources being allocated to the development of IT?

Eric McQueen: Yes, absolutely. It is best if I answer that question. Going back to "Shaping Scotland's Court Services", we were clear that we had to make substantial upgrades and investment in information and communication technology. To be honest, it has probably been underfunded in recent years. Therefore, quite separate from the Courts Reform (Scotland) Bill, we anticipate significant improvement in ICT capability over the next two years and beyond.

During the next year, we will invest in the region of £2.5 million on installation of a new network infrastructure, on upgrading all the videoconference equipment across the network, and on ensuring that we have courts that are kitted out with the right equipment to offer the right level of evidence presentation.

We will also put in place the initial building blocks for moving to the new case management systems that will allow electronic registration and payment of fees and submission of motions so that, particularly in the early period, we can start to move civil business away from the paper-oriented system that we have at the moment to one that is based much more on technology.

The ICT costs in the financial memorandum are only the very small amounts that are specific to the Courts Reform (Scotland) Bill. The major part of the investment is already under way; it has been agreed by the Scottish Court Service board and it is in budgets for the next two years. That was a big part of our spending review submission to the Scottish Government to make sure that the right foundations are in place, and that IT and digital delivery will lie at the heart of what we do in the future.

11:15

Margaret Mitchell: I want to follow that point a little bit further. I believe that a lot of costs of the reform will be met by court fees. Is it justified that court users rather than the public purse will pay for court reform?

Eric McQueen: Certainly, the long-time view of successive Governments has been that civil litigation should be funded by the parties that are

involved. Civil court fees have been based on that premise for as long as I can remember.

At the moment, chargeable court fees in Scotland are about £40 million. We collect about £22 million a year in hard cash. There is £9 million-worth of exemptions—people who do not pay civil court fees because of the level of their earnings. There is probably about £8 million that is currently unfunded. A big part of the civil court fees, either through exemptions or in the areas in which we are not yet at full cost recovery, are being met by the public purse. In the future, we would like to move closer to full cost recovery while maintaining those exemptions, which supports Scottish Government policy.

A big part of our work in the coming year will be on looking into the real detail of the cost of the reformed civil system. We will come back to the Scottish Government so that it can consult, and then we will make subsequent orders for the Finance Committee to examine on what civil court fees should be in the future.

Margaret Mitchell: You do not have concerns about access to justice and about court fees being prohibitive, but have you considered the scenario in which court fees do not cover all the costs? What alternatives will be put in place to make sure that the cost of the reforms can be covered?

Eric McQueen: The cost of the major investment in the reforms that are now under way is now part of our core funding. The fee order that went through in December last year included a more-than-inflation amount to kick start some of the funding that was required for court reforms. The Scottish Civil Justice Council, the creation of the team for the rules council, and some of the early IT works were already part of that fees order.

The reality is that our funding comes via two streams. One part of it is core funding from the Scottish Government that is allocated through the budget bills, and the other part comes through civil court fees. At the end of the day, the policy on fee recovery is a decision for the Scottish Government and Parliament. We need money to run the Scottish Court Service, and it has to come from those two areas. Ultimately Parliament will decide on that.

Margaret Mitchell: Has the Scottish Court Service no contingency plan?

Eric McQueen: There is not a contingency plan. We are working to ensure that we can put in place the most cost effective and efficient court service, as Parliament has asked. That will come at a cost, but we do not expect that cost to be more than the cost of running the service as it is at the moment. Parliament will take a view on how the funding is to be provided.

Margaret Mitchell: Sheriff Principal Stephen was a member of the Gill review. What research was carried out and what evidence was gathered to justify the threshold being set at £150,000?

Sheriff Principal Stephen: It was rather difficult to get credible data on settlement figures because the amounts are private to the parties. We know about the court judgments, but they form a very small proportion of the cases that go to court. Some data were provided to the researchers, but it was decided that the exclusive competence limit, or the privative limit, had to be sufficiently robust and high to avoid inflation of the sum that was being sued for in a particular action.

In a sense, it matters not what the case settles for at the end of the day. Where the case goes in the court system depends on the figure that the pursuer selects to bring it into court. That can relate to the case's true value or be considerably inflated from it, particularly in personal injury actions.

Margaret Mitchell: Is it fair to say that the proposed figure is in part a guesstimate?

Sheriff Principal Stephen: It is not a guesstimate. It was based on the information that was available about the number of cases that went to proof and the settlement statistics that we were able to gain from personal injury cases in particular.

Margaret Mitchell: The personal injury court is set to be situated in Edinburgh. There are concerns about the capacity to deal with the volume of work that is going through in Edinburgh as it is. Given that Haddington sheriff court is due to close, do you have concerns about how the personal injury court will work? Is there any indication of where that court will sit and who in the judiciary will sit in it?

Sheriff Principal Stephen: I have no concerns about having a national or specialised personal injury court in Edinburgh, whether it be in Edinburgh sheriff court or other parts of the court estate in Edinburgh. Edinburgh has a specialised personal injury court, in which three sheriffs operate. They do not operate full time, because they do not need to do so. Specialist sheriffs already operate in that context.

I have no concerns about having an effective personal injury court. Rules and judicial training on civil jury trials will be needed. The last civil jury trial in the sheriff court took place at the beginning of the 1980s, so no sheriffs have direct experience of such trials, other than as practitioners in the Court of Session.

Margaret Mitchell: I will raise another point that other panels have discussed. A lot of store has been set by looking at the value of cases, but that

does not necessarily consider the complexity of cases. There is concern that complex cases that might otherwise have gone to the Court of Session will not be heard there, which will have a knock-on effect on the development of Scots law. Do you have comments on that?

Sheriff Principal Stephen: The only comment that I can make is that monetary value is the most practical way of determining in which court and under which system of rules a case will be heard. Likewise, under the proposed simple procedure, cases for less than £5,000 could involve great complexities but, if the complexity arises, it must be tackled.

There is a sort of double-lock procedure to get out of the sheriff court and into the Court of Session. Sheriffs have no interest in retaining a case that has genuine complexity or novelty and which deserves a decision from the Court of Session. However, sheriffs are sufficiently experienced to decide the cases and make law.

I will put the position in context. Of the many personal injury cases that are raised, fewer than 2 per cent involve a disputed proof or require a decision by a sheriff or a judge. Intermediate motions will require to be dealt with, but that is done daily in our personal injury court. I have no difficulty with envisaging important cases being dealt with in the PI court.

Lindsay Montgomery: Quite a significant number of high-value cases are already processed in the sheriff court. I will give you some legal aid figures. In the past three years, we have given almost 1,400 grants for sheriff court cases in which the monetary value was in excess of £50,000—well above the £5,000 that applies in the Court of Session. More than 400 of those cases were valued at over £150,000. Over the same three years, more than 100 cases of medical negligence and reparation were granted, and more than 30 of those were valued at over £150,000. A significant percentage of much higher-value cases are already processed in the sheriff court.

The Convener: Did those cases involve counsel?

Lindsay Montgomery: Of the 1,400 cases, 90 per cent did not or have not yet involved counsel, although some of the more recent ones may get counsel. In 70 per cent of the 104 cases of medical negligence and reparation, counsel was not sought. A lot of the cases are handled by solicitors. Equally, some very complex cases can involve a lower value, and we will grant sanction for counsel in those cases.

Margaret Mitchell: I want to ask you about the threshold. The sheriffs were definitely of the opinion that not all the cases should move in one go if the £150,000 threshold is maintained, but that the transfer should be staggered. Do you have a view on that?

Lindsay Montgomery: I am sorry, but I did not hear the first part of your question.

Margaret Mitchell: The sheriffs were definitely of the opinion that, if the £150,000 threshold remains, all the cases should not be transferred in one go but should be staggered. Do you have a view on that?

Lindsay Montgomery: If the courts are able to cope with the number of cases, I see no real reason for not transferring them all at one time. A significant number of higher-value cases are already being processed in the sheriff court. In addition, as Sheriff Principal Stephen said, an awful lot of personal injury and reparation cases settle.

Margaret Mitchell: You have no concerns about all the cases moving in one go.

Lindsay Montgomery: Not from our point of view.

Sheriff Principal Stephen: Perhaps I do not understand what the sheriffs said or what your question is about. My understanding is that nobody is going to open the bottom of the silo of cases in the Court of Session so that they will suddenly descend on the sheriff court. After the bill becomes law—if it becomes law—cases will start in the sheriff court and there will be a gradual build-up of the volume. There will not be a tsunami of work descending on the sheriff court.

Roderick Campbell: Mr Montgomery, last week we heard evidence from Ronnie Conway of the Association of Personal Injury Lawyers and from Robert Milligan QC on the financial memorandum and the figure that it cites of a saving of £1.2 million, which is 50 per cent of expenditure. Mr Milligan suggested:

> "85 per cent of legal aid funding is recovered by the Government, so it does not spend that money. Secondly, legal aid is very seldom allowed in anything other than the most serious personal injury cases and I do not see why that will change ... A 50 per cent saving is anticipated. I do not know where that 50 per cent figure comes from".

Mr Conway said that the figure is "illusory" and "wrong". Can you expand on that?

Lindsay Montgomery: I have no idea where the figure of 50 per cent comes from.

Roderick Campbell: It is 50 per cent of the expenditure on counsel, based on the 2012-13 level. It is in paragraph 97 of the financial memorandum, which states that there will be a saving of £1.2 million in counsel fees.

Lindsay Montgomery: I think that there are a number of misunderstandings there. We have

submitted further information to the Finance Committee.

Costing the bill is very complex for a range of reasons. First, these cases can take years and years. We still have cases on the go that are 10-plus years old. We have had to take a view on the basis of the population of cases that we are looking at.

The Convener: What kind of case takes 10 years?

Lindsay Montgomery: A reparation case.

The Convener: A reparation case is taking 10 years?

Lindsay Montgomery: Yes.

The Convener: Perhaps we need better case management in the courts.

11:30

Lindsay Montgomery: Absolutely. That is why we support the proposals whole-heartedly.

There are a range of reasons, but we are paying cases now that we granted 10 years ago. They have taken that length of time to get through the courts.

For reparation and personal injury, the average is about four to five years. After we grant, we start paying solicitors and advocates for cases. For advocates, we pay every six months a dollop of money based on what they have done. We can do that for many years before the case ends. If the case is successful, we might get our money back, depending on the circumstances of the party that loses.

We will make substantial savings in the cases that move down to the sheriff court that do not require counsel, whereas currently, we are paying those amounts every six months for the next four or five years.

Yes, a lot of the cases that we support are won, but an awful lot of cases are not won. In the past couple of weeks, two cases that we granted on the basis that they had very good prospects of success were lost. Between those two cases, we will be paying out £300,000. Those are just two very recent cases; in any year, we can pay out substantial amounts of money that are lost.

I sympathise with Ronnie Conway and his colleagues at the Association of Personal Injury Lawyers trying to work out how all these bits of money fit together. It is very complex to estimate. We think that the levels of savings will be in the order of £800,000 to £1.2 million, depending on the population of cases that come through. Without any doubt, there must be savings, because if you take a significant number of cases out of the Court of Session and they do not require counsel in the future, we will save money.

Roderick Campbell: But surely that is comparing apples with pears. You need to compare an identical case run by counsel with one run by a solicitor in the future. Just because a case is in a different court, that does not necessarily make it cheaper; it depends on the hourly rate that is being paid to solicitors as opposed to counsel.

Lindsay Montgomery: For a start, in the Court of Session, we will be paying for at least two people: one will be an advocate and one will be a solicitor. Sometimes, there is more than one advocate. In the sheriff court, many of the cases that are currently done at these higher values are done by solicitors, so we will be paying for the solicitor, not someone else.

Roderick Campbell: But that depends on the rate that you are paying the solicitor, as opposed to the rate that would be paid to counsel.

Lindsay Montgomery: We pay senior counsel, including VAT, about £1,800 a day in the Court of Session. Solicitors are paid for advocacy work about £58 an hour. They are paid in different ways, so the comparison is not that easy.

The Convener: You have to get sanction for senior counsel. You cannot just get senior counsel.

Lindsay Montgomery: You have junior counsel in every case in the Court of Session.

The Convener: I understand that. I did it myself, but you do not just get a Queen's counsel on a request to the Scottish Legal Aid Board.

Lindsay Montgomery: We were talking about a comparison of rates.

The Convener: Yes.

Lindsay Montgomery: Where we have senior counsel, the cost will be about £1,800 a day. For junior counsel, it is about £1,300 a day—in the Court of Session. We pay less for counsel in the sheriff court, where we have them, but the difference is only about 10 per cent.

Roderick Campbell: That is my point. It is apples and apples, not apples and pears.

Lindsay Montgomery: It is apples and apples. If you compare one case that a solicitor is taking to another, identical, case that a solicitor and junior counsel in the Court of Session are taking, you can see that we will save a substantial amount of money—on the basis that they are both done properly—because we are paying for fewer people to do them.

That said, a lot of those cases are won. If we get recoveries, there will be no cost to us. However, there are still a lot of cases that cost us a lot of money.

The averages are difficult to compare, but the average cost for reparation and personal injury cases in the Court of Session is £30,000 to £40,000, whereas in the sheriff court you are talking about £4,000 to £8,000. You have to be careful with those comparisons, but the reality is that sheriff court cases cost us way less money.

Roderick Campbell: Okay. You gave further information to the Finance Committee on that point.

Lindsay Montgomery: We submitted further information because we revisited the figures.

Roderick Campbell: Are you still adhering to a possible saving of up to £1.2 million?

Lindsay Montgomery: Over time, and taking account of the differences in how cases are handled in the sheriff court and the Court of Session, we have said that the saving could be in a range between £800,000 and £1.2 million. I do not think that it will be miles away from that. In fact, for most of the figures that we put in the financial memorandum, we erred on the side of understating savings. For example, we have put nothing for what we think the benefits of case management and judicial specialisation would be, because they are too difficult to estimate. We believe, however, that they will significantly reduce the cost.

There is a risk that, partly because of the wording of the financial memorandum, Ronnie Conway and colleagues thought that we were speaking about only personal injury cases. We are not; we are talking about personal injury and reparation and the other cases that will go down to the sheriff court on the basis of the proposals. That covers a much bigger population of cases and that is where the estimate of £800,000 to £1.2 million of savings may come from.

We have made it very clear: none of those things is simple to estimate. We will save money, however.

John Finnie: I have some questions for Mr McQueen. The explanatory notes say that the reforms are intended

"to modernise and enhance the efficiency"

of the system. The financial memorandum states at paragraph 39:

"The SCS has estimated ... a potential saving of £163 for every day where a summary sheriff can be used in lieu of a sheriff".

Has it been projected ahead how those savings would correlate to sheriffs leaving? One sheriff leaves this year, say, and they are replaced by a summary sheriff, which would mean a saving of £163 every day.

Eric McQueen: The overall saving will be largely to the Scottish Government and, as far as judicial costs are concerned, we reckon that it will be about £1.2 million over the full time. On the question of what that saving will look like every year, we anticipate that it will be around £200,000 as the pool starts to build up and we move between sheriffs and summary sheriffs. Clearly, that is tied into retirement profiles, which can change on a year-by-year basis. We are clear that, once we get to the end, the tally for the savings to the Scottish Government will be around £1.2 million. Depending on the change period, £200,000 a year is the best rough estimate.

John Finnie: I suspect that, in response to this question, you will tell me that this is not quite your area. The Scottish Government has a policy of no compulsory redundancies. Are you aware of any plans for early packages or encouragement for sheriffs to leave?

Eric McQueen: We can safely say that we are aware of none whatsoever.

John Finnie: Good.

Eric McQueen: Under the terms of appointment of the judiciary, that is not possible or feasible.

John Finnie: Okay. It does no harm to have that on the record.

The financial memorandum says:

"There may be further costs in future dependent on how the future deployment of shrieval resources is determined."

In relation to honorary sheriffs, the financial memorandum tells us:

"In the longer term it is expected that part-time sheriffs and part-time summary sheriffs, supported by technology, will be able to cover this work with a minimal effect on costs."

We previously heard that a sheriff in Paisley goes to Campbeltown one week in four or one week in three, I think, to undertake duties there. Can you explain how those duties that take place every three or four weeks will be dealt with by part-time sheriffs or part-time—

Eric McQueen: That is very much in the long term. There will be no immediate rush to move honorary sheriffs out. They play a very valuable role, particularly in our rural communities in dealing with immediate business when it arrives if there is no sheriff in the area.

As far as the reforms are concerned, the Lord President and the Scottish Government want to ensure that there are properly qualified and trained

judiciary in place for all cases. That is a reasonable starting point.

As we make progress with technology—this could be four or five years down the road, admittedly—will there be more opportunities for the types of work that honorary sheriffs do to be done instead by other sheriffs, using technology? A predominant area in which honorary sheriffs are used is that of custody cases in local areas. If the changes in the Criminal Justice (Scotland) Bill come through, that will give us the opportunity to do first callings in custody cases by videoconference. We are working with Police Scotland and the Crown on what that could look like in the future. In a number of years, a lot of the routine emergency-type business, which is about the first callings that honorary sheriffs do, could be done in a different, more effective way. However, until we have such facilities in place and they are proven, we will continue to use the valued honorary sheriffs whom we have in place. There is no intention to do anything different. I do not know whether Mhairi Stephen wants to add anything from a judicial perspective.

Sheriff Principal Stephen: In my sheriffdom, all the honorary sheriffs are either legally qualified or have experience; for example, in the past one sat as chairman of the Westminster magistrates. Honorary sheriffs do not tend to be used in my sheriffdom, but I know that they are used in the more remote rural communities, where it is essential to have somebody on hand to deal with very urgent business, such as an urgent custody hearing or the granting of a warrant. It is not a problem in my area.

Honorary sheriffs become honorary sheriffs because they have done significant public service, usually as a procurator fiscal, a sheriff, or in another area. I think that the last time that an honorary sheriff was used in the Lothian and Borders sheriffdom was during the very bad winter of 2010, when somebody had to struggle to Selkirk or Peebles to deal with a custody hearing, although I do not know how the prisoner got there. It is horses for courses. The abolition of honorary sheriffs will not have a great impact on Lothian and Borders sheriffdom, but it will have an impact on other sheriffdoms.

Introducing a new level of judiciary in the form of the summary sheriff is pretty groundbreaking. I cannot remember the last time a new level of judiciary was introduced, even south of the border. This is a huge opportunity to set the parameters and get people with varied skill sets. The nature of the job will be much more flexible. Indeed, there may be a peripatetic type of responsibility if a summary sheriff has a special skill, particularly in civil matters. He or she might not need to sit all week in one area, but might travel and deploy his or her skills in different courts on different days. That is another area in which the new level of judiciary will, I think, give the system a lot more flexibility.

John Finnie: How advanced are discussions on the notion of peripatetic sheriffs?

Sheriff Principal Stephen: That is being discussed, but it is ultimately for the Judicial Appointments Board for Scotland to select sheriffs. However, obviously it will need to know what the job specification is. It is clear that there will be a requirement for people to do the generalist work on summary crime and civil business. However, as we said in the review, we have an opportunity to get people who have particular skills and who have dealt with clients all their working lives, such as experienced solicitors who have had an entire career of sorting out their clients' problems. Such skills will be very important in sorting out problems in the simple procedure in consumer cases and others.

John Finnie: The explanatory notes state:

"Section 28, which re-enacts and updates section 17 of the 1971 Act, gives the sheriff principal power by order to prescribe where and when sheriff courts will sit and the descriptions of business to be disposed of at those sittings."

Therefore there is discretion at the moment, which will be reinforced by the bill, to facilitate the peripatetic approach and measures of specialism.

Sheriff Principal Stephen: Yes, indeed. At present, it is not particularly efficient to have a sheriff going to a court to do part of a morning's business and then not to deploy them for the rest of the day. The discretion that you talk about must be melded with an efficient approach. It is thought that there might be more part-time appointments to the summary sheriff bench, which would make for a lot more flexibility.

11:45

John Finnie: There is great encouragement of collaborative working throughout the public sector, and Mr McQueen said that he would discuss with Police Scotland the technology that will be used. Sheriff Principal, I presume that collaboration extends to the use of other public sector facilities. No one wants to inconvenience a sheriff, of course, but having one sheriff drive about in a car, rather than a whole load of public officials, must affect the cost to the public purse. Is there an examination across budget heads to ensure that people are not operating in silos, as was recommended by the Christie Commission on the Future Delivery of Public Services?

Sheriff Principal Stephen: An object of the reforms is not to bring people to court too often. We bring people to court too frequently, and

sometimes we do not achieve the object. We should bring people to court when they are needed and otherwise use technology. For example, the parallel jurisdiction in family work between the summary sheriff and the sheriff will work, I am sure, with practice directions and with technology. If, for example, the court in Jedburgh has a family case and wants the skill of the specialist family sheriff, there is no reason why the child welfare hearing cannot be conducted by remote means, between Edinburgh, where the family sheriff is situated, and the room or courtroom in Jedburgh where the parties are situated.

The Convener: I must praise John Finnie for not mentioning the Highlands and Islands in his question, but they were lurking there.

John Finnie: Give me time, convener.

Of course, there is no substitute for the whites of people's eyes, and it is better that just one pair of eyes is moved, to assist maybe a dozen folk.

On the Highlands and Islands—[*Laughter*.] It says in the policy memorandum, under the heading, "Island communities":

"The provisions of the Bill apply equally to all communities in Scotland."

Last week, the committee heard from Scottish Women's Aid that there would be a significant disadvantage for people if a range of specialists came in and the world and their granny had to get a boat to Aberdeen or a plane to Inverness to have a matter dealt with, rather than have one individual travel to meet them. You said that the bill is groundbreaking, Sheriff Principal. Do you agree that it offers an opportunity to ensure that justice is taken to the people instead of the people having to go to justice?

Sheriff Principal Stephen: That could be done in a variety of ways. I am pleased to hear that money is to be spent on technology, which will very much underpin the effectiveness of the reforms.

John Finnie: Finally, in a lot of courts there is the opportunity to designate a particular day for domestic abuse work. The phrase "domestic abuse court" conjures up a vision of entirely new structures and buildings, but with modest administrative arrangements cases could be clustered together, which would make things better for other agencies. Can such an approach be progressed as a matter of urgency?

Sheriff Principal Stephen: That happens at present. The important matters in domestic abuse cases are speed, support and advocacy. Even in the larger courts, domestic abuse cases tend to be clustered into a particular day, so that trained domestic abuse sheriffs can deal with them.

John Finnie: I have to tell you that that is not the case in the Highlands and Islands.

Eric McQueen: I tend to agree with John Finnie. As we move towards more specialism, we can think more about clustering cases on particular days, especially in the more rural areas such as the Highlands. We can certainly look at that.

John Finnie: I appreciate that. Thank you.

The Convener: As I recall, Scottish Women's Aid told us last week that it wants domestic abuse cases to be heard before a sheriff and not a summary sheriff, because it thinks that that would send a message about the seriousness with which the justice system takes such cases. Does the panel have a view on that?

Sheriff Principal Stephen: At the end of the day, it is about what the outcome will be. The important ingredients that I mentioned are that cases are dealt with speedily, so that special bail conditions do not separate families overlong unless that is necessary; that the people involved have advocacy; that they are supported; and that there are smart sentencing options. If such matters are brought as summary cases, it is appropriate that suitably trained summary sheriffs deal with and sentence them appropriately. Very often, the important message is about dealing with cases swiftly and having the correct sentencing option, which is usually a constructive sentencing option rather than necessarily imprisonment.

The Convener: Does anyone else have a view? I wanted to put the issue to you because Scottish Women's Aid emphasised that point. I see that no one wishes to comment, so I will move on.

Will the Legal Aid Board save money if civil cases go to the lower level and to other sheriffs?

Lindsay Montgomery: That would depend on decisions taken on the fee rates payable. That is a matter for the Scottish Government, and we will discuss it with it.

The Convener: Cases should not go to a summary sheriff simply because that would save money.

Lindsay Montgomery: No, that is not the issue. We must look at changing the fee rates for summary sheriff business.

The Convener: Where are we on changing the fee rates? That seems to be relevant if the committee is considering what the motivation for the changes is.

Lindsay Montgomery: That is an area for discussion between us and the Government in early course. As we said in our written evidence, the bill will require a number of changes to fees,

including for summary sheriff business. We will have to work that out fairly early on.

The Convener: Will that be before the bill reaches stage 3, which is predicted to take place in June?

Lindsay Montgomery: I cannot say; the timing will be for the Scottish Government.

The Convener: I beg your pardon—the clerk tells me that the end of June is the timetable for stage 2. It is still April fools' day and I am scaring the horses—I must not do any more of that.

I will pass over to John Pentland because he has not asked a question yet. Sandra White is back with us—she is alive and well. I hope that she has had a cup of tea.

John Pentland: Mr McQueen, what reassurance can you give to people who have raised concerns about the number of cases that would go to sheriff court, given that the court system is creaking under the extreme pressure?

Eric McQueen: The reassurance that I can give, which reiterates some of the things that I have mentioned, is that the sheriff courts have the physical capacity to do the work and we do not have major concerns about that.

On the level of business that could come from the Court of Session should the bill be passed, we anticipate around 2,700 cases, the bulk of which will be personal injury cases. We anticipate that those would be dealt with by the specialist injury court, which will be set up separately and specifically resourced to deal with that business. Therefore, the level of cases to come to the sheriff court would be a very small number—based on that arithmetic, it would be around 700.

With time, as the specialist personal injury court becomes established, we might expect that some of the work that the sheriff courts deals with will go instead to the specialist court. The whole point of having judicial specialism and access to early court diets for the business is that we want that court to become a place of choice for people.

The level of business that will go to the sheriff courts will be very small—it is less that 3 per cent of the civil business that they are handling and only about 2 per cent of those cases go through to the proof. I know that that view is shared by the sheriffs principal and the Lord President. We are confident about the impact on the sheriff court and the ability of that court to deal with the business.

John Pentland: You do not anticipate that the additional work will create further court adjournments.

Eric McQueen: Not at all.

The Convener: It is in writing now. It is on the record.

Sandra White has a question.

Sandra White: John Pentland asked the question that I was going to ask about the impact of a specialised injury court and Eric McQueen answered it.

The Convener: There was an issue about the importance of counsel in health and safety cases in the sheriff court, was there not, Sandra? Concerns were expressed by last week's panel that sheriffs might not be prepared to sanction counsel. There were all kinds of issues about sanctioning for expenses and so on.

I just put that to you as an issue that might also involve the Legal Aid Board, in particular in health and safety cases, which are obviously personal injury cases.

Sandra White: I was going to ask about specialisation and the impact on the courts. I thought that somebody else had maybe asked that.

The Convener: No, nobody has asked that.

Sandra White: I was going to ask about the employment court, but I did not know whether that was relevant or not.

The Convener: Do witnesses who have had the opportunity to see last week's evidence have any comments on it?

Sheriff Principal Stephen: I will say a little about specialisation in the specialist court. The Scottish Civil Justice Council is working on a pre-action protocol and considering whether it should be made compulsory in personal injury cases. At present there is a voluntary pre-action protocol, which I am sure that you have heard about, because you have heard a lot about personal injury. That is a very important matter.

Much of the object of reform is to enhance settlement to underpin the idea that compromise can be better than contest, which is a worthy object. After the work is done by the personal injury sub-committee, the Civil Justice Council will consider the matter of making compulsory the pre-action protocol. That should have an effect on the number of cases coming to the specialist personal injury court. I say, from personal experience in my past life as a solicitor who dealt with personal injury cases, that such cases are in the main raised to be settled. That is clear from the fact that very few cases proceed to a full-blown hearing: only a very small number do. That is a very important aspect.

I would also like to reassure the committee that the rules of court that apply to personal injury cases are the same in the Court of Session, the

sheriff court and the present summary cause procedure. It is a framework or timetable that the parties have to adhere to. Parties know what the parameters are: they get the proof date in the sheriff court once defences are lodged. I am concerned to hear that cases take up to four years, because they should be dealt with within a year, or roughly that sort of period.

Basically, sheriffs will manage those cases and will become involved if someone trips up at one of the stages. The sheriffs will deal with any cases that have to go to a contested hearing.

Sandra White: Thank you for the clarification. We will hear more evidence from the Scottish Trades Union Congress and others on personal injury and employment.

Sheriff Principal Stephen: I would like to reassure you that there is no agenda or object in the review to downgrade personal injury—quite the opposite: it is to have appropriate resources. Personal injury is a very important area. I dealt with pursuers in personal injury litigation as a solicitor. Neither is there any agenda to exclude counsel where counsel is required. Sheriffs, I am sure, will want to be well addressed by both solicitors and counsel and they will deal with their discretionary decision on sanction of counsel appropriately.

It is also important to recognise that personal injury solicitors tend to be specialists in this area.

12:00

The Convener: Mr Montgomery, you wanted to come in on that.

Lindsay Montgomery: What we do with sanction for counsel is different. The sheriff decides whether they will allow counsel in the event that one party loses and has to pick up the cost. We will take decisions on granting sanction for counsel if we believe that the assisted person requires it. We grant sanction for counsel in the sheriff court when it is appropriate and the case warrants it. We will continue to do that.

The difference with the current system is that if it is the Court of Session, junior counsel is automatically available if the case requires it. In the sheriff court, it will be down to the submission by the solicitor, often aided by counsel, to say, "This case needs counsel because it is complex and difficult," and we will grant it.

Sandra White: Thank you.

Christian Allard: I have a question for Sheriff Principal Stephen about the Gill review's vision for future court procedures. Are the small claims courts working for unrepresented litigants just now? Does the Gill review suggest that court procedures should be transformed at that level?

Sheriff Principal Stephen: I think that I can comment on that. The committee heard from the Sheriffs Association not so long ago. There are different approaches to small claims. Some sheriffs are more comfortable and skilled than others at intervening; they almost mediate and get the parties to speak to each other. Often it is difficult to get such parties to speak to each other at all.

The Gill review thought that such an approach would be an important part of the civil jurisdiction of the new level of judiciary, or the summary sheriffs. Summary sheriffs would bring a different mindset. You have to bear in mind that sheriffs have a huge civil jurisdiction—in one week, they can hear a case that involves £100 and another that involves several million pounds. All of that requires different skills and approaches. The lower-value cases are suitable for a more mediatory, interventionist approach.

The review considered that this would be a good opportunity to have summary sheriffs with those very skills; they would bring a different approach to such cases, which would be an important and major part of their jurisdiction.

Christian Allard: Will that different approach increase the number of litigants who come to court without any representation? Will that be seen as access to justice?

Sheriff Principal Stephen: Indeed. Many party litigants, or litigants in person as they are called in England, come to court in such cases. It is true to say that when a sheriff sees someone coming into court with a full Tesco bag, they sometimes think, "Oh gosh"—

The Convener: Politicians think the same. Sometimes two Tesco bags are brought in, and the person says, "I'm going to take you back 10 years", but we do not want to go back 10 years.

Sheriff Principal Stephen: Exactly. When people represent themselves, they are often far too close to the issue and the sheriff has to take an objective approach to get to the root of the problem. Sometimes the sheriff has to explain that, even if the party litigant proves what they want to prove, they might not achieve the remedy that they are seeking. It is important that sheriffs are able to deal with those cases.

Such cases can be quite time consuming, so it is a good idea for them to become a specialised part of the summary sheriffs' jurisdiction.

Christian Allard: You talked about training for sheriffs. What assurance can you give to organisations such as Citizens Advice Scotland

that have asked for genuine support for people who represent themselves?

Sheriff Principal Stephen: The review mentioned, and it is generally accepted, that in-court mediation is extremely important. That involves taking the case out of the court for a spell and having trained mediators get the parties together. In-court advice is important, too. Lindsay Montgomery might be able to say a little more about that.

Another aspect is public legal education. That is part of the proposal that better information be provided on the website and guidance issued so that the litigants can follow the procedure. In addition, it is an important duty of the Civil Justice Council to ensure that the rules that will be made as a priority are apt for that procedure and for party litigants.

Lindsay Montgomery: We fund a range of projects around the country that help people to resolve cases. In fact, a large part of the purpose of our grant funding is to enable people to resolve matters before they become problems that need to be dealt with in court. We also fund the in-court advice that has been available in Edinburgh for a long time and a number of other projects.

It is important to remember that legal aid is not available for small claims, and the bill will not change that. It is a case of finding ways of giving people support at—or, we hope, before—court to find ways to resolve matters.

The Convener: If a small claim becomes complex because it involves a complex principle of law—that can happen—I take it that it will be remitted elsewhere and that legal aid will then be available.

Lindsay Montgomery: Yes. If a case comes out of the small claims process and goes through the summary or the ordinary process, legal aid can be available.

The Convener: Margaret Mitchell is next. I will not say anything else in case I say that it will be the final question. John Pentland is giving me that look.

Margaret Mitchell: Sheriff Principal Stephen raised the issue of a pre-action protocol. Will you comment on the evidence from the previous panel that the three-month time limit for applications for judicial review would lead to a rush to get to court, which would mean that the pre-action protocol would not be used?

Sheriff Principal Stephen: Judicial review is not really my billet, but I can say that the proposal probably emanated from taking a comparative look at how matters are dealt with in England and Wales and wanting to have some sort of gatekeeping function, which is the permission stage.

I believe that there is a pre-action protocol in England, although I do not know anything about how it operates. The pre-action protocol that the Civil Justice Council is considering relates to personal injury cases, but there are other protocols, including one that relates to housing cases, which will eventually be for the summary sheriff. Those protocols are already in place.

I accept that three months is potentially a tight timescale, but I have no direct experience of dealing with judicial review, because it is a Court of Session function.

Margaret Mitchell: I appreciate that you are here today as a member of the Civil Justice Council rather than as a member of the Gill review board.

May I ask a final—

The Convener: Mr Montgomery wants to respond to the question.

Lindsay Montgomery: From what we found out about what is happening in England and Wales, we know that there is a pre-action protocol there, but it is not mandatory. However, if parties do not abide by it, the court will have regard to that when it takes decisions on expenses.

In our submission, we proposed that there should be a pre-action protocol for judicial review, and I was glad to hear Tony Kelly support that point of view. It would be far better if the disagreement over whatever public body's decision it was could be resolved without having to go to court. We think that, in that context, a pre-action protocol would be very helpful. There will still be cases in which no agreement can be reached, and it will be crucial to have arrangements in place to ensure that they can be taken forward.

Margaret Mitchell: I do not think that there was any dubiety about that. The point was that the three-month limit was so short that people would automatically go to court just to protect their position instead of seeking some pre-action protocol.

Lindsay Montgomery: But having a pre-action protocol will enhance the chances of people taking that approach. Perhaps further consideration needs to be given to whether there should be something in the bill to reflect the fact that there should be a pre-action protocol. If it is available, you can take a view on whether the three months should start after that or whether, as in England and Wales, both should run at the same time. Those options will give you different positions.

Margaret Mitchell: A number of people from whom we have taken evidence have suggested that the three-month limit for judicial review is too short for SLAB to be able to consider legal aid applications. What is your view on that?

Lindsay Montgomery: Three months will be tight for all of us—and no messing—but a number of safeguards will ensure that people are able to get legal aid cover in place.

For a start, something like 80 per cent of the applications that we get for judicial review, and about 60 per cent of those that we grant, relate to asylum or immigration. They tend to be part of a continuing process; they have been elsewhere in the system, and judicial review is just the final stage. As a result, this move is not a surprise to anyone who is involved in such cases.

Every year, a huge number of solicitors use what is called special urgency for a whole range of cases. Last year, there were about 11,000 such cases; in 8,500 of them, the solicitor would have been able to protect the client's position, including by putting in submissions in cases where there was a time bar, without having to come near us. That sort of thing happens in cases that are subject to a maximum period of three or five years, and I am amazed at the number of cases that come in at the very last stage, even though the person in question has had three or five years. In such cases, the solicitor can use special urgency to get the petition into court.

However, if a three-month time limit is introduced, we will be able to take a decision on an application—and, as long as it meets the statutory tests, grant the legal aid—if we get the application early and the solicitor gives us all the information that we require. I believe that someone said in evidence that we would wait until the petition stage, but I do not think so. If the application meets the statutory tests, we will grant the legal aid. If a solicitor comes late in the three-month period or if we do not get enough information and have to go back to them, they will be able to take special urgency measures to get the petition into court and protect the client's interests. It will, of course, mean that we will have to prioritise judicial review applications to ensure that we experience no delays.

Secondly, we will want to do quite a lot of work with the profession to ensure that there is much fuller guidance on what we need for a judicial review application to be successful. At the moment, we have to return or continue an awful lot of those applications, only to grant them on review. We would like to get all the necessary information to grant them the first time round, because that would benefit everyone involved, including the lawyers, the clients and the courts. We think that, if that were done, the process would be much more manageable. We will all have to be disciplined, which will be a challenge, but if the proposal in question goes ahead we do not think that it will cause problems with access to justice.

The Convener: I am a bit of a fish out of water with this, but I imagine that there will be language difficulties, problems with people not knowing the law and so on to deal with. We all say that ignorance of the law is no defence, but—my goodness—most people are ignorant of many aspects of the law. What about asylum seekers who find themselves in a foreign country, having to deal with chaos, pressures, language difficulties and so on? I am a bit surprised by your response. After all, we are talking about the difference between three months and three years, which is your equivalent limit for personal injury cases.

You also said that you would prioritise judicial review applications. What, then, would be the knock-on effect on other emergency applications?

Lindsay Montgomery: We are able to deal with special urgency cases in 1.1 days on average. Those are full applications, because we need a period—

The Convener: I am sorry, but you said that you prioritise applications. Moving applications in a certain category to the head of the queue must have a knock-on effect.

12:15

Lindsay Montgomery: We get 500 or so applications a year, 80 per cent of which relate to asylum and immigration. As was said in the previous session, those applications are dealt with in a particular way. In almost all those cases, a solicitor will already be involved. Judicial review is the final stage in what can often be a long process; in other words, the issue in those cases will not be new. There are also cases against Scottish ministers, which are often brought by prisoners, and many of those will already have been progressed.

However, the point does not apply in all areas—as has been pointed out, environmental cases are slightly different—but it will apply in a large percentage of what is not a huge number of applications. Given that we deal with 20,000 to 22,000 civil legal aid applications every year and a huge number of ancillary ones, it is not difficult to prioritise those 500 applications.

The Convener: So the three-month limit is not a problem and is of no concern to SLAB.

Lindsay Montgomery: No. We are saying that it will cause us to change how we do things and ensure that there is better guidance, and that it will help us to get these things right first time. My point is that if, at the end of the day, the Parliament

decides to have a three-month limit, I do not believe that the legal aid system will not be able to meet that fully.

Roderick Campbell: I have a final, small question for Mr McQueen. Do you have any knowledge of the geographical spread of the approximately 700 non-personal injury cases that will transfer from the Court of Session to the sheriff courts?

Eric McQueen: I do not have that information with me today, but if it is helpful, I can provide it for you later.

Roderick Campbell: That would be helpful.

Eric McQueen: In any case, we are talking about less than 3 per cent of sheriff court business. We expect that the transfers will happen where populations are based; in other words, the larger sheriff courts in, say, Edinburgh and Glasgow will get a bigger share of them. We are happy to provide a snapshot of that situation, but I expect that it will pretty much follow the distribution of the current court network.

The Convener: That concludes the evidence-taking session. I thank the panel for their evidence. As agreed, we now move into private session.

12:17

Meeting continued in private until 12:37.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by APS Group Scotland.

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

e-format first available
ISBN 978-1-78457-134-4

Revised e-format available
ISBN 978-1-78457-149-8

Printed in Scotland by APS Group Scotland