The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 17 June 2014

Session 4

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JUSTICE COMMITTEE
19th 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:

Roseanna Cunningham (Minister for Community Safety and Legal Affairs)
Graeme Pearson (South Scotland) (Lab)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 17 June 2014

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

Subordinate Legislation

Proceeds of Crime Act 2002 (Amendment of Schedule 4) (Scotland) Order 2014 [Draft]

The Convener (Christine Grahame): Good morning. I welcome members to the Justice Committee's 19th meeting in 2014. I ask everyone to switch off completely mobile phones and other electronic devices, as they interfere with the broadcasting system even when they are switched to silent. No apologies have been received.

Yes, I have a cold; I have not changed my voice.

Agenda item 1 is consideration of the draft Proceeds of Crime Act 2002 (Amendment of Schedule 4) (Scotland) Order 2014, which is an affirmative instrument. I welcome to the meeting the Minister for Community Safety and Legal Affairs, Roseanna Cunningham, and two Scottish Government officials: Dr Lucy Smith, who is head of organised crime strategy; and Carla McCloy-Stevens, who is a solicitor in the legal directorate.

The minister will give evidence in advance of the debate. I understand that she wishes to make an opening statement.

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): Yes. Thank you, convener. I will make a brief opening statement to explain what brought about the statutory instrument.

The order is required to fix a lacuna, which is just a loophole—

The Convener: But it is much posher.

Roseanna Cunningham: It is a posher loophole.

The Convener: It is a posher word.

Roseanna Cunningham: The order is required to fix a lacuna that has recently arisen in the Proceeds of Crime Act 2002, which I will refer to as POCA.

Scottish courts can make confiscation orders against certain offenders under part 3 of POCA. In each case, the court must decide whether an offender has a criminal lifestyle and, if so, whether he or she has benefited from his or her general conduct. An offender is considered to have a criminal lifestyle if he or she is convicted of an offence that is specified in schedule 4 to POCA. Where that is the case, the court can assume that the offender's income, expenditure and assets over the previous six years constitute or represent the offender's benefit from his or her general criminal conduct for the purpose of calculating the amount to be confiscated, unless the assumption is shown to be incorrect or would otherwise result in a serious risk of injustice. That is basically how POCA works.

Schedule 4 to POCA lists a number of lifestyle offences, and the Scottish ministers can amend the list by order. In 2011, the Scottish Parliament approved such an order, which added to the list an offence under section 39(1) of the Consumer Credit Act 1974, concerning illegal money lending. The purpose was to target illegal money lenders who profit from exploiting vulnerable individuals and communities. However, the Consumer Credit Act 1974 was largely repealed by United Kingdom legislation on 1 April 2014. That included the offence provision in section 39; consequently, the offence was also removed from the list of lifestyle offences in schedule 4 to POCA.

The Scottish Government is committed to ensuring that schedule 4 to POCA continues to be an effective means of depriving criminals of the proceeds of their crime. The order aims to reinstate illegal money lending as a lifestyle offence. If approved, it will amend schedule 4 to respecify the offence in its new guise as an offence under section 23(1) of the Financial Services and Markets Act 2000, as that is the act that now authorises and regulates consumer credit-related activity.

Although the current hiatus in schedule 4 to POCA has not affected any on-going confiscation proceedings, the Crown Office and Procurator Fiscal Service both welcome the amendment that the Scottish Government proposes to make through the order.

Basically, a gap was opened up by virtue of Westminster legislation. We are simply moving to close that gap again, in accordance with what we as a Parliament already agreed a couple of years ago.

The Convener: Thank you. As members have no questions, we will move on to the formal debate on the motion to approve the instrument. I invite the minister to move motion S4M-10291—

Roseanna Cunningham: I—

The Convener: I get to say this bit: that the draft Proceeds of Crime Act 2002 (Amendment of Schedule 4) (Scotland) Order 2014 be approved.

As no member wishes to speak in the debate, the question is, that motion S4M-10291 be agreed to.

I am sorry; I did not let the minister move the motion.

Roseanna Cunningham: I think that I have to do so.

I move,

That the Justice Committee recommends that the Proceeds of Crime Act 2002 (Amendment of Schedule 4) (Scotland) Order 2014 [draft] be approved.

Motion agreed to.

The Convener: Obviously, some of my tablets are kicking in. We could have fun. Thank you very much, minister.

As members are aware, we are required to report on all affirmative instruments. Are members content to delegate authority to me to sign off the report?

Members *indicated agreement.*

Courts Reform (Scotland) Bill: Stage 2

10:05

The Convener: Item 2 is the Courts Reform (Scotland) Bill. We do not have a target to reach today, so we can go as far as we want; we have some time next week, if needed.

Before we continue, we need to give the minister's officials time to take their seats. There is quite a crowd of them—almost a ministerial choir, although I think that it would breach the rules if they were to burst into some kind of choral delivery. The minister is, of course, staying with us, and I welcome her panoply of officials, who are present strictly in a supporting capacity; members should be aware that they cannot question the officials.

Members should have their copy of the bill, the marshalled list and the list of groupings of amendments.

Section 61—Civil jury trials in an all-Scotland sheriff court

The Convener: Amendment 49, in the name of the cabinet secretary, is in a group on its own.

Roseanna Cunningham: We can start gently, because amendment 49 is a minor amendment to section 61, which sets out the arrangements for civil jury trials in an all-Scotland sheriff court. Civil jury trials are not particularly common any longer. Amendment 49 removes subsection 6, which provides that the interlocutor of the sheriff specifying the issues to be put to the jury is sufficient authority for the sheriff clerk to summon the jurors. We make the amendment following advice from the Lord President's office that such detailed regulation of the means in which jurors are summoned is better left to rules of court under section 97.

I move amendment 49.

Amendment 49 agreed to.

Section 61, as amended, agreed to.

Sections 62 to 66 agreed to.

Section 67—Application for new trial

Amendment 15 moved—[Roseanna Cunningham].

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

Members: No.

The Convener: There will be a division.

For

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

Against

Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Abstentions

McInnes, Alison (North East Scotland) (LD)

The Convener: The result of the division is: For 6, Against 2, Abstentions 1.

Amendment 15 agreed to.

Amendment 16 moved—[Roseanna Cunningham].

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

Members: No.

The Convener: There will be a division.

For

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

Against

Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Abstentions

McInnes, Alison (North East Scotland) (LD)

The Convener: The result of the division is: For 6, Against 2, Abstentions 1.

Amendment 16 agreed to.

Section 67, as amended, agreed to.

Section 68—Restrictions on granting a new trial

Amendment 17 moved—[Roseanna Cunningham].

The Convener: The question is, that amendment 17 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Abstentions

McInnes, Alison (North East Scotland) (LD)

The Convener: The result of the division is: For 6, Against 2, Abstentions 1.

Amendment 17 agreed to.

Amendment 18 moved—[Roseanna Cunningham].

The Convener: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Abstentions

McInnes, Alison (North East Scotland) (LD)

The Convener: The result of the division is: For 6, Against 2, Abstentions 1.

Amendment 18 agreed to.

Section 68, as amended, agreed to.

Section 69 agreed to.

Section 70—Simple procedure

The Convener: Amendment 50, in the name of the cabinet secretary, is grouped with amendments 51 to 55 and 59.

Roseanna Cunningham: Amendments 50 and 51 are technical amendments that clarify the categories of cases that are to be dealt with under simple procedure.

Section 70(3) provides that certain types of proceedings may only be brought subject to simple procedure. Amendment 50 ensures that no other types of proceedings may be brought under simple procedure.

Amendment 51 is in consequence of that. It makes clear that, despite the rule on what may or may not be raised as a simple procedure case, cases may be transferred into and out of simple procedure through the operation of sections 75

and 76. It also clarifies the relationship between the amended provision in section 70(3) and the effect of section 79.

Amendment 52 ensures that the Court of Session can make rules of court to assist in determining whether individual proceedings fall into the definition of proceedings that is set out in section 70(3), and therefore are proceedings that must be brought under simple procedure. That is designed to ensure that the Court of Session may preserve the most useful aspects of the existing case law that applies to cases that must be brought subject to summary cause procedure if there is any doubt about the application of that case law to simple procedure.

Amendments 53 and 54 are technical amendments. They ensure that the term "simple procedure cases" in part 3 of the bill is wide enough to include cases that are transferred to the new simple procedure and cases that are made subject to simple procedure under future enactments. Amendment 55 is another technical amendment that ensures that a case that is transferred out of simple procedure under section 76 is no longer caught by references to a "simple procedure case".

Amendment 59 is a technical amendment that clarifies the effect of section 75. Section 75 provides for cases that are not being dealt with under simple procedure to be transferred to that form of proceedings provided that they are, at the time of the transfer, now of a type that could be raised under simple procedure.

Section 75(2)(b) permits that transfer even if the sum that is sought would exceed the usual monetary limit for simple procedure cases. That amendment aligns section 75 with section 70(3) by referring to types of proceedings rather than orders sought in proceedings.

I move amendment 50.

Elaine Murray (Dumfriesshire) (Lab): When the cabinet secretary was here last week, he suggested that there would be some amendments that would clarify the issue in relation to cases such as asbestosis cases. Is this such an amendment?

Roseanna Cunningham: No. Amendment 50 does not relate to those cases.

Amendment 50 agreed to.

The Convener: Amendment 43, in the name of Alison McInnes, is grouped with amendments 31 and 44.

Alison McInnes (North East Scotland) (LD): I will speak in support of my amendments 43 and 44, which would prevent personal injury cases from being considered under the simple procedure.

Like the rest of the committee, I broadly support the simple procedure and believe that it should prove to be effective in resolving disputes that are worth less than £5,000, such as single-issue consumer cases. However, for a number of reasons, I do not believe that the simple procedure is an appropriate setting in which to consider personal injury cases. The Law Society of Scotland and the Association of Personal Injury Lawyers argue that those cases are not compatible with the fact that most litigants in the simple procedure setting will be unrepresented, or with the inquisitorial and interventionist approach that sheriffs are likely to adopt under the simple procedure.

Personal injury cases tend to involve identifying cause of action, liability, the Consumer Protection Act 1987 and breaches of statutory duty. They can also require accident records, occupational health records, medical evidence and medical records to be obtained, perhaps by court order, and then presented to the court. Personal injury cases are therefore substantially different from the majority of cases that will be pursued at that level.

As Julia Clarke from Which? told the committee, in consumer cases the questions that tend to be asked are:

"'Did you get the kitchen?', 'Did your car work?'"—[*Official Report*, *Justice Committee*, 18 March 2014; c 4358.]

Indeed, the Cabinet Secretary for Justice acknowledged that difference in September 2007, when he removed personal injury cases from the small claims procedure. At that time, he said:

"This will mean that anyone pursuing such a claim will be able to obtain the necessary medical evidence and legal representation required."

It is appropriate that personal injury cases are heard in the specialist court so that there is no advocacy deficit and we can ensure that pursuers have the assistance that they need to identify, collect, preserve and present the evidence.

I am grateful to Elaine Murray for her support.

I move amendment 43.

10:15

John Pentland (Motherwell and Wishaw) (Lab): The argument behind amendment 31 is similar to that for amendment 25, which I have withdrawn as a result of the cabinet secretary's promise to lodge amendments to cover such provisions. The issue relates to exclusion from the simple procedure.

I do not know whether the measures that the cabinet secretary is to bring forward will cover the issue raised in amendment 31, but I remind the committee that last week I said that the Scottish Parliament has always accepted that asbestos-related conditions are something of an exceptional circumstance with regard to legislation and the pursuit of cases through the courts. I also remind members that Clydeside Action on Asbestos argued in its evidence that its members' cases

"must fall into the definition of 'the most complex and important cases'",

needing

"access to experienced Advocates and Solicitor Advocates who have knowledge of this specialised area of Law"

and

"swift access to justice at the highest level."

Roderick Campbell (North East Fife) (SNP): I understand the concerns that APIL and others have expressed about the issue and have some sympathy with amendment 43. Nevertheless, I point out that when we took evidence from Citizens Advice Scotland it did not express any concerns about this point. Indeed, according to the *Official Report*, CAS said:

"With lower-value claims under the simple procedure, the assumption from the start should be that counsel are not involved and, indeed, that lawyers will not necessarily be involved."—[*Official Report*, *Justice Committee*, 18 March 2014; c 4357.]

I cannot see anything in CAS's written submission that draws attention to the issue. That said, I have some sympathy with the amendment.

Elaine Murray: In supporting Alison McInnes's amendment 43, I point out that the concern is that, although the sum of £5,000 might seem low, in relation to personal injury, such cases can still be fairly complex. As for the point that Roddy Campbell made about lawyers not being present, if someone has suffered a loss of earnings through injury at work it might be appropriate for them to have legal representation to fight their case. As Alison McInnes has suggested, the committee was supportive of the simple procedure, but I do not really think that such an approach is suitable for personal injury cases.

Margaret Mitchell (Central Scotland) (Con): I, too, have sympathy for Alison McInnes's amendment. It makes sense to remove personal injury cases from the simple procedure; that would also address the potential equality-of-arms issue.

As for amendment 31, I completely understand where John Pentland is coming from, but I will be interested to hear what the minister has to say on the matter.

The Convener: That is your cue, minister.

Roseanna Cunningham: Amendment 43, in the name of Alison McInnes, would have the effect of excluding all personal injury cases, as defined in amendment 44, from simple procedure, while amendment 31, in the name of John Pentland, would have the effect of excluding from simple procedure personal injury cases arising from exposure to asbestos. I understand that the amendments reflect some stakeholders' concerns about the treatment of complex personal injury cases, and the Government is grateful to Clydeside Action on Asbestos and the Scottish Trades Union Congress for engaging directly with us on these issues. As the cabinet secretary emphasised at the previous stage 2 session and as I think was mentioned earlier, the Government is committed to ensuring that such cases are treated properly.

With regard to comments that have just been made, I point out that, on the generality of PI cases under £5,000, there will be special rules for dealing with personal injury cases under simple procedure. Section 76 already allows any party to a case to apply to have the case transferred out of simple procedure if that seems appropriate.

I also note—this is where the situation with the groupings becomes a bit difficult—that John Finnie has lodged amendments that pave the way for cases that would otherwise have had to be brought under simple procedure to be brought instead in the specialist PI court, once a suitable order is made. We will debate those amendments as part of a later group, but I hope that it is not premature to say that I welcome them. There is still some discussion to be had on this area.

Simple procedure is designed to be just that—a simple procedure in which claims below £5,000 may be brought. We all accept that some low-value claims will never be simple, and the bill makes provision for that. However, to exclude all personal injury cases from simple procedure would be to throw the baby out with the bath water.

The Convener: Which would not be a simple procedure case. [*Laughter*.]

Roseanna Cunningham: That would not.

I ask Alison McInnes to withdraw amendment 43 and not to press amendment 44.

On amendment 31, I refer to the cabinet secretary's comments in response to John Pentland's earlier amendment, which would have excluded asbestos claims from the exclusive competence of the sheriff court under section 39.

I have the deepest concern for the victims of asbestos, but it is not appropriate to make a special exception for one class of victims, however worthy. We consider it undesirable to start making

different rules for particular types of injury; to do so would open the door to other pressure groups seeking preferential treatment—understandably—and it would be invidious to try to treat asbestosis cases differently from clinical negligence cases, for example, or those involving cerebral palsy. Therefore, I ask John Pentland not to move his amendment.

Alison McInnes: I have listened to the minister's explanation, but I am not persuaded. I press amendment 43.

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

Members: No.

The Convener: There will be a division. [*Interruption*.]

We will start again. I did not think that I would be the one succeeding today. We will repeat the vote. Let us rewind. The division is on Alison McInnes's amendment 43. [*Interruption*.] That is not right. [*Interruption*.]

Five members have voted against the amendment. I have not infected you all already, surely to goodness.

For

Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
McInnes, Alison (North East Scotland) (LD)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 5, Abstentions 1.

Amendment 43 disagreed to.

Amendment 51 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 135, in the name of John Finnie, is grouped with amendments 136 and 137.

John Finnie (Highlands and Islands) (Ind): Amendment 135 is not entirely unrelated to our previous discussions, which is in part why I did not speak. The committee heard a lot about section 59 of the Enterprise and Regulatory Reform Act 2013, which is UK Government legislation, and the change that removed employers' statutory liability in workplace injury cases. That change compounded the difficulties that workers already had, a position that was highlighted by the STUC.

Amendments 135 to 137 would ensure that certain personal injury cases below £5,000 could be raised in the new specialist injury court. The amendments would ensure that the rights of victims would be maintained and would mitigate the effect of section 59 of the 2013 act.

If I may, I will refer to my amendment 142 on the sanction for counsel.

The Convener: No, you cannot.

John Finnie: In that case, I unreservedly withdraw any reference to that amendment.

The Convener: You have not moved your amendment.

John Finnie: I formally move the amendment.

The Convener: Which one?

John Finnie: I move amendment 135.

The Convener: Excellent. We are getting there. Does anyone else wish to come in?

Christian Allard (North East Scotland) (SNP): I have a question for the minister about the £5,000 limit. Consumer representatives such as Which? and CAS have asked whether in a few years' time it would be possible to up the limit to £10,000. Is there a possibility in a few years' time of a review of how the simple procedure can remain appropriate and responsive to the court's needs?

The Convener: That is not relevant per se to amendment 135. However, the temperature seems to have got to you all, so I will let you away with it.

Margaret Mitchell: Amendment 135 is a good amendment. It seems to provide the flexibility that we would want to ensure that there is equality of arms and that these cases are heard in the appropriate court.

Elaine Murray: I very much welcome the amendments, which will help to ensure equality of arms. I note that amendment 137 would allow one party to make the application for proceedings to go into the simple procedure. I presume that court rules would cover the possibility of the bigger party, if you like, forcing the case into simple procedure.

The Convener: I am pulling faces. I am not supposed to, but I am pulling a face.

Elaine Murray: I would like a bit of clarification of that, to be sure that requiring the consent of only one party would not disadvantage the smaller party.

Roseanna Cunningham: I am just taking a note of that last comment.

I welcome these amendments, as I hinted at earlier. The effect of amendments 135 and 136

would be that where cases below £5,000 are brought in an all-Scotland sheriff court—and here we are really talking about the specialist personal injury court—they would not be subject to simple procedure in that court. It is for an order under section 41(1) to define which cases may be brought in the all-Scotland court under the rules that apply in that court.

Under section 75, a case may only be transferred into simple procedure if the parties make a joint application—there must be agreement. Amendment 137 would introduce a new rule that where proceedings for payment of a sum up to the £5,000 simple procedure limit are raised in the specialist court, any party may apply to the sheriff to have them transferred into simple procedure in the local court on special cause shown, which answers some of the earlier comments. Ultimately it would be a decision for the sheriff: an application is not an automatic transfer; it would have to be considered. This, again, strikes me as a helpful clarification of the way in which the specialist court should operate, so I am grateful to John Finnie for his amendments, which the Scottish Government is happy to support.

I point out to Christian Allard that the Scottish Civil Justice Council already has a statutory obligation to review the civil justice system and must lay an annual report before the Parliament. That is an on-going aspect of its work and that should catch the specific issue that Christian Allard raised.

The Convener: John Finnie, do you want to wind up?

John Finnie: The minister covered the point that Elaine Murray raised, so I have nothing to say.

Amendment 135 agreed to.

Amendment 31 moved—[John Pentland].

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

Members: No.

The Convener: There will be a division.

For

Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 2, Against 6, Abstentions 1.

Amendment 31 disagreed to.

Amendments 52 to 55 moved—[Roseanna Cunningham]—and agreed to.

Amendment 44 moved—[Alison McInnes].

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

Members: No.

The Convener: There will be a division.

For

Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
McInnes, Alison (North East Scotland) (LD)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 5, Abstentions 1.

Amendment 44 disagreed to.

Section 70, as amended, agreed to.

After section 70

Amendment 136 moved—[John Finnie]—and agreed to.

Section 71—Proceedings for aliment of small amounts under simple procedure

The Convener: Amendment 56, in the name of the cabinet secretary, is grouped with amendment 57.

Roseanna Cunningham: Section 71 permits a claim for aliment under section 2 of the Family Law (Scotland) Act 1985 to be brought subject to simple procedure. If I can give you a small lesson in Scots law, we do not have alimony in Scotland—despite what you hear on television—we have aliment.

The Convener: Some of us knew that.

10:30

Roseanna Cunningham: Not everyone does, convener, and I do like to take these small educational moments.

At the moment, the bill provides that simple procedure may be used for awards up to £35 a week for a child under the age of 18 years and, in any other case, up to £70 per week. We considered that, after almost 30 years, those values should be updated. We consulted a number of key stakeholders and there was general agreement with the proposal, which the amendments under discussion reflect. Accordingly, the amendments provide that simple procedure may be used for awards up to £100 a week for a child under the age of 18 years and, in any other case, up to £200 per week. Amendments 56 and 57 achieve that.

I move amendment 56.

Amendment 56 agreed to.

Amendment 57 moved—[Roseanna Cunningham]—and agreed to.

Section 71, as amended, agreed to.

Section 72—Rule making: matters to be taken into consideration

The Convener: Amendment 58, in the name of the cabinet secretary, is in a group on its own.

Roseanna Cunningham: Section 72 establishes an expectation that, as far as possible, simple procedure rules will enable an interventionist and problem-solving approach. The Scottish civil courts review recommended that the rules for the new procedure should be written in as clear and straightforward language as possible. The rules will reflect as far as possible the principles set out in section 72.

The new approach to be adopted should permit the court to identify the issues and specify what it wishes to see or hear by way of evidence or argument. This is clearly a fundamental shift away from the adversarial approach where the parties control evidence and argument. The intention is that the court should be able to help the parties to settle the dispute and the procedure adopted should reflect the circumstances of the case.

Amendment 58 reflects concerns raised by representatives of the Sheriffs Association that although the court should be able to help the parties to settle the dispute, that should not mean that the court should negotiate between the parties; it should merely assist them to present their case. Sheriffs Pettigrew, Wood and Liddle agreed that it would be more appropriate if the term "negotiate with" was amended to read "facilitate negotiation between". That is what amendment 58 achieves.

I move amendment 58.

The Convener: I welcome this amendment, because I think the provision is much more circumspect and appropriate than what we had before. I thought I would just say that.

Amendment 58 agreed to.

Section 72, as amended, agreed to.

Sections 73 and 74 agreed to.

Section 75—Transfer of cases to simple procedure

Amendment 59 moved—[Roseanna Cunningham]—and agreed to.

Section 75, as amended, agreed to.

After section 75

Amendment 137 moved—[John Finnie]—and agreed to.

Sections 76 and 77 agreed to.

Section 78—Appeals from simple procedure cases

The Convener: Amendment 60, in the name of the cabinet secretary, is grouped with amendment 61.

Roseanna Cunningham: Amendments 60 and 61 are drafting amendments. Section 78(2) provides that an appeal may be taken to the sheriff appeal court on a point of law only against a decision of the sheriff constituting the final judgment in a simple procedure case. The intention of that provision is to prevent the interruption of simple procedure cases by appeals against non-final judgments. As it is presently drafted, it may have the effect of going further and preventing a decision of the sheriff appeal court in an appeal in simple procedure from being further appealed to the Court of Session. The intention is that once an appeal has been taken against the final decision of the sheriff in a simple procedure case, it should be treated in the same way as any other appeal under section 104. That is the effect of the amendments.

I move amendment 60.

The Convener: Thank you very much. I was somewhat distracted by the arrival of a fan—at last. We could do with another one.

Amendment 60 agreed to.

Amendment 61 moved—[Roseanna Cunningham]—and agreed to.

Section 78, as amended, agreed to.

Sections 79 to 84 agreed to.

Section 85—Judicial review

The Convener: Amendment 32, in the name of Margaret Mitchell, is grouped with amendment 138.

Margaret Mitchell: Amendments 32 and 138 cover a very specific circumstance. Their effect would be to reduce the time limit for lodging, from three months to six weeks, in challenges under judicial review where the applicant is a company and the challenge is to a decision under part III of the Town and Country Planning (Scotland) Act 1997. They are intended to address concerns that, currently, judicial review is frequently used by commercial rivals to delay development proposals for competitors. That, in turn, delays investment and job creation.

It is important to stress that the amendments would not restrict the legitimate use of judicial review. Therefore, the time limit of three months that is proposed in the bill will continue to apply to all judicial reviews that are not related to planning. The three-month time limit for lodging will also continue to apply to all judicial reviews that relate to planning but which are lodged by individuals, relevant public bodies or community organisations. The rights of individuals, voluntary groups and communities to make applications for judicial review within the three-month time limit that is proposed in the bill are protected.

The amendments were suggested by Asda and the Scottish Retail Consortium and would have particular implications for companies that operate across Scotland, for retail development and for retail jobs more widely. Commercial enterprises are well placed, by virtue of their access to the necessary resources, to make an application within six weeks. That six-week time limit for lodging judicial review applications would reduce delays and would provide greater certainty for developers' ability to deliver for local communities, by making the planning process more efficient and by making timescales for delivery more accurate.

To put the amendments in context, it is worth noting that, between 2003 and 2012, out of the 12 judicial reviews against retail developments, 11 were raised by commercial rivals. A six-week time limit on judicial review would help to address the issue. At the same time, it would decrease the impact of excessive delays and the use of the process by commercial rivals. It does not seem unreasonable to put in place such a limit for commercial entities that are likely to have been involved or interested in the planning process and which are likely to have access to legal advice and to be able to lodge a review application quickly.

I stress again that individuals and communities would not be adversely affected. Rather, they would be likely to benefit from the amendments.

I move amendment 32.

John Finnie: On more than one occasion, we have heard it suggested that it is bad practice to single out a particular aspect. As someone who has previously been involved in a planning committee, I find it ironic that the particular company that was mentioned is the source of information to Margaret Mitchell. I am not at all supportive of singling out retail concerns for any benefit at all.

Sandra White (Glasgow Kelvin) (SNP): I was supportive of the community aspect. However, if a community activist or group put in for a six-week period, what is to stop a larger organisation jumping on the bandwagon? I think that there would be confusion in that respect, so I am not supportive of Margaret Mitchell's amendments.

The Convener: Can I clarify that? Do you mean a community group being used by an opponent?

Sandra White: That could happen, I think.

The Convener: Right. Elaine Murray is next.

Elaine Murray: The only witnesses who put forward that point of view to the committee were from Asda. The proposals did not seem to have much support from anybody else. I hear from Margaret Mitchell that the SRC also supports the amendments, but we did not seem to have any other supporting evidence on the position.

The point that Sandra White makes is correct: it would be quite easy to circumvent the measures, for example by getting an individual to apply for a judicial review, and the company could support that individual in doing so. I am not sure that the measures would actually achieve what they are intended to achieve.

Roderick Campbell: I reiterate the points that others have made. In its written submission, Asda made particular reference to a case involving one of its commercial rivals that went to the Supreme Court. Given the current rules and comments of the Supreme Court, I think that that kind of case is going to be rare, and I do not think that it would be appropriate to support the amendments. Particularly in relation to amendment 138, it is worth noting that there is no qualification to allow the court to extend the time as provided for under proposed new section 27A(1)(b) of the Court of Session Act 1988. For all those reasons, I oppose amendments 32 and 138.

While I remember, I refer to my entry in the register of members' interests as a member of the Faculty of Advocates.

The Convener: While you remember—yes. They are all forgetting themselves today, minister.

Roseanna Cunningham: Yes, and Roderick Campbell has just reminded me that I ought to

remind members of my entry in the register of members' interest.

The Convener: Do any other members want to out themselves? We might as well get it done in a oner. [*Laughter*.]

Roseanna Cunningham: Margaret Mitchell's amendments 32 and 138 propose a six-week rather than a three-month time limit for applications for judicial review of a planning decision unless the applicant is an individual or an environmental or community group.

I start by saying that I welcome Margaret Mitchell's agreement that there should be a three-month time limit for the majority of cases. Having said that, it will come as no surprise to members to learn that we do not agree on the application of a much shorter period of six weeks for planning cases.

The intention appears to be to impose a strict time limit on applications that might be brought cynically by commercial competitors. I fully appreciate the desire behind the amendment. Asda's written evidence to the committee at stage 1 referred to

"companies in the development industry who are looking to delay competitors and thereby retail investment and job creation."

It is perhaps worth pointing out that the amendment would apply a six-week limit not only to property developers who seek to bend the judicial review process to their own financial ends, but also to small companies whose existing business might be threatened by the decision to grant permission to some large new development.

As far as I am aware, in the evidence that was given to the committee, only Asda suggested a time limit shorter than three months. Although Asda might have been arguing for the shorter time limit because it has been on the receiving end, it is equally as likely to be the other way round. Lord Gill recommended a three-month limit in his review, and that was supported by Sheriff Principal Taylor. I am satisfied that a simple, straightforward and consistent time limit should apply to all applications to the supervisory jurisdiction of the Court of Session and that three months is an appropriate timescale.

I should perhaps say at this stage that the three-month time limit is not an absolute and inflexible rule. The court is given discretion to extend the limit where it is considered equitable to do so, and it has the power to ensure that no legitimate applicant is unfairly disadvantaged. Asda's evidence is useful in highlighting the need to ensure that the judicial review process is not abused and that planning cases are not unduly delayed. It is for those reasons that we have proposed a permission stage to filter out unmeritorious cases.

I therefore ask the committee not to agree to Margaret Mitchell's amendments.

Margaret Mitchell: I should probably clarify that I still have a little concern about the three-month time limit for community organisations. The point of mentioning them was just to say that the amendment would not affect the provision in the bill. I suppose that it is up to members to look at that between stages 2 and 3 and to satisfy themselves whether three months, with the necessary safeguards that the minister talked about, is the time limit that we will eventually want to take forward.

Turning to some of the other comments, it seems to me that the reason for John Finnie's opposition is that it was Asda that made the point.

John Finnie: Not exclusively.

Margaret Mitchell: Other members mentioned that only Asda made the point, but that does not mean that it is not a good point. Other bodies such as the Scottish Retail Consortium see some validity in it.

On the point about uncertainty, could a community group be used as a kind of pawn? Maybe it is up to judicial management or discretion to decide on that.

However, having aired the argument for amendment 32, which I stress is a probing amendment, I feel that there is an opportunity for other commercial groups who have heard the discussion to come forward, which might tip the balance a little. However, I absolutely take on board the minister's point that small companies could potentially be disadvantaged by the proposed amendment, so I will not press amendment 32.

Amendment 32, by agreement, withdrawn.

10:45

The Convener: Amendment 125, in the name of Elaine Murray, is grouped with other amendments as shown in the groupings. Do not ask me questions about this, but if amendment 143 is agreed to, I cannot call amendments 114 to 116 in this group and amendments 111 to 113 in the next group, because they will all be pre-empted.

Elaine Murray: Section 85 imposes a time limit of three months on an application for judicial review, although we have heard that there could be some flexibility. The committee has heard conflicting evidence on this matter, including proposals that there should be no time limit, a time limit of six months or a time limit of one year.

Other witnesses agreed that three months is appropriate, though. Amendment 125 would not change the time limit, but it recognises that an applicant might not know about the grounds for an appeal at the time when the grounds arise. It could, indeed, be some time later when the applicant becomes aware that there are grounds for a judicial review.

The proposal in amendment 125 is to start the clock ticking when the applicant first has knowledge of the grounds for an appeal rather than when they arise. I think that that would address the concerns to do with when communities become aware that they might have grounds for appeal.

Amendments 62 and 63, in the name of the minister, appear to be drafting amendments but, in my view, they will make the bill read more awkwardly, as I think that subsection (2) of proposed new section 27A of the 1988 act will read that subsection (1) will not apply when an application is to be made "before the end of a period ending before the period of 3 months mentioned in that subsection (however that first-ending period may be expressed)." I find that slightly difficult to follow. I will be interested to learn from the minister why that form of wording, which seems a bit clumsy, is preferable to what is in the bill.

Amendments 139 and 143, in the name of Alison McInnes, would get rid of the time limits altogether, but I am not convinced that that is necessary.

Amendments 114 to 117 would make what appear to be technical amendments to the proposed amendment of the Tribunals (Scotland) Act 2014.

I hope that committee members will agree that it would be fairer to the applicant for the time limit for an appeal for judicial review to commence at the point when the applicant becomes aware of the grounds for appeal.

I move amendment 125.

The Convener: Minister, I ask you to speak to amendment 62 and other amendments in the group.

Roseanna Cunningham: Okay, but I want to start with amendments 139 and 143 rather than immediately go into a response to amendment 125.

The Convener: I am easy-osy about that.

Roseanna Cunningham: Amendments 139 and 143 would have the effect of removing a significant element of the reforms suggested in Lord Gill's Scottish civil courts review. Amendment 139 would remove any changes that the bill makes to the judicial review procedure, which would mean that not only would there be no statutory time limits on applications, which is what we have just been discussing, but even the most unmeritorious cases would have to proceed to a hearing on the merits.

I find it strange that amendment 139 should be lodged and I am not entirely clear what is behind it. All parties accepted in general Lord Gill's "Report of the Scottish Civil Courts Review" when it was published. His proposals on judicial review formed a significant part of that review, and the bill will implement his recommendations. However, Alison McInnes now proposes amendments that would remove those provisions in their entirety. The result of those amendments would be that judicial review would continue on the basis of the common-law plea of mora, taciturnity and acquiescence, which Lord Gill considered to be not particularly

"well-suited to a procedure designed to provide a speedy and effective remedy to challenge the decisions of public bodies."

There is a public interest in judicial review challenges being made promptly and resolved quickly. People should be able to challenge the decisions of public authorities, but they should also be able to rely on them. An appropriate balance has to be struck, and we consider that the way to do that is through a time limit.

The time limit provision in the bill is drafted in a way that is designed to provide fairness to applicants while reflecting the public interest in having settled decision making. The bill also recognises that there might be occasions when that time limit needs to be extended, so the court is empowered with discretion to do that if it considers it equitable, given all the circumstances. Again, we referred to that earlier.

Three months was chosen as being sufficient in the vast majority of cases and is a time limit that has operated satisfactorily in England and Wales for some considerable time. The Scottish Government consulted on that time limit and a majority of the respondents were in favour.

During stage 1, anxieties were raised about whether legal aid could be arranged within that timescale, but the evidence of Lindsay Montgomery, the chief executive of the Scottish Legal Aid Board, was that it would not present a problem. Indeed, an application could be made under the legal aid special urgency provisions.

I will say more about time limits when I deal with amendment 125, in the name of Elaine Murray, but first I must address the other reform that would be lost were Alison McInnes's amendments to be agreed to: the introduction of a permission stage, which was another of Lord Gill's

recommendations. Petitions for judicial review occupy a disproportionate number of sitting days. The permission to proceed stage would remove those cases that are effectively unarguable, with the safeguard that an applicant who is refused permission has a right of appeal to the inner house.

Amendment 139 would mean that unmeritorious claims would proceed to a hearing on the merits, taking up valuable court time at a cost to the public purse. In addition, without the permission stage, judicial review can become a weapon used to delay development projects, which is something that we have just been discussing. We have already heard from Margaret Mitchell, in the debate on the previous group of amendments, about the way in which judicial review applications could be abused. Although her proposed solution, in our eyes, went too far, she highlights a real issue, to which the introduction of a permission stage, as recommended by Lord Gill, is a proper part of the response.

To summarise, amendments 139 and 143 would mean that there would be no reform to judicial review. I remind the committee that Lord Gill devoted an entire chapter of his report, which was welcomed by this Parliament, to the improvement of the judicial review process. He has said of the bill:

> "Proposed new section 27A of the 1988 act, which is in section 85 of the bill, seems to be concisely and clearly expressed, which leaves no one in any doubt of what is required of them if they petition for judicial review. I cannot see any way in which it could be improved on."—[*Official Report, Justice Committee*, 22 April 2014; c 4547.]

It would certainly not be improved on by being omitted from the bill, and I ask the member not to press her amendments.

The effect of amendment 125 would be to change the point at which the clock starts ticking for the purposes of the judicial review time limit in section 85. The bill gives that point as the date on which the grounds giving rise to the application first arise—for instance, the date on which the decision under challenge was taken. Amendment 125 changes that to the date on which the applicant first had knowledge of the grounds giving rise to the application.

The current test in the bill is an objective test. The grounds giving rise to the application are objective circumstances, such as the date on which a decision is taken, which will be known to the decision maker and may readily be ascertained by a court. However, it is important to note that the current test in the bill has been drafted in such a way as to allow the court to apply the principle of fairness in determining from when a particular time limit should run.

The House of Lords has held that, under the equivalent long-standing test in England and Wales, which is drafted in similar terms, the time limit will not start to run until the person affected by a decision would be likely to be aware of that decision. The Court of Session will, of course, find such an approach highly persuasive. Although it would not necessarily be bound by it, it would be likely to accept the decision.

Elaine Murray's test would, however, be a subjective one. It would depend on the actual knowledge of each applicant, and it could well lead to legal arguments about when the individual applicant had the requisite knowledge. That would greatly reduce the certainty of the time limit, as even after three months have passed from the date on which a decision was publicised, it would be possible for an application to be brought by a person who was, for whatever reason, unaware of it until more recently.

The aim of the section 85 time limit is to balance the need for access to judicial review with the interests of certainty in decision making. To take an everyday example of the latter interest, a person who is granted planning permission for the extension of her house should, at some point, be entitled to build the extension without fear that the decision to grant that permission will be quashed on judicial review. That interest in certainty would be undermined by adopting Elaine Murray's test. It should also be noted that there is already flexibility in section 27(1)(b) for the court to extend the time limit, where equitable, having regard to the circumstances. That gives further comfort to claimants that, where good reasons arise, the court is fully empowered to allow claims to be made out of time. I hope that I have been able to give some comfort to Elaine Murray on this point, and I ask her not to press amendment 125.

The Government amendments are relatively minor and technical. Amendments 62 and 63 are minor drafting amendments that seek to clarify how the time limits are expressed in proposed section 27A(2) of the Court of Session Act 1988, as inserted by section 85 of the bill. They make it clear that any time limit that might be imposed by another enactment will apply only if it in fact ends before the three-month time limit applied under section 27A(1).

Amendment 65 seeks to introduce a time limit that was recommended by Lord Gill but which was inadvertently omitted from the bill as introduced. The bill permits an applicant who has been refused permission to proceed after an oral hearing to appeal to the inner house of the Court of Session against the refusal. The seven-day time limit that Lord Gill recommended for such an appeal is introduced in amendment 65.

Finally, amendments 114 to 117 are technical drafting amendments to the provisions inserted into the Tribunals (Scotland) Act 2014 by paragraph 24 of schedule 4 to govern the procedural steps that should be followed when the Court of Session remits a petition for judicial review to the upper tribunal for Scotland under section 57(2) of the 2014 act.

I urge the committee to support amendments 62, 63, 65 and 114 to 117 in the name of the cabinet secretary and not to support amendments 125, 139 and 143.

Phew!

The Convener: You may take a breath, minister.

Alison McInnes: I have lodged amendments 139 and 143 because I believe that the judicial review arrangements need further exploration and explanation. After all, we are talking about a significant review, and I remain concerned that the three-month time period might erode access to justice. Indeed, in their evidence to us, a number of witnesses and organisations expressed a view that the provisions are needlessly restrictive and fundamentally unnecessary. Jonathan Mitchell QC said that a three-month limit was "unique" and far more restrictive than others that already exist in our system, such as the three years allowed to claim after a road accident or the five-year limit after a contract dispute. Tony Kelly from Justice Scotland pointed out that only 20 per cent of respondents to the Gill review supported the introduction of a time limit and the Law Society of Scotland, which actually supports these amendments, has argued that introducing the limit is disproportionate, given the comparatively small number of applications that are made in Scotland.

There is concern that the three months is insufficient time to assemble a case and secure funding, and that is particularly true for community groups, which, given the need to meet, understand their options and agree a course of action, will likely need longer to marshal their case. It would also present real challenges to those who require legal aid or who have to find a solicitor willing to act pro bono. As I understand it, we do not have a significant problem with unmeritorious cases, but I recognise that the current system can be abused.

Just before the stage 1 debate, the Government told the Scottish Parliament information centre that it was its understanding that the three-month limit would supersede the 12-month limits in the Scotland Act 1998 and the Human Rights Act 1998. I thought that that was a substantial change, and the committee did not consider it when it took evidence or produced its report. Judicial review allows citizens to contest acts of the state and ensure that decision making is just, reasonable and proportionate, and I would like to hear some further explanation from the minister on the point.

The Convener: Even though Elaine Murray will wind up on this group, I will let the minister back in to answer members' comments. However, while the minister considers that particular point, I will call other committee members.

Roderick Campbell: I will comment only briefly, convener. The minister has dealt very comprehensively with most of the issues, but we must accept that north of the border judicial review is a rarity compared with the situation south of the border, and that these provisions represent a significant change in the culture of judicial review north of the border. That said, I think that we want to move away from the problems that come with the common-law plea of mora, taciturnity and acquiescence, which gives lawyers a lot of fun but which I am not sure generally helps the public.

The Convener: Perhaps you can tell us what it means.

Roderick Campbell: Were it not for the provision on what is equitable in proposed section 27A(1)(b) of the 1988 act, I would have concerns. For those reasons, I have to say that I think that some of the concerns that witnesses have expressed are slightly overdone.

11:00

Margaret Mitchell: Alison McInnes's amendments have been good at flushing out more information on how the judicial review time limit would apply. The fact that there is provision for an extension is good. I do not know whether I am altogether satisfied that three months is the appropriate time limit, even with the assurances, but I could not support there being no time limit.

Good points were made about the 12-month limits and human rights.

I was certainly persuaded by the minister's argument in response to amendment 125.

The Convener: I am a bit confused, Margaret, because I thought that you wanted a shorter time for some cases.

The position on judicial discretion is often overlooked in all cases that come before the court. If there is merit in somebody saying that they did not know that they had a right, judicial discretion is a very handy thing. I do not quite know why Jonathan Mitchell was trying to compare the triennium with the period for judicial review. That is not comparing apples with apples; it is comparing apples with pears. They are completely different things, and I think that they are even subject to some kind of review. We sometimes overlook the judicial discretion of the sheriffs and senators,

whereby when they meet somebody whose case has real merit but who has missed some kind of deadline, they are prepared to let the case go ahead.

Minister, do you have points to make in answer to Alison McInnes?

Roseanna Cunningham: Alison McInnes made the point that these time limits will supersede the time limits under the Scotland Act 1998 and the Human Rights Act 1998, and that is correct; they will. Although both acts are reserved, they permit stricter time limits to be imposed, so there is no difficulty with what we want to do; it is envisaged and encompassed within those acts.

An interesting issue arises in relation to the comparison with the triennium. What we are talking about with judicial review is public decision making, which needs certainty. We cannot have long-running periods of uncertainty about the application of a public decision. I therefore do not believe that the time limit here is comparable to the time limit for, for example, personal injury cases. The convener is correct to say that we are not talking apples and apples. We are talking about two very different things and about the need for public decision-making not to be snarled up for very long periods of time unnecessarily when things could be moving a bit faster. That kind of public decision making needs certainty and people are entitled to know for sure about the decision-making process when it comes to public decisions.

Personal injury case decisions are privately taken, but the public decision-making process is very different. Although judicial review is a useful tool for people to test public decisions, we must always watch that it does not become a way of quite cynically stalling the public decision-making process.

Elaine Murray: I have listened carefully to what the minister said and I accept that there could be a problem with legal argument about when somebody actually had knowledge of the grounds for complaint. The illustrative example of a planning permission case that the minister used is a case in point in which the argument could be used in a vexatious fashion to cause delay when a planning application could be proceeded with.

I am prepared to withdraw the amendment.

The Convener: You have to ask us if you can do that.

Elaine Murray: Okay, but just before I do that, I should have said something about amendment 65 when I was speaking to amendment 125. I am still a bit concerned about the period of seven days for an appeal following an oral hearing. I understood that the normal time limit for appeals was 21 days, so seven days seems to be very short in comparison. As I say, I should have raised the point earlier.

Roseanna Cunningham: There is really not much more that I can add to what I have already said. It was Lord Gill's recommendation. As the legislation is effectively about enacting Lord Gill's review, we have had the opportunity to hear from him.

The Convener: Does Elaine Murray want to withdraw the amendment?

Elaine Murray: I seek permission to withdraw the amendment.

The Convener: Is she allowed?

Amendment 125, by agreement, withdrawn.

The Convener: Members are so kind to Elaine Murray.

Amendment 138 not moved.

Amendments 62 and 63 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 64, in the name of the cabinet secretary, is grouped with amendments 102, 103 and 111 to 113.

Roseanna Cunningham: Members will be relieved to know that I will be considerably briefer than I was previously.

This is another group of technical amendments, which simply update references in the bill to sections of the Tribunals (Scotland) Act 2014 to take account of changes in the numbering of those sections when that bill was enacted.

I move amendments 64, 102, 103 and 111 to 113.

The Convener: You are moving only one amendment, are you not?

Roseanna Cunningham: I am sorry. I got carried away there.

I move amendment 64.

The Convener: How we all wish that we could get carried away today.

Amendment 64 agreed to.

Amendment 65 moved—[Roseanna Cunningham].

The Convener: The question is, that amendment 65 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
White, Sandra (Glasgow Kelvin) (SNP)

Against

Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 2, Abstentions 1.

Amendment 65 agreed to.

Amendment 139 not moved.

Section 85, as amended, agreed to.

Sections 86 and 87 agreed to.

The Convener: Because I am getting weary, we will get to sections 90 to 95 and then have a five-minute break. We can then all adjust our temperature.

Section 88—Remit of cases to the Court of Session

The Convener: Amendment 66, in the name of the cabinet secretary, is grouped with amendments 67 to 69, 140, 70 and 71.

Roseanna Cunningham: I will speak about specific amendments to remits in a moment.

The amendments in the group were lodged as a result of Lord Gill's evidence to the committee at stage 1, on 22 April, and my letter to the committee of 30 April, which made a commitment to amend certain provisions in the bill on remits in line with Lord Gill's comments.

As the committee recognised in its stage 1 report, the ability to remit a case to the Court of Session that would otherwise be within the exclusive competence of the sheriff court is a necessary, competent and important tool. The provisions on remits that are set out in section 88 are intended to ensure that the system is not abused by requests to remit cases from the sheriff court becoming the norm in an attempt to circumvent the raising of the exclusive competence of the sheriff court to £100,000. However, it is important that we get the balance right so that cases are able to find their appropriate level in the system.

Currently, there are two different tests in the bill that govern the remit of a case from the sheriff court. One test, which is in section 88(2), applies to cases in which the monetary value is above the exclusive competence of the sheriff court; the other test, which is in section 88(4), applies to cases in which the value is within that exclusive competence.

In his stage 1 evidence, Lord Gill stated that he thought the second test of exceptional circumstances in section 88(4) for cases within that exclusive competence was "too high". He also stated that a single test for remit—the same one that is in section 88(2)—was "desirable in principle" and in practice.

The Government has considered the matter and agrees that it is desirable that there should be a single test for remit to make the rules and procedures of the courts easier to understand. Amendment 66 therefore amends section 88(4) to bring the test in line with that in section 88(2).

There are also currently two different mechanisms that govern the remit of a case from the sheriff court. Where the monetary value is above the exclusive competence of the sheriff court, if the sheriff remits that case, it transfers automatically to the Court of Session under section 88(2). However, where the value is below the exclusive competence, a request from a sheriff to the Court of Session under section 88(4) may be refused by the Court of Session under section 88(5). The difference in treatment between remits of cases above and below the exclusive competence is deliberate in order to prevent attempts being made to circumvent the new level of the exclusive competence.

Lord Gill believed that the test of special cause shown in section 88(5) presented an additional hurdle that an applicant for remit must clear, but he considered that threshold too high and suggested that a test of cause shown would provide an adequate safeguard to prevent any abuse of process. Amendment 67 makes that change.

The Scottish Government remains of the view that the provisions of the bill, including those in section 88(6), which would allow the Court of Session to take account of the business and other operational needs of the court in deciding whether to accept a remit from the sheriff, are compatible with the European convention on human rights. I think we said that we did not envisage that being an issue. However, we have noted the Lord President's comments on the desirability of the provision. Amendment 68 does in fact remove section 88(6).

Amendment 69 makes appropriate provision for appeals following the easing of the test for remit by amendments 66 and 67. It removes the appeal provisions in sections 88(9), 88(10), 88(11) and 88(12), with the effect that section 104(2) will apply for the purposes of appeals against decisions of sheriffs under sections 88(2) and 88(4). That means that a sheriff's decision not to remit the case under section 88(2) or to request the Court of Session to do so under section 88(4) may be appealed to the sheriff appeal court with

the permission of the sheriff. The amendment would ensure that these appeals are treated consistently with other appeals from the sheriff.

Amendment 140, in the name of Roderick Campbell, proposes an alternative approach to such appeals. His amendment would replace the right of appeal to the sheriff appeal court against a sheriff's decision on remit with the right of appeal to the Court of Session. Where the Government's amendment 69 would make these appeals consistent with the rule that applies throughout the bill—that appeals from the sheriff go to the sheriff appeal court—Rod Campbell's amendment would make an exception for decisions on remit. In my view, there is no justification for making an exception to the principle for appeal against a decision not to remit a case to the Court of Session. I would ask that Rod Campbell does not move his amendment.

In view of the changes to the rules on upwards remit to the Court of Session in section 88, the rules on downwards remit from the Court of Session in section 89 also need to be amended. In the light of the amendments made to section 88 by amendments 66 to 69, there would be a disparity between the test in section 89(2) and the new tests to be provided for in section 88. There would therefore be a real risk of an attempt by litigants whose case is remitted down in terms of section 89(2) to immediately try to have their case remitted back up under section 88.

Amendment 70 replaces the test in section 89(2) to mirror that in section 88(5). That means that the Court of Session must remit proceedings to the sheriff court unless it can be demonstrated that there is cause shown that the proceedings should stay in the Court of Session. The adoption of the same test will make it unlikely that the Court of Session would remit any case to the sheriff court that would have a good chance of being accepted by the Court of Session were the sheriff to remit it back. We are trying to avoid a ping-pong process.

Amendment 71 deletes section 89(7) so that, as with section 88, the Court of Session should no longer be able to take into account its business or operational needs in coming to a decision on whether to remit to the sheriff.

I move amendment 66.

Roderick Campbell: Perhaps it would be helpful if I started by saying that I very much welcome amendments 66 to 68 and I understand the minister's comments. In lodging amendment 140, I was really taking on board some of the other comments that Lord Gill made when he referred to the question of the Court of Session having some kind of safety net. He said:

"It might be that a sheriff made a decision based on inadequate information or on an incorrect understanding of matters, so it would be helpful if there was the fallback that the Court of Session could take a second look at the matter, rather than someone's claim being ruled out for ever."—[*Official Report, Justice Committee*; 22 April 2014 c 4543.]

I still think that his comments had some validity, but I hear what the Government has to say about it. It is my intention not to move the amendment in due course.

11:15

The Convener: You are not moving it now anyway; you are just speaking to it.

Elaine Murray: The majority of the Government amendments are welcome. They lower the bar for remit to the Court of Session, which is to be welcomed. I am sorry, in a sense, to hear that Roddy Campbell does not intend to move amendment 140, because I see some merit in allowing the decision to be taken by the Court of Session. I would have preferred amendment 140 to amendment 69, if that had been possible, but there is probably little point in supporting Roddy Campbell's amendment if he does not intend to press it.

The Convener: The minister may not like me telling you this, but you can move the amendment. If Roddy Campbell says, "Not moved," another member can move the amendment. You should know that by now. You have been here 15 years, woman; I should not have to tell you procedures. It's the heat, darling. It's the heat.

Alison McInnes: I welcome the Government's amendments to section 88, because they are an improvement on the situation.

The Convener: Yes, particularly with regard to the subsection on taking business into account. That is something that we would have found unsettling.

Amendment 66 agreed to.

Amendments 67 and 68 moved—[Roseanna Cunningham]—and agreed to.

Amendment 69 moved—[Roseanna Cunningham].

The Convener: The question is, that amendment 69 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

McInnes, Alison (North East Scotland) (LD)
White, Sandra (Glasgow Kelvin) (SNP)

Against

Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 2, Abstentions 1.

Amendment 69 agreed to.

Amendment 140 moved—[Elaine Murray].

The Convener: The question is, that amendment 140 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Abstentions

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 140 disagreed to.

Section 88, as amended, agreed to.

Section 89—Remit of cases from the Court of Session

Amendments 20, 19, 70 and 71 moved—[Roseanna Cunningham]—and agreed to.

Section 89, as amended, agreed to.

Sections 90 to 95 agreed to.

11:18

Meeting suspended.

11:30

On resuming—

Section 96—Power to regulate procedure etc in the Court of Session

The Convener: Amendment 72, in the name of the cabinet secretary, is grouped with amendments 73, 76 to 79, 119 and 120.

Roseanna Cunningham: Amendments 72, 73, 76 to 79 and 119 are all technical amendments to the court rule-making powers. They do not change the substance of the powers but ensure that the rules made for the Court of Session will be interpreted in terms of the Interpretation and Legislative Reform (Scotland) Act 2010 in the same way as the rules to be made for the sheriff court and the sheriff appeal court would be.

The amendments move the Court of Session rule-making powers into the body of the bill, instead of the current provision to place them into the Court of Session Act 1998. That will ensure that court rules for the Court of Session, the sheriff court and the sheriff appeal court will be subject to the same interpretative regime. This is in keeping with the aims of the rules rewrite project that the Scottish Civil Justice Council is undertaking to provide a consistency of approach across the breadth of the sheriff court and the Court of Session rules, with clear rules that are easy to understand.

Amendment 120 is a technical amendment that amends the SCJC's powers to put beyond doubt its role in being able to propose rules of court relating to the setting of fees.

I move amendment 72.

Amendment 72 agreed to.

Amendment 73 moved—[Roseanna Cunningham]—and agreed to.

Section 96, as amended, agreed to.

The Convener: Amendment 74, in the name of the cabinet secretary, is grouped with amendments 75, 80, 81, 91, 108, 118 and 124.

Roseanna Cunningham: Amendment 91 inserts a new section that re-enacts the existing powers of the Scottish ministers to set court fees. Those powers are currently exercised by the Scottish ministers under section 2 of the Courts of Law Fees (Scotland) Act 1895. The amendment consolidates the 19th century provision, setting out the powers in clearer modern language. It reflects, for example, the reality that it is for the Scottish ministers rather than the secretary of state to set court fees, and that the fees should generally be payable to the Scottish courts and tribunals service rather than to named officers of court.

Amendments 108 and 118 are consequential amendments. The latter repeals the relevant section in the 1895 act; the former removes from the bill an amendment to that section that is no longer needed. As with the section that it re-enacts, the new section on court fees contains a power, by order, to modify the lists of courts and judicial officers contained in that section. As this is a power to make a textual modification to primary legislation, it is appropriate that it be made subject to affirmative procedure. Amendment 124 makes that provision.

Amendments 74, 75, 80 and 81 move the sections conferring powers to make rules and procedure and fees under sections 96 to 99 into a new part along with the new power inserted by amendment 91, so that all the powers on procedure and fees are located together.

I move amendment 74.

Amendment 74 agreed to.

The Convener: You know that we are coming shortly to your amendments, Mr Pearson.

Elaine Murray: Oh, there he is. I was worried that he was not here.

The Convener: I don't know—I am the one who is not well today, but I have concerns about you.

Section 97—Power to regulate procedure etc in the sheriff court and the Sheriff Appeal Court

Amendment 21 moved—[Roseanna Cunningham]—and agreed to.

Section 97, as amended, agreed to.

Amendment 75 moved—[Roseanna Cunningham]—and agreed to.

After section 97

The Convener: Amendment 126, in the name of Graeme Pearson, is grouped with amendment 127.

Graeme Pearson (South Scotland) (Lab): Amendments 126 and 127 concern the ability of the bill—once it is an act—to ensure that proceedings are conducted justly. They try to explore some of the reservations that were expressed by witnesses during this committee's evidence-taking sessions.

Amendment 126 provides:

"(1) The power to regulate procedure by act of sederunt under sections 96 and 97 is to be exercised with a view to enabling the Court to conduct proceedings justly.

(2) Acts of sederunt made under sections 96 and 97 are to be interpreted by the Court with a view to enabling the Court to conduct proceedings justly."

As guidance, it then lists a number of items that the court should consider when trying to arrive at a just outcome.

The first item is the need to ensure equitable treatment of parties to the proceedings. In that regard, I am trying in some way to put people's mind at rest with regard to the notion of equality of arms and the notion that both sides of proceedings have fair access to treatment before the courts.

The next item is the need to be mindful of the expense of proceedings. That acknowledges the fact that the Government's intention for the legislation is to reduce the costs of proceedings within the court procedures.

The next item is the need to conduct proceedings in a manner that is proportionate to the value of orders that is sought in the proceedings. That is guidance to the court that we do not want to see disproportionate use of legal advice, which is costly and adds difficulty in deciding a just outcome.

The next item concerns the nature and complexity of the proceedings. Although some proceedings might not have a high value in terms of the kind of resolution that is being sought, there are often complexities in the arguments that are being developed in the court, and the court should acknowledge that complexity when deciding the level of representation for each of the parties.

The next item is the need to take account of the financial position of the parties to the proceedings. As was explained to us during our evidence-taking process, it is often the case that some parties have limited access to financial support. In my view, a court should acknowledge that and, in the pursuit of justice, should try to assist support for parties in those circumstances.

The next item is the need to ensure that proceedings are conducted fairly and timeously. That concerns the notion of moving cases on, rather than allowing them to languish over long periods of time, while taking due account of fairness to both sides.

The final item is the need to ensure that proceedings are conducted in a manner that is mindful of the resources that are available to court and of other proceedings that are progressing through the court. That is an acknowledgment in a practical sense that, although one would like to fast-track every case, judges quite evidently need to take account of the court calendar.

Such direction is not without precedent in legislation. UK legislation has had similar approaches when dealing with tribunals and so on. It would be helpful for the general public, in approaching the new legislation, to understand the approach that is to be taken by the courts.

Equally, it has been acknowledged that people outside Parliaments—all Parliaments, not only ours—have criticised the quality of some of the legislation that has been produced, and they have said that there is a lack of guidance to assist judges when they are weighing up the various processes that lie before them.

Amendment 127 attempts to achieve a similar outcome to amendment 126. If it is deemed that amendment 126 is too complex or difficult to deal with, amendment 127 would attempt to achieve the same outcome but says that it would be left to

the "Scottish Judicial Council" to determine how "justly" is to be understood in the making and interpreting of acts of sederunt.

I move amendment 126.

Margaret Mitchell: These amendments address an important point. There is certainly nothing in amendment 126 to which I could take exception; it sets out the stall of what we would all like to be achieved. However, it might well be that amendment 127 does the same thing without micromanaging what needs to be taken into account. I am certainly interested in hearing the minister's views on the matter.

The Convener: Frankly, I think that the amendments are unnecessary. In my experience—as I no longer practise law, I do not have to declare an interest—the bench takes these matters into account; indeed, I would be most concerned if proceedings in our sheriff courts, our lower courts or the Court of Session were not conducted justly.

I come back to the issue of flexibility. If a sheriff feels that things are not going fairly for a party litigant, they will intervene, seek an adjournment and have a word with someone. When I appeared in the sheriff court, sheriffs were pretty good at letting us know if they were not happy about the way proceedings were going in the interests of justice.

I see what Mr Pearson is arguing, but that is the practice in courts as I have experienced it. I would not want to put such matters down in writing when the judiciary is already quite capable of doing them and, indeed, does that kind of thing regularly.

Graeme Pearson: Convener—

The Convener: You will get to wind up, Mr Pearson. I call Roderick Campbell.

Roderick Campbell: I instinctively get concerned about prescriptive lists. I understand why the procedure itself has some prescriptive lists, but these amendments go wider than procedure; indeed, they go into the nature of justice itself, but I have no idea where natural justice, for example, features. I would certainly be concerned about having such a provision in the bill. I do not know whether certain issues would benefit from discussion by the Scottish Civil Justice Council, but that is a slightly wider issue.

Christian Allard: Some of the arguments that have been expressed are quite laudable, but, like Roderick Campbell, I do not think that the provision has any place in the bill.

Roseanna Cunningham: I am grateful to Graeme Pearson for explaining the intended effect of amendments 126 and 127, which seek in different ways to ensure that civil court rules are made and interpreted in light of an overriding principle that cases be dealt with justly. I have to say, however, that one would presume that to be the overriding principle of the justice system without its having to be written into every piece of legislation. If we had to do so, I would find that a rather strange way to proceed.

It will come as no surprise to find that the Scottish Government agrees with the principle, which chimes with the bill's overall purpose of bringing things into modern language and ensuring that procedures suit modern times; indeed, the same purpose was also behind the Gill and Taylor reviews. We want to ensure that that principle of justice is carried through in practice, but the Scottish Government does not think that it is appropriate to set it out in primary legislation.

Rules of court are a matter for the Scottish Civil Justice Council, which was established only last year as part of this whole arc of reform. Under its founding statute, the council is obliged to have regard to a number of principles, the first of which is that

"the civil justice system should be fair, accessible and efficient".

The SCJC has already started a major project to modernise and rewrite the rules that apply in the Court of Session and the sheriff courts, and I understand that, in doing so, it proposes to adopt an overriding principle that strongly resembles the one that Graeme Pearson has argued for.

The interim report of the SCJC's rules rewrite working group says:

"We are of the view that there should be a statement of principle and purpose in both the sheriff court and Court of Session rules, to which the court should have due regard, but that it should not override the other rules of court. The statement should be founded on ... recommendation ... of the Scottish Civil Courts Review, and should indicate that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, within a reasonable time, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court, and that parties are expected to comply with the rules."

I am informed that that proposal has been endorsed by the Civil Justice Council, which will consider the content of such a rule in due course.

The adoption of such a principle is properly a matter for the SCJC. Indeed, amendment 127 recognises that by leaving it to the council to define what is meant by "justly". I am happy to inform the committee that the SCJC already has the adoption of a relevant principle in hand, and I ask the member not to press his amendments.

11:45

Graeme Pearson: I have heard all that has been said by committee members and by the minister, and I take due consideration of it. The changes that the bill proposes are very significant, as we all appreciate. They will affect many ordinary people in the years ahead, many of whom will have no previous experience of our justice system and will not understand how the courts go about their processes of judicial decisions.

I thought, and still think, that it would be useful to have such a statement as I propose within the legislation in order that those who are external to the courts, who do not have the experience that our convener has of the way in which sheriffs weigh matters before them, are able to read for themselves about the various matters that would be weighed up in deciding what "justly" means.

I believe that my proposals are helpful. I am grateful that the minister has indicated that these matters may be dealt with by another means. I would like to know: if I withdrew amendment 126 at this stage, would I be able to re-enliven the issue at the next stage?

The Convener: That is a matter for the Presiding Officer, but I think that it would be quite likely. I cannot give any undertaking, but amendments may be lodged. If you seek the committee's agreement to withdraw the amendment now, it is then up to the Presiding Officer whether to accept a stage 3 amendment.

Graeme Pearson: Could I ask the minister, in the meantime, for some detail about the alternatives that she has indicated in terms of the processes?

The Convener: We need to know now whether you are going to press or withdraw the amendment.

Graeme Pearson: I will withdraw it.

Amendment 126, by agreement, withdrawn.

Amendment 127 not moved.

Section 98—Power to regulate fees in the Court of Session

Amendments 76 to 79 moved—[Roseanna Cunningham]—and agreed to.

Section 98, as amended, agreed to.

Amendment 80 moved—[Roseanna Cunningham]—and agreed to.

Section 99 agreed to.

The Convener: I call amendment 81, in the name of the cabinet secretary—

Roseanna Cunningham: Moved.

The Convener: The ice cream must be calling.

Amendment 81 moved—[Roseanna Cunningham]—and agreed to.

After section 99

The Convener: Amendment 45, in the name of John Pentland, is grouped with amendments 141, 142, 47 and 144.

John Pentland: We heard a lot from witnesses about the equality of arms, particularly in the context of the complexity of personal injury cases. In such circumstances, the expertise of one side—both in legal representation and in the experience of such cases that employers and insurance companies have—cannot be hoped to be matched by the other party without access to counsel at the very least.

I have submitted two alternative amendments—amendments 45 and 141—to achieve equality of access to justice in such cases. In many ways, an automatic right would be better, as it would be simpler and quicker, and the gains would offset any cases where it could be argued that counsel was not strictly necessary. If that is a step too far, the other option is just a presumption. If there was a good reason why counsel should not be granted in a case, that could be contested.

My other amendments in the group are consequential.

I move amendment 45.

John Finnie: I have a lot of sympathy with what John Pentland says, which is in line with the concerns that the committee expressed earlier.

The Convener: Is your microphone on?

John Finnie: It is.

The Convener: Right. It is just that I cannot hear because of the fans.

John Finnie: I beg your pardon. I am having to keep my distance from the microphone, because I have broken my specs.

The Convener: It is not going well today for any of us.

John Finnie: To reiterate, we considered John Pentland's concern, as outlined at stage 1, that there will no longer be an automatic sanction for counsel if the issue is not taken to the Court of Session, and we have a great deal of sympathy with his view.

My amendment 142 proposes to put the Taylor test in the text of the bill to provide certainty for those without resources that they will not be out-gunned by larger organisations, again in line with what we said at stage 1.

There will be detailed discussions with the Scottish Civil Justice Council on how that proposal is progressed, and I hope that it will gain support.

Roderick Campbell: I find this particular issue quite difficult, but I welcome the fact that Sheriff Principal Taylor's comments will be included in the text of the bill. That is a step forward.

Roseanna Cunningham: When I gave evidence to the committee on the Government's response to the Taylor report, I expressed the view that, given the rapidly changing legal landscape, it was appropriate that detailed provision on matters such as sanction for counsel should be dealt with in court rules.

A large part of the purpose of the current bill is to ensure that the courts have appropriate powers to regulate their practice and procedure. The Scottish Civil Justice Council, which was established by an act of Parliament last year, is already embarking on a complete overhaul of the rules in the sheriff court and in the Court of Session.

I argued that it would be very odd for the Parliament to set up an independent body with the express purpose of considering court rules and then, a year or so later, to fossilise in primary legislation matters that are properly the subject of court rules. I remain of that view.

John Pentland's amendments 45 and 141 would establish in primary legislation a presumption in favour of sanction for counsel in specified types of personal injury cases in an all-Scotland specialist court. In the version in amendment 141, the presumption in favour of sanction for counsel could be rebutted where special cause is shown that the case is straightforward, or that it involves settled law or a small number of witnesses whose evidence is not expected to be complex.

In the other version in amendment 45, the presumption would be non-rebuttable. It would, in effect, be a rule that sanction for counsel must be granted.

In each amendment, the Scottish ministers are to be given a power by order to vary the list of "relevant proceedings" to which sanction will automatically be given, but the rules are otherwise inflexible and set in stone. That is precisely the type of rule that the Scottish Government considers should not be placed in primary legislation. However welcome it might be at present—and I agree with John Pentland that many of the cases that he identifies will merit sanction for counsel—it is unwise to fix the test in the text of the bill in that manner.

I am, on the other hand, happy to welcome John Finnie's amendment 142. The effect of that amendment is to enact the test that was proposed by Sheriff Principal Taylor, which prescribes that the court shall have regard to what might broadly be termed equality of arms in considering an application for sanction for counsel.

The committee recommended in its stage 1 report that the Taylor test should be placed in the text of the bill. The Scottish Government was reluctant to do so, for the reasons I have already mentioned—not because we disagree with the test, which Sheriff Principal Taylor said in evidence that he regarded as reflecting current best practice, but because we consider that the test should not be fixed in primary legislation.

John Finnie has hit upon a solution to that problem. His amendment places the Taylor test in the text of the bill, while providing that the test is subject to rules that might be made under the powers in sections 97 and 99. That neatly squares the circle, and I am happy to support amendment 142.

The Convener: John, do you want to wind up?

John Pentland: I will just press my amendment 45.

The Convener: The question is, that amendment 45 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
McInnes, Alison (North East Scotland) (LD)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 45 disagreed to.

Amendment 141 moved—[John Pentland].

The Convener: The question is, that amendment 141 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Mitchell, Margaret (Central Scotland) (Con)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 141 disagreed to.

Section 100 agreed to.

Section 101—Vexatious litigation orders: further provision

The Convener: Amendment 82, in the name of the cabinet secretary, is grouped with amendments 83 to 90.

Roseanna Cunningham: Amendments 82 to 90 are technical amendments that clarify references to "court" in the provisions on vexatious behaviour where a court grants an order relating to a person who has behaved vexatiously. They ensure that, where a court is mentioned in sections 101 and 102, it is clear whether the reference is to the court that grants an order, the court in which the order will have effect or the court that gives the permission that is required under the order.

I move amendment 82.

The Convener: That sounds technical, so I do not think that I will get any bids from members.

Amendment 82 agreed to.

Section 101, as amended, agreed to.

Section 102—Power to make orders in relation to vexatious behaviour

Amendments 83 to 90 moved—[Roseanna Cunningham]—and agreed to.

Section 102, as amended, agreed to.

After section 102

Amendment 91 moved—[Roseanna Cunningham]—and agreed to.

Amendment 142 moved—[John Finnie]—and agreed to.

Section 103 agreed to.

Section 104—Appeal from a sheriff to the Sheriff Appeal Court

The Convener: Amendment 128, in the name of Elaine Murray, is grouped with amendments 129 and 130.

Elaine Murray: Amendments 128 to 130 deal with appeals from the sheriff court in personal injury cases. Section 104 is on appeals against the decision of a sheriff being taken to the sheriff appeal court. My amendment 128 removes the application of the section from appeals against the decision of a sheriff in personal injury cases, where the Scottish ministers have by order provided that the jurisdiction of a sheriff or specified sheriffdom sitting in a specified court extends throughout Scotland for the purpose of dealing with specified types of civil proceedings—in other words, the personal injury sheriff court, which will now deal with claims for under £100,000.

Amendments 129 and 130 insert a section after section 107 that would enable appeals against decisions taken in the personal injury court to be taken in the Court of Session without the need for permission, and would give the Court of Session powers to determine the appeal by upholding the decision, recalling it, varying it—[*Interruption*.]

The Convener: I suspend the meeting for a moment.

11:57

Meeting suspended.

11:59

On resuming—

The Convener: We will start again. Elaine, you were speaking to amendment 128 and the other amendments in the group. Off you go.

12:00

Elaine Murray: I lodged the amendments because cases in the personal injury court will be heard by specialist personal injury sheriffs and, unless both parties agree otherwise, or special cause is shown, proceedings will be tried by a civil jury of 12 people. It is inappropriate for judgments in such cases to be appealed to a sheriff court, possibly consisting of only one sheriff who might not even be a specialist in personal injury cases. As the judgment will have been made by a jury and the decision made by a sheriff who specialises in those often complex and difficult cases, it would seem to be much more sensible for appeals against the judgment to be heard in another specialist court in the Court of Session.

I move amendment 128.

Roseanna Cunningham: Amendments 128 to 130 are a package. The effect of amendment 128 would be to prevent appeals from the final judgment of an all-Scotland personal injury court from going to the sheriff appeal court, although

decisions of that court that did not constitute final judgment would continue to go to the sheriff appeal court. The effect of amendment 129 would be to make such all-Scotland personal injury cases subject to an equivalent right of appeal to the Court of Session. The result would be that all appeals against final decisions by the personal injury court would be heard in the Court of Session, rather than the sheriff appeal court.

Lord Gill recommended the establishment of a sheriff appeal court to deal with all civil appeals from the sheriff court, including personal injury appeals from the personal injury court.

The reasons why I oppose the amendments are as follows. First, if there is concern about the bench being comprised of a single appeal sheriff, the cabinet secretary said last week that

"the bill deliberately leaves such decisions on quorum and on who will preside at sittings of the court to rules of court."—[*Official Report*, *Justice Committee*, 10 June 2014; c 4671.]

I am confident that the rules of court and the responsibility of the president of the sheriff appeal court—a sheriff principal—for the allocation of appeal sheriffs will ensure that an appropriately constituted bench will hear personal injury appeals from the personal injury court.

Secondly, if there is concern about sanction for counsel, John Finnie's amendment 142, which puts into the bill the test proposed by Sheriff Principal Taylor prescribing that the court shall have regard to what might broadly be termed equality of arms in considering an application for sanction for counsel, should address it.

Thirdly, there might be concern about the complexity of a personal injury appeal and I understand that that might be a particular issue following section 69 of the Enterprise and Regulatory Reform Act 2013, which removes civil liability for breach of statutory health and safety duties, which is ironic in the circumstances. If so, it will be possible to have an appeal remitted to the Court of Session in appropriate circumstances, since section 106 of the bill permits the sheriff appeal court to remit the appeal to the Court of Session on the application of one of the parties if it is satisfied that the appeal raises a complex or novel point of law.

Finally, as the cabinet secretary said last week:

"It is an important principle of Lord Gill's review and, therefore, throughout the bill, that courts have the flexibility to allocate the right judicial resources to the right courts."—[*Official Report*, *Justice Committee*, 10 June 2014; c 4672.]

The consistent policy of the bill is that appeals should lie from the sheriff court to the sheriff appeal court and not directly to the Court of Session. There is no justification for treating one category of case—personal injury—differently from all others. There is also no basis for suggesting that appeals from a specialist personal injury court could not be dealt with perfectly competently in the sheriff appeal court.

For those reasons, I oppose Elaine Murray's amendments.

Elaine Murray: We seem to take quite a lot on trust about the way in which the rules of court will be applied. They seem to be the answer to everything. Through the evidence that we have seen and from what the witnesses have said to us, we know that there are issues around personal injury cases that make them more complex. It still seems to be inappropriate that an appeal against a decision that has been taken by a specialist sheriff and a jury will go to the sheriff appeal court, even if it has two or three sheriffs. It would seem to be more appropriate that such an appeal be heard by a similar type of specialist court, so I will press amendment 128.

The Convener: The question is, that amendment 128 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Mitchell, Margaret (Central Scotland) (Con)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 128 disagreed to.

Section 104 agreed to.

Sections 105 to 107 agreed to.

After section 107

Amendment 129 moved—[Elaine Murray].

The Convener: The question is, that amendment 129 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Mitchell, Margaret (Central Scotland) (Con)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 129 disagreed to.

Sections 108 and 109 agreed to.

Section 110—Effect of appeal

Amendment 130 not moved.

The Convener: Amendment 92, in the name of the cabinet secretary, is grouped with amendments 93 to 97.

Roseanna Cunningham: Amendments 92 to 95 are technical drafting amendments that will ensure consistency of language in the provisions governing the effect of an appeal to the sheriff appeal court, the Court of Session and the Supreme Court. They make it clear that, in each case, the appeal court may review any prior decision in the proceedings, including, where relevant, any prior decision on appeal.

Amendments 96 and 97 are minor drafting amendments that will bring the wording of the test for permission to appeal to the Supreme Court in inserted section 40A of the Court of Session Act 1988 into line with that contained in the Supreme Court's practice direction.

I move amendment 92.

Amendment 92 agreed to.

Amendments 93 and 94 moved—[Roseanna Cunningham]—and agreed to.

Section 110, as amended, agreed to.

Section 111—Appeals to the Supreme Court

Amendments 95 to 97 moved—[Roseanna Cunningham]—and agreed to.

Section 111, as amended, agreed to.

Section 112 agreed to.

Schedule 2—Transfer of summary criminal appeal jurisdiction to the Sheriff Appeal Court

Amendment 34 not moved.

Schedule 2 agreed to.

Section 113—Appeals from the Sheriff Appeal Court to the High Court

The Convener: Amendment 46, in the name of John Pentland, is in a group on its own.

John Pentland: Amendment 46 would make it slightly easier to argue for more time in which to bring an appeal against a decision of the sheriff appeal court on criminal proceedings. We believe that "exceptional circumstances" is too high a hurdle to have to clear and that "special cause" would be sufficient to ensure that there were good reasons for an extension.

I move amendment 46.

Margaret Mitchell: That seems reasonable, although I will listen to what the minister has to say.

Roseanna Cunningham: The purpose of amendment 46, in the name of John Pentland, is to lower the test that the High Court is required to meet in order to consider extending the period of 14 days within which an application for permission to appeal on a point of law from a determination of the sheriff appeal court in a criminal case must be made to the High Court. The effect would be that the current test, which means that something very unusual or exceptional would have to have occurred to justify extending the time limit for appeals, would be slightly lower.

The test of "special cause" would mean that it would have to be a cause that was special to that particular case, in that it was particularly complex or there were complications particular to that case. It would not, however, be a special cause if the cause pled was a common aspect of similar cases. It is not clear, therefore, that the test proposed by John Pentland is significantly lower than that in the bill.

The test of "exceptional circumstances" matches that proposed for the extension of other criminal appeal time limits in the Criminal Justice (Scotland) Bill and I urge the committee to maintain that consistency by not agreeing to John Pentland's amendment.

John Pentland: I have heard what the minister said, but I will press the amendment.

The Convener: The question is, that amendment 46 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 46 disagreed to.

Sections 113 to 116 agreed to.

After section 116

The Convener: Amendment 98, in the name of the cabinet secretary, is grouped with amendments 99, 121 and 122.

Roseanna Cunningham: Section 16(12) provides that the Scottish courts and tribunals service will have the responsibility for paying the salaries for all the judiciary of sheriffdoms, including sheriffs and sheriffs principal, as well as for paying their expenses.

That creates an anomaly in that the Scottish Government would retain responsibility for paying the salaries and expenses of senators, while the Scottish courts and tribunals service will have that role for the other judicial office holders. To remedy that, amendment 98 will insert a new part and section into the bill to provide for the Scottish courts and tribunals service to be responsible for paying the salaries of senators. Amendment 99 will provide a new power for the Scottish courts and tribunals service to pay senators' expenses.

Amendment 121 is a consequential amendment to repeal section 9(5), on judicial salaries, of the Administration of Justice Act 1973, which charges the salaries of senators on the Scottish consolidated fund. Subsection (2) of amendment 98 replicates that power, so it is not needed in the 1973 act.

Amendment 122 is a consequential amendment to repeal the Judicial Offices (Salaries, etc) Act 1952, which provides for the expenses of High Court judges on circuit and of sheriffs; it can be repealed in consequence of section 17 and the new section that will be inserted by amendment 99.

These amendments will affect the administrative function of payment of salaries only; determination of the level of the salaries of sheriffs principal, sheriffs and senators remains reserved to Westminster.

I move amendment 98.

Amendment 98 agreed to.

Amendment 99 moved—[Roseanna Cunningham]—and agreed to.

Section 117—Establishing, relocating and disestablishing justice of the peace courts

The Convener: Amendment 100, in the name of the cabinet secretary, is grouped with amendments 101 and 123.

Roseanna Cunningham: In its response of 18 March to the Delegated Powers and Law Reform Committee's stage 1 letter of 11 March, the Scottish Government agreed that orders under section 2(1), which are to do with reorganising courts and so on, should be subject to the affirmative procedure rather than the negative procedure, and amendment 123 provides for that.

Amendments 100 and 101 make similar provision for orders under sections 59(2) or (6) of the Criminal Proceedings etc (Reform) (Scotland) Act 2007, which deal with justice of the peace courts.

I move amendment 100.

Amendment 100 agreed to.

Amendment 101 moved—[Roseanna Cunningham]—and agreed to.

Section 117, as amended, agreed to.

Sections 118 to 120 agreed to.

Schedule 3—The Scottish Courts and Tribunals Service

Amendments 102 and 103 moved—[Roseanna Cunningham]—and agreed to.

Schedule 3, as amended, agreed to.

After section 120

The Convener: Amendment 104, in the name of the cabinet secretary, is in a group on its own.

Roseanna Cunningham: The Tribunals (Scotland) Act 2014 gives the Judicial Appointments Board for Scotland—JABS—the role of making recommendations to the Scottish ministers for appointments to the new Scottish tribunals.

The Convener: Sorry, but what is JABS?

Roseanna Cunningham: The Judicial Appointments Board for Scotland.

The Convener: There you are. I quite like the name JABS.

Roseanna Cunningham: In addition, the Courts Reform (Scotland) Bill will give the Scottish ministers the role of making recommendations for appointments to the new office of summary sheriff. Currently, only JABS board members may participate in recruitment exercises. For tribunal recruitment, the 2014 act gives JABS some additional flexibility.

In anticipation of the increase in its level of work, JABS has requested a power to appoint people who will be able to assist board members with the recruitment process by, for example, interviewing candidates or sitting on JABS recruitment panels.

That power will be available to them in all recruitment exercises, whether for the courts or tribunals judiciary.

Amendment 104 will provide the board with the power to appoint non-board members to assist it in carrying out its functions and, in so doing, it will provide rules as to what kind of person may be appointed and will make provision for any fees and expenses for such assistants to be determined and paid by the Scottish ministers. Proposed new paragraph 13A of the Judiciary and Courts (Scotland) Act 2008 will deal with their appointment and proposed new paragraph 13B of the 2008 act will enable the assistants to do everything that their equivalent board member can do, short of actually taking part in recommendation decisions. Where the board is making a recommendation in relation to a position in the Scottish tribunals, amendment 104 will also ensure that a member of the tribunals is involved in proceedings leading to that recommendation. In effect, it is just about ensuring that the judicial appointments board is properly resourced to do the job that we expect it to do.

I move amendment 104.

Amendment 104 agreed to.

Section 121 agreed to.

12:15

Schedule 4—Modifications of enactments

Amendment 35 not moved.

The Convener: Amendment 105, in the name of the Cabinet Secretary for Justice, is grouped with amendments 106 and 107.

Roseanna Cunningham: The amendments in the group are technical and are consequential on the Judicial Pensions and Retirement Act 1993 (Part-time Sheriff, Stipendiary Magistrate and Justice of the Peace) Order 2014. That order will be fresh in members' minds; it was before the committee in May and has only recently been agreed by Parliament.

The Convener: I wish that we could come out and quote the order at you now, but I do not think that that will happen.

Roseanna Cunningham: The amendments will remove from the bill provision on the retirement age of part-time sheriffs, because such provision has been made in the 2014 order. They will also repeal provision that was made in the order about the retirement age of stipendiary magistrates, because the bill will abolish that office.

I move amendment 105.

Amendment 105 agreed to.

Amendments 106 to 108 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 109, in the name of the Cabinet Secretary for Justice, is in a group on its own.

Roseanna Cunningham: Amendment 109 is a technical amendment that is consequential on the transfer of summary criminal appeals from the High Court to the sheriff appeal court. The effect of the amendment will be to give the sheriff appeal court power to require provision of legal aid in proceedings before that court, just as the High Court may currently do under section 25 of the Legal Aid (Scotland) Act 1986.

I move amendment 109.

Amendment 109 agreed to.

The Convener: Members will notice that I am truncating everything.

Amendment 110, in the name of the Cabinet Secretary for Justice, is in a group on its own.

Roseanna Cunningham: Section 112—oh, hang on.

The Convener: We are dealing with amendment 110.

Roseanna Cunningham: Yes. I am sorry. I get slightly confused when my notes initially indicate another section.

Section 112 will transfer to the sheriff appeal court the existing jurisdiction of the High Court to hear appeals in summary criminal proceedings. Amendment 110 will make consequential amendments to part 1 of the Criminal Justice and Licensing (Scotland) Act 2010 that will ensure that the part's provisions on sentencing guidelines, and on publication of appeal decisions relating to sentencing, continue to operate correctly following that transfer.

I move amendment 110.

Amendment 110 agreed to.

The Convener: I remind members that, if amendment 143 is agreed to, I cannot call amendments 111 to 117, as they will have been pre-empted.

Amendment 143 not moved.

Amendments 111 to 122 moved—[Roseanna Cunningham]—and agreed to.

Schedule 4, as amended, agreed to.

Section 122—Subordinate legislation

Amendment 123 moved—[Roseanna Cunningham]—and agreed to.

Amendments 47 and 144 not moved.

Amendment 124 moved—[Roseanna Cunningham]—and agreed to.

Amendment 36 moved—[Alison McInnes].

The Convener: The question is, that amendment 36 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
Mitchell, Margaret (Central Scotland) (Con)
McInnes, Alison (North East Scotland) (LD)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 36 disagreed to.

The Convener: Amendment 131, in the name of Elaine Murray, is grouped with amendments 132 and 134.

Elaine Murray: Many witnesses expressed grave concerns about whether the sheriff courts have sufficient resources to deal with the additional cases that will come down to them under the bill. As we know, there are already, or are planned, a number of other pressures on the sheriff courts. Ten district sheriff courts have been closed or are in the process of being closed, and there is no guarantee that more closures will not follow.

I understand that there are plans to direct more criminal cases to sheriff courts and that sheriffs are to be given the power to impose longer sentences for those more serious cases. If the requirement for corroboration is abolished, as the Scottish Government intends, more cases will come to the courts. The bill will introduce summary sheriffs, but that will happen only by appointment on the retiral of an existing sheriff—the Scottish Court Service has told us that it will take 10 years for the entire complement of summary sheriffs to be in place.

Amendments 131, 132 and 134 are linked to amendment 133, which we will debate later. Section 39, which will give the sheriff courts exclusive competence over actions for less than £100,000, and section 70, which introduces the simple procedure, will be enacted by an order of the Scottish ministers under affirmative procedure, under amendment 131. The amendments are, in effect, a sunrise clause.

Amendment 134 specifies the conditions that must be met before making the order. They are that ministers must

"have prepared, and laid before the Parliament, a report showing that sufficient provision has been made for staffing, resources, technology, court room space and judicial appointments to ensure that users of the Scottish Courts will enjoy at least the same level of access to justice"

as previously.

The reforms that are set out in the bill will not work if they are insufficiently resourced. The bill's financial memorandum was inadequate; it was criticised by the Finance Committee for being too reliant on third-party estimates that Scottish Government officials were unable to justify.

There has been considerable dispute about the accuracy of the estimated number of cases that will transfer from the Court of Session to the sheriff court, and about the savings that are claimed—for example, in the legal aid budget—in the financial memorandum. The committee has expressed concerns that court fees might have to be increased to pay for the reforms. Therefore, it would be eminently sensible to reassure Parliament that everything is in place to make the reforms work before enacting sections 39 and 70. If the resources are not in place, our sheriff courts may end up in chaos.

I move amendment 131.

Margaret Mitchell: I speak in support of Elaine Murray's amendments. There has been real concern about whether the proposals are adequately resourced and about the effect of the sheriff court closures. I note that, in agreeing to amendment 101, we have made future proposals to close JP courts subject to affirmative procedure. We have also agreed to amendment 104, which makes possible new appointments to the Judicial Appointments Board for Scotland. For all those reasons, I very much support the amendments.

Roseanna Cunningham: Amendments 131 and 132, in the name of Elaine Murray, would make commencement of sections 39 and 70 subject to affirmative procedure in Parliament. Commencement orders are not normally subject to any Parliamentary procedure, so such a provision would be very unusual.

Amendment 134 would place another set of hurdles in the way of commencement of sections 39 and 70 by requiring Parliament to approve under section 41(1) a draft order setting up an all-Scotland sheriff court, and to have considered a report on resourcing of that specialist court before orders bringing the exclusive competence and simple procedure into force could be laid.

I appreciate that the reasoning behind the amendments is to give Parliament an opportunity to consider whether the time is right to introduce the changes that are envisaged in sections 39 and 70. Those provisions are fundamental parts of the reforms that have been proposed by the Scottish civil courts review, and it is legitimate to ask whether the sheriff court has sufficient resources to assimilate and absorb the casework that will be raised in the sheriff court, rather than in the Court of Session, as a result of the raising of the exclusive competence of the sheriff court and the advent of the new simple procedure.

However, the committee has already asked those questions and the Lord President, the chief executive of the Scottish Court Service and Sheriff Principal Stephen have all given evidence to the effect that plans have been made and resources have been allocated. Therefore, it is difficult to avoid the conclusion that the result would simply be that the opportunity would be used to rerun the arguments entirely.

It would be in no-one's interest to commence the provisions of sections 39 or 70 before the time is right, but I suggest that that question does not require further debate in Parliament before the sections are commenced. The arguments for reform have been made eloquently in the Scottish civil courts review and the matter has been extensively debated before the committee.

In relation to the report that would be required by amendment 134, I remind the committee that, under the Judiciary and Courts (Scotland) Act 2008, which was passed unanimously by Parliament, the Scottish Court Service is now an independent judicially led corporate body that runs the Scottish courts. Under section 2(2) of the act, the Lord President—not the Scottish ministers—is responsible for making and maintaining arrangements for securing efficient disposal of business in the Scottish courts.

If a report on staffing, resources, information technology, court capacity and judicial capacity were to be desired, it would be for the Lord President to provide it. In fact, no such report is required. As both the Lord President and the chief executive of the Scottish Court Service have confirmed in evidence to the committee, the resources are in place, there is capacity in the sheriff courts and the reforms will permit the courts to work more efficiently. The Lord President said:

"From the work that has been done by the Scottish Court Service and the Scottish Civil Justice Council, I am absolutely satisfied that the reforms can be adequately funded. They are part of the long-term planning of the Scottish Court Service."—[*Official Report*, *Justice Committee*, 22 April 2014; c 4536.]

In fact, the chief executive of the Scottish Court Service highlighted that sheriff courts face less pressure today than they did two years ago because of a general downward trend in demand for civil court services.

The Lord President also told the committee that he was

"absolutely certain that the capacity exists in the sheriff courts to absorb all of the business, even with the closure of the outlying courts."—[*Official Report*, *Justice Committee*, 22 April 2014; c 4541.]

and said that he was confident that the proposals would

"ensure that civil actions can be dealt with in one diet, unless there is some special reason not to do that."—[*Official Report*, *Justice Committee*, 22 April 2014; c 4540.]

Sheriff Principal Stephen told the committee that the proposed reforms would allow the courts to work more efficiently, thus freeing up current resources. She also said that, if the bill is passed,

"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."—[*Official Report*, *Justice Committee*, 1 April 2014; c 4482.]

The point bears repeating. Many people have spoken of a "transfer" of business from the Court of Session—indeed, I have used that shorthand myself—but the bill will not transfer existing cases from the Court of Session to the sheriff court. All that it does is provide for the future; the build-up of work in the sheriff court will be gradual and will take place over time as new cases are raised. There is simply no need for a report to be done before commencement, either on the sheriff courts generally, or on the new specialist personal injury court in particular.

I therefore ask Elaine Murray to seek to withdraw amendment 131.

Elaine Murray: I have listened to the minister's comments and I accept that it is unusual to include a sunrise clause in a bill, but I have to say that many of us felt that the financial memorandum was inadequate, and a number of witnesses expressed concern about it. We also heard conflicting evidence on the matter. Those who are involved with the Scottish Court Service told us that everything was going to be fine, but although we were told that plans are in place, we were not told what those plans are. The Scottish Court Service might be responsible for running the courts, but we as a Parliament are responsible for passing legislation that can be implemented effectively, and amendment 131 gives us the chance to carry out more scrutiny. It might well be that the report that we receive will make it clear that everything is in place, in which case I am sure that we will all say, "Fine—these provisions can go ahead." However, I am not yet convinced that the measure will not be enacted before the sheriff

courts are able to cope, so I intend to press amendment 131.

The Convener: The question is, that amendment 131 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Mitchell, Margaret (Central Scotland) (Con)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 131 disagreed to.

Amendments 37 and 132 not moved.

Section 122, as amended, agreed to.

Sections 123 to 126 agreed to.

After section 126

The Convener: Amendment 133, in the name of Elaine Murray, is in a group on its own.

Elaine Murray: Amendment 133 seeks to require ministers to report annually to Parliament on the functioning of the legislation. The report would contain information on

"the number and types of cases"

that each of the Scottish courts had dealt with,

"the average length of time taken to dispose of each type of case"

and

"the provision made for staffing, resources, technology, court room space and judicial appointments".

That would enable Parliament and the committee to monitor how the act was working. It would provide a degree of post-legislative scrutiny and would, I believe, assist with the annual budget process by indicating whether additional resources were required and whether and where savings had been made. For example, it would allow Parliament to assess whether the privative limit had been set at the correct level.

The provision could easily be repealed in future legislation if Parliament considered that such reports were no longer required. However, I believe that it would provide an important safeguard during the period when the reforms come into effect.

I move amendment 133.

Roseanna Cunningham: Although I appreciate the reasons behind amendment 133, it is unnecessary. Section 67 of the Judiciary and Courts (Scotland) Act 2008 requires that

"As soon as practicable after the end of each financial year, the SCS must—

(a) prepare and publish a report on the carrying out of its functions during that year".

That report is sent to the Scottish ministers, and a copy is laid before the Scottish Parliament. The 2008 act rightly places responsibility for preparing an annual report on the Scottish Court Service, not on the Scottish ministers. If the Scottish ministers were asked to produce such a report and lay it before Parliament, they would simply be replicating what the Scottish Court Service was already doing.

For that reason, I ask Elaine Murray not to press her amendment.

Elaine Murray: I ask leave to withdraw the amendment so that I can consider the minister's comments and look into the question whether such a report should be produced by the Scottish Court Service or the Scottish ministers.

Amendment 133, by agreement, withdrawn.

Section 127—Commencement

Amendment 134 not moved.

Sections 127 and 128 and long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the minister and officials for their attendance.

The committee's next meeting is on 24 June, when we will consider four Scottish statutory instruments that are subject to negative procedure, and two petitions on police and fire service control rooms. I thank members for their tolerance of the heated atmosphere—which was, I should add, nothing to do with us, this time.

Meeting closed at 12:31.

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

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