



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# JUSTICE COMMITTEE

Tuesday 3 June 2014

Session 4

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**Tuesday 3 June 2014**

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**JUSTICE COMMITTEE**  
**17<sup>th</sup> 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)  
Kay McCorquodale (Scottish Government)  
Stella Smith (Scottish Government)

**CLERK TO THE COMMITTEE**

Irene Fleming

**LOCATION**

The David Livingstone Room (CR6)



## Scottish Parliament

### Justice Committee

*Tuesday 3 June 2014*

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

### Decision on Taking Business in Private

**The Convener (Christine Grahame):** Good morning and welcome to the 17th meeting in 2014 of the Justice Committee. I ask everyone to switch off mobile phones and other electronic devices completely as they interfere with the broadcasting system even when switched to silent. We have received no apologies.

Agenda item 1 is a decision on whether to take in private item 5, which is consideration of the committee's work programme. Are we agreed?

**Members** *indicated agreement.*

## “Review of Expenses and Funding of Civil Litigation in Scotland”

10:00

**The Convener:** Agenda item 2 is an evidence-taking session on the Scottish Government's response to the “Review of Expenses and Funding of Civil Litigation in Scotland” by Sheriff Principal Taylor. Members have copies of the response.

I welcome to the meeting Roseanna Cunningham, Minister for Community Safety and Legal Affairs, and her Scottish Government officials: Stella Smith and Kay McCorquodale, both from the civil law and legal system division, and Alastair Smith, from legal services. I understand, minister, that you wish to make a short opening statement.

**The Minister for Community Safety and Legal Affairs (Roseanna Cunningham):** Thank you, convener. I will be very brief. I should also, at this point, remind the committee of my previous declaration of interest, which still stands.

The Taylor review is, of course, inextricably linked to Lord Gill's Scottish civil courts review; indeed, the writing of the report was predicated on the fact and the review carried out on the assumption that Lord Gill's recommendations had already been implemented. The recommendations from Lord Gill's review form the basis of the Courts Reform (Scotland) Bill, and the Taylor review was written on the understanding that it would follow on from the implementation of the previous review.

At stage 1 of the Courts Reform (Scotland) Bill, the committee made some connections between the bill's provisions and Sheriff Principal Taylor's report. Indeed, the committee's stage 1 report highlighted the relationship between the Taylor recommendations on sanction for counsel and the issue of the exclusive competence threshold. I consider sanction for counsel, which sits in chapter 3 of the Taylor report, as the main issue that connects the bill and the report, although the remainder of chapters 2 to 4, on the cost of litigation, and chapters 7 to 9, on speculative fee agreements, qualified one-way costs shifting and damages-based agreements are of more general relevance to the bill.

The recommendations in chapters 2 to 4 of the report, including the test for sanction for counsel, have been closely examined, and the Scottish Government does not believe that these are matters for primary legislation. Instead, they sit firmly within the powers and remit of the Scottish Civil Justice Council; indeed, the Cabinet Secretary for Justice and the Lord President have

agreed that to be the case. The Scottish Civil Justice Council was set up only recently, and we consider that it would be rather odd that, having set up the council, we would proceed to bypass what we had considered to be its proper work by implementing such measures in primary legislation instead of allowing the council to do what it was intended to do. The recommendations on sanction for counsel will sit with the council's costs and funding committee, which I understand sees this issue as a priority and intends to discuss it at its next meeting later this month.

Moving through the Taylor report, we agree that the various damages-related recommendations in chapters 7 to 9 are for the Scottish Government and will require to be taken forward in primary legislation. It was never the Scottish Government's intention to include those recommendations in the Courts Reform (Scotland) Bill; indeed, as I have already mentioned, Sheriff Principal Taylor states quite clearly in his foreword that he has assumed that the recommendations of the Scottish civil courts review, which are being delivered through the Courts Reform (Scotland) Bill, will already have been implemented. However, the Scottish Government will aim to bring forward further primary legislation within the lifetime of this Parliament to implement the recommendations in chapters 7 to 9 of the Taylor report.

After those very brief comments, convener, we can move straight to questions.

**The Convener:** Nobody seems to have any.

**Roseanna Cunningham:** That is good—there is a coffee waiting for me downstairs.

**The Convener:** They are not quite on form yet, minister, but they will get into it.

**John Finnie (Highlands and Islands) (Ind):** I would like to ask about referral fees. They are banned in England and we are told that that is because they are not considered to be in the interest of consumers. Have you any concerns that the interests of consumers in Scotland will be adversely affected by the fact that there are no similar arrangements in Scotland?

**Roseanna Cunningham:** Taylor has not recommended that referral fees be banned, but we will look at the options that would protect consumers around things like cold calling and having a voluntary code. We are cautious about referral fees. It is not about banning them outright but about looking at how to put in place protections that would prevent the excesses that might have come about.

**John Finnie:** How will that monitoring take place? Who will—

**Roseanna Cunningham:** I am sorry; I cannot answer that question at this stage. We have to look at the options for how we might do that.

**John Finnie:** When might we hear about the options?

**Stella Smith (Scottish Government):** We intend to discuss the matter of referral fees with the Law Society of Scotland, which would have to change its rules in relation to referral fees should it be decided that they are allowed for solicitors. We have said in the response to the Taylor report that we will take this matter forward by discussing it with the Law Society first and foremost. We have undertaken to look at other options to protect consumers.

**The Convener:** I think that John Finnie was asking for some idea of a timescale. We know that you are going to engage with the Law Society, but do you have any idea of how long that process will take?

**Roseanna Cunningham:** Our intention is that the discussions will take place over the summer. You have called for evidence on the Taylor review in the context of the Courts Reform (Scotland) Bill, but this will not be part of that bill. Our discussions with the Law Society on some of the issues—this will not be the only one that we have to discuss with the Law Society—will take place over the summer. We cannot mandate the outcome of those discussions at the start of the conversation.

**The Convener:** I appreciate that, but I was looking for an idea of when we would have some certainty. If it is not possible to say just now, it is not possible.

**Roseanna Cunningham:** There is certainty about the legislation on the damages package because we want to do that within the current parliamentary session. Other things may take longer.

**The Convener:** That is helpful.

**Roderick Campbell (North East Fife) (SNP):** I have a general question. On page 2 of Sheriff Principal Taylor's review, in the foreword, he points out the differences in the volume of litigation in England and Scotland over a three-year period. He states that

"the total number of claims for clinical negligence in Scotland was one thirtieth of all claims made in England";

that

"the total number of claims for employer liability in Scotland was one twelfth of all claims for employer liability made in England";

and that

"the total number of claims for motor liability in Scotland was one twenty fourth of all claims made in England".

On any criteria, those figures are substantially less than one would have thought. What is your view of the suggestions on qualified one-way costs shifting and damages-based agreements? Accepting that we already have speculative fee arrangements, what might those do to the culture of litigation? Are substantially more cases likely to come to court?

**Roseanna Cunningham:** I am sorry; at this stage, I really could not answer whether it will result in more cases. The hope is that it will encourage more people, particularly those who are currently discouraged from raising actions, and that it will provide openings for individuals to raise actions that they feel would be far too expensive. It is very difficult to estimate at this stage how many extra pursuers might be encouraged by this package of measures. It is a whole package of measures and it would be hard for me to say what the future numbers might be.

**Stella Smith:** For clarification, Taylor was keen to emphasise that you have to see qualified one-way costs shifting in the context of the Gill reforms as a whole. That relates to, for example, the power to strike out unmeritorious claims in case management.

We have also said in our response that we shall be considering what exceptions should be made to one-way costs shifting, such as, for example, where there is fraud on the part of the pursuer.

**Roseanna Cunningham:** You are asking me to make an estimate that I simply cannot make. I am sorry.

**Roderick Campbell:** I was not asking you to be as specific as that; I was just asking for a general comment on cultures. Do you think that the proposal would encourage a different culture?

**Roseanna Cunningham:** The Taylor review discovered that there was a difficulty about the fact that, in general terms, people either have to be poor enough that they qualify for legal aid or so rich that the costs do not matter. As that leaves a majority of people in the middle feeling pretty much shut out from legal action, we are trying to bring together a range of measures that will encourage more people to feel that they have access to the civil courts. A lot of people at the moment feel that they do not have access to the civil courts. The point is that the changes will be brought into being across a suite of legislative proposals and rule changes. The Gill review is part and parcel of that process, as is the Taylor review and any primary legislation that might follow on from that. The issue concerns the entire package of making justice work.

**Roderick Campbell:** There is a proposal in England and Wales to extend qualified one-way costs shifting to defamation and judicial review.

When we consult stakeholders here, will we take a wider view of one-way costs shifting than Sheriff Principal Taylor did?

**Roseanna Cunningham:** I have already indicated that it is our intention to legislate in the lifetime of this Parliament on this package, and that will include qualified one-way costs shifting. That is the point at which the consideration of further extension of cases that would be affected by the changes would be taken into consideration. That would be a separate piece of legislation around damages. In the consultation in advance of that legislation, we would ask about the extension to include further cases.

**Stella Smith:** To clarify, in his report, Sheriff Principal Taylor talks about an incremental approach. His suggestion is that qualified one-way costs shifting should be introduced in personal injury cases. As the minister said, we will consult on that in the context of the primary legislation that she mentioned. However, we first need to see how it works in the context of personal injury cases before considering whether it should be extended to other types of case.

**Roderick Campbell:** Convener, as I forgot to do so earlier, I now refer members to my entry in the register of members' interests, which states that I am a member of the Faculty of Advocates. I will now pass on the questioning to other members.

**The Convener:** That is very kind of you, but I have a list of people who wish to ask questions. I understand that you are not yet on form today.

Elaine Murray has a question.

**Elaine Murray (Dumfriesshire) (Lab):** One of the reasons why we might not be on form is that the minister has told us that a lot of what is in category 2 is actually going to be in the forthcoming damages bill.

**Roseanna Cunningham:** No. To be clear, we are talking about a separate piece of legislation. We have other damages legislation to deal with first. This would be another bill.

**Elaine Murray:** A subsequent bill.

**Roseanna Cunningham:** Yes. I would not want to give the impression that everything will be rolled up into one big damages bill. There are two separate pieces of legislation.

**Elaine Murray:** I misunderstood that. I thought you meant the forthcoming damages bill.

**Roseanna Cunningham:** No. I am glad that you asked about that, because that misunderstanding might have led to some confusion.

**Elaine Murray:** You say that the legislation would be introduced in the lifetime of this Parliament, but do you have any idea of the timescale for consultation on some of the issues?

**Roseanna Cunningham:** No. I cannot answer that question categorically. My best guess is that it would be legislation for the final year. It is difficult to see it being dealt with in the next parliamentary year, but we have two full parliamentary years to go.

10:15

**Elaine Murray:** I think that we are all looking forward to the two years already.

I want to ask about issues in category 3: protective expenses orders, before-the-event insurance and multiparty actions. There seems to be less of a response on them. Is the Government considering introducing any of those in future legislation?

**Roseanna Cunningham:** No. We consider that it is appropriate for the Scottish Civil Justice Council to use its existing powers in that area. At the moment, we are, in effect, giving ourselves a watching brief to see how things develop before we would come back and consider anything further.

The area is changing, and we want to ensure that the Civil Justice Council has an opportunity to look at it. We consider that that is best done by it, partly because it is fleeter of foot than we are. If we were going to introduce primary legislation on all those things, that would take time, and if we then tried to change that legislation, it would take more time. The Civil Justice Council can respond much more quickly.

**Elaine Murray:** Indeed, but the Parliament will get the opportunity to scrutinise things that are done through primary legislation.

**Roseanna Cunningham:** If something is done through primary legislation, it is set in concrete boots for a considerable time. I certainly do not take the view that court rules should be dealt with in that way, because changes to them might need to be made much more quickly than legislative change can be made unless, of course, the legislation is full of ministerial powers to make statutory instruments. However, people do not like to see such acts either, do they?

**The Convener:** We are all right about statutory instruments.

**Roseanna Cunningham:** That is really a bigger question. Perhaps there is not a perfect way to achieve things but, in Scotland, we quite often watch things change via court decisions and case law. The civil justice rules will be appropriate to

what is currently the decision-making process in the courts.

**Elaine Murray:** Do you think that things such as class action procedures can be introduced through rule changes and that there will be no necessity for legislative change?

**Roseanna Cunningham:** In the longer term, we are committed to multiparty or class actions. It is not that that matter is less urgent. We will consider it in respect of the package of legislation that we have talked about, but there are issues that have to be bottomed out when public funding is involved—for example, with the Scottish Legal Aid Board. We are not quite there yet in our certainty about whether we will put that into the package of legislation, but it is being considered for it.

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

The Scottish Government's response refers to a cap on the amount of a client's damages award that could be taken to satisfy a solicitor's fee. A damages award or agreement could include an amount for future losses, including the loss of earnings or sums for the future care of the pursuer. In England and Wales, that has been protected for the client, but in the Taylor report there is no mention of that. Are future losses deserving of special consideration?

**Roseanna Cunningham:** I think that future losses are worthy of special consideration, and we intend to consider the matter. That may not have been clear from the response, but I put on the record that we intend to consider it, if that is the principal concern.

**Margaret Mitchell:** That is helpful. On the same subject, the cap could relate to market forces; if market forces are not seen to operate in an acceptable manner, the Government might intervene. Will you clarify how that would work?

**Roseanna Cunningham:** Are you asking about the intervention or the cap?

**Margaret Mitchell:** The intervention.

**Roseanna Cunningham:** We intend to introduce a cap, and it will not be possible to deduct from damages a greater sum than the cap. In our response, we agreed with Sheriff Principal Taylor's observation that, routinely, a figure that is less than the cap might in practice be deducted, because of competition between lawyers. We accept that market forces are involved.

At this stage, we have no plans to intervene. In the longer term, if the cap looks as though it is beginning to distort the situation, it might be reconsidered. However, that is not our intention at the moment.



**Stella Smith:** We said in the response that we intend, as was suggested by Sheriff Principal Taylor, to introduce a cap on the amount of damages that can be deducted to satisfy a lawyer's fee under a damages-based agreement. We said that we will take that forward in the package of legislation that the minister has mentioned.

Sheriff Principal Taylor said in passing that even if a cap is in place market forces will play a role. Routinely, a figure that is less than the cap might be deducted from damages, because of market forces.

**Margaret Mitchell:** I understand; that is fine.

I understand the rationale behind qualified one-way costs shifting, but not all pursuers are under financial strain and not all defenders are well funded. Does the minister have any concerns that the proposals might make some individuals or small companies less likely to defend personal injury actions?

**Roseanna Cunningham:** That is difficult to quantify. In practice, defenders such as small businesses rarely, in personal injury actions, recover their costs, so they would not be in a worse position. We will consult on the issue before introducing legislation, so some of the issues will be teased out in the consultation.

**Margaret Mitchell:** Would such defenders not have to pay the pursuers' costs?

**Roseanna Cunningham:** That is possible. I am sorry, but you are asking me about a consultation on legislation that has not been drafted. Such levels of detail will be part and parcel of the process of developing that legislation.

**Margaret Mitchell:** I am asking about the whole thing. The pursuer's legal costs will always be met by the defender, which is justifiable if the defender is very wealthy, but that is not always the case.

**Roseanna Cunningham:** That is true, but I expect that the court would have a view on that element of the decision-making process. As I said, such issues will come up in the consultation on the legislation that will encompass the proposals.

**The Convener:** Surely it will still be the case that the sheriff or judge can exercise discretion.

**Roseanna Cunningham:** Yes—of course.

**The Convener:** I wonder whether Margaret Mitchell was asking about that. She is right to raise the issue of a plumber without insurance who finds himself or herself in court and discovers that they will have to pay the expenses, even if the pursuer has lost. I presume that a sheriff could take circumstances into account.

**Roseanna Cunningham:** We go back to the Taylor review being produced on the basis of the Gill review's having been implemented. A raft of things in the Gill review will also have impacts. Decisions, including those in the shrieval decision-making process, will continue to be made about what is fair in a particular case. We will consult on all those issues when we develop the legislation.

**Margaret Mitchell:** So, would the same apply in dealing with an increase in instances of pursuers deciding that they have nothing to lose, that they will get their expenses paid and—

**Roseanna Cunningham:** I expect all those issues to be raised in the consultation on the proposed legislation—which is now unlikely to happen until the final year of this session.

**Margaret Mitchell:** The difficulty for the committee is that we are trying to get something out of this evidence session, to move beyond what we have on paper and to explore the issues. That response was helpful, however.

Let us move on to regulation of claims management companies. They are regulated in England and Wales, but the recommendation is not to do the same here. What is the rationale behind that?

**Roseanna Cunningham:** There are a couple of reasons for that. First, there is not much in the way of reported malpractice, concerns or problems in Scotland at the moment; the issue has not been raised in a serious way. However, we must take into account some of the other changes that are being made outwith all this. The alternative business structures that we are currently negotiating with the Law Society of Scotland are not yet up and running, so we do not know what effect they will have on the market.

Some of what claims management companies do at the moment may no longer be required; once the changes are in place, we will have changed the field, and we do not know what effect that will have on the claims management sector. Also, the establishment of another regulator would cost money. We are still pursuing all the other changes in the process, and we do not think that putting in place a regulator is the right thing to do at the moment.

Some claims management companies are already de facto regulated, either because the solicitors who are involved in their work are subject to Law Society regulation, or because they are part of UK-based businesses, which are subject to the regulator in England and Wales. The question is whether it would be proportionate formally to regulate at this stage, or better to see how the field changes as a result of the overall package of changes.

We have not ruled out regulation of claims management companies, but we want to see the impact of all the other things that we are doing. That includes proposals that we have just been discussing, which will form part of the legislation that is proposed for towards the end of the parliamentary session. It is not that having a regulator is out of the game entirely, but if you are asking me to rank it in terms of time and priority, I would respond by saying that we do not view it as something that we wish to establish immediately.

**Margaret Mitchell:** I understand that. In the interim, however, while claims management companies are not regulated here—although some of them might be de facto regulated—and all of them are regulated in England and Wales, is there not a danger that Scottish consumers could be at a disadvantage as Scotland becomes a haven for claims management companies that are not de facto regulated and that could be—

**Roseanna Cunningham:** We have no evidence of malpractice in Scotland at the moment. If that was to change, we would clearly have to think again. At the moment, however, we have no evidence of malpractice. In those circumstances, we feel that it is the right thing to allow a number of the other changes to embed and to see what impact they have on the claims management sector.

**Sandra White (Glasgow Kelvin) (SNP):** Some of the questions that I was going to ask have been answered, particularly on future losses and on special cases. I welcome that, and I think that the committee does, too. This relates to the issues that Margaret Mitchell raised regarding small businesses and pursuers. It will be good to see what happens when the consultation comes out.

I will go further back to an issue that I think is really important: sanction for counsel. I understand what the minister said on the matter being a priority and on the Scottish Civil Justice Council considering the matter—the SCJC's costs and funding committee has been mentioned in that regard. Could you expand on how those arrangements will work, and what will the timescale be?

10:30

**Roseanna Cunningham:** I cannot mandate the SCJC timescale. As I said, the first meeting to consider the issue will be later this month. The whole of the Scottish Civil Justice Council rules procedure is being done as expeditiously as possible. Lord Gill has absolutely no reason to want the rule changes to be brought in slowly, so my expectation is that the issue will be dealt with as soon as possible.

I think that we are committed to introducing a statutory instrument next year on fees for counsel. I ask Stella Smith whether that is correct.

**Stella Smith:** No—the instrument will be on advocates' fees, which is a slightly different issue.

**Kay McCorquodale (Scottish Government):** Fees for counsel will be left to the discretion of the Civil Justice Council. It might want to take evidence on that, because the situation is changing. Since the Taylor review, the dean of the Faculty of Advocates has made new rules under which counsel can appear without a solicitor. There are various changes that have to be taken into account.

**Stella Smith:** To assist the committee, I point out that, as the minister mentioned in her opening statement, the Civil Justice Council's costs and funding committee will consider sanction for counsel at its next meeting.

**Sandra White:** That is helpful. The minister mentioned that it will not necessarily take a full year or year and a half to deal with the issue—it could be done sooner.

**Roseanna Cunningham:** It is wise to remind ourselves that the Faculty of Advocates has already changed its rules to allow counsel to act in certain civil cases without an instructing solicitor. Some things have happened fairly recently, and things are moving quite quickly. In some respects, the Taylor review has already been overtaken by events.

**Alison McInnes (North East Scotland) (LD):** I want to pursue the sanction for counsel test a bit further, because the committee felt strongly enough about it to recommend in our stage 1 report on the Courts Reform (Scotland) Bill that the test should be introduced in an amendment to the bill, rather than being left to rules of court. I want to press you on that. We must accept that equality of arms is at the heart of access to justice, and the minister will be aware that there is a lot of disquiet on the issue of sanction for counsel. In those circumstances, would it not be worth while to put the measure in the bill?

**Roseanna Cunningham:** No, because if we put it in the bill, it would be that much harder to change it in future. We have set up the Civil Justice Council to do a job. As I have said, it would be paradoxical to set up a body to do a particular job and then proceed to bypass it by introducing primary legislation instead. The agreement that has already been reached between the Cabinet Secretary for Justice and Lord Gill is appropriate, and the issue is appropriate for the Civil Justice Council.

**Alison McInnes:** Your response to the Taylor review recognises some of the concerns. It states:

“in the early days of the new exclusive competence limit, sheriffs should be encouraged to grant leave to appeal ... where they might not otherwise do so”,

in order for jurisprudence to be built up. That suggests that there will be issues and that the disquiet that we are hearing has some basis.

**Roseanna Cunningham:** The point that Sheriff Principal Taylor made in evidence to the committee and in his review was that sanction for counsel is rarely refused. There will not be an abrupt change in practice. If there was an abrupt change, I am sure that the Civil Justice Council would want to consider that. However, there is no indication that that will be the case.

**The Convener:** Perhaps representatives do not ask for sanction for counsel unless they are pretty sure that they will get it. Perhaps that is why there is such a good hit rate. People will not request it if they think that the request will be rejected. Those who ask for it will be pretty clear that they will get it, on the basis of precedent. Is that the case? Is that why sanction is never refused?

**Roseanna Cunningham:** I am not sure that any research has been done on that. I am conscious from my experience in the courts that you might avoid some sheriffs for certain things if you can manage it. That might be what is happening in this case, but it would be an absolutely normal part of the process that would not change because of anything that we did. As long as sheriffs have discretion, we will sometimes get such cases.

**The Convener:** It is terribly complicated for ordinary people let alone the committee to understand the ins and outs of all the ways in which expenses will be calculated. At the end of the day, how are ordinary people—the defender or the pursuer—going to know what applies to them? Whose responsibility will it be to put that in simple language for them?

**Roseanna Cunningham:** I imagine that it is the fundamental responsibility of a person’s legal adviser to give the best advice they can on how to proceed with the case. At the end of the day, is that not a job for the professional that an individual engages?

**The Convener:** Fine. It is just that it is so complicated, as people have all these things in front of them. At the moment it is quite difficult to explain to a client how expenses operate, and with the confection of options that we have here—this list—it is going to get even more complicated for them to understand the ramifications. I am not saying that the change should not happen—just that it is complicated.

**Roseanna Cunningham:** That is part and parcel of why people employ a legal adviser. I do not think that there has ever been any way round that. In that sense, nothing will change. If

someone is going to raise a legal action, their best course of action is to see a solicitor first. I am sure that all members here frequently advise people who come to their constituency offices that they need to take legal advice. I cannot move away from that point. If someone employs a lawyer, it is the lawyer’s job to advise their client as to the best course of action in the particular circumstances of their case.

**The Convener:** Yes, but I am just making the point that it seems to be getting very complicated. Perhaps there is a good result at the end, but there is a very complex list of options for expenses.

**Roseanna Cunningham:** I think that ordinary people understand in broad terms things such as no win, no fee. Most people understand such general ideas. We have professional legal advisers for a reason, and I do not think that there is any way round that. The expenses options are complex, but the law has always been so. This discussion is getting very jurisprudential now.

**The Convener:** Yes. I am going to move on.

**Kay McCorquodale:** As a point of clarification, I note that it is a recommendation in Sheriff Principal Taylor’s report that solicitors should be under an obligation to set out in a letter to their clients all the different funding obligations and options, and their ramifications.

**The Convener:** Then they get a solicitor to explain the letter to them.

**Kay McCorquodale:** That is for the Law Society of Scotland to take forward, which it will probably do.

**The Convener:** I take it that you are referring to a letter of engagement.

**Kay McCorquodale:** Yes.

**The Convener:** I turn to one of our legal members for a comment. Roderick?

**Roderick Campbell:** I think that I will keep off the issue of the duties of legal professionals for the moment. *[Laughter.]*

Minister, I want to move on to the question of multiparty or group actions. If it were suggested—not by me, I hasten to add; I would not be so bold—that we in Scotland might be dragging our feet on the issue of multiparty actions and if it were asked why the Government was not embracing the issue a bit more forcefully, what would you say to that?

**Roseanna Cunningham:** I have indicated that we are considering including multiparty actions in the legislation that we would be likely to bring forward in this session of Parliament. If you were to argue that we should have brought it in five

years ago, I would say that we have a broad spectrum of change in the justice portfolio and we have to find the right legislative vehicle for change to take place. I am sure that the Justice Committee is grateful that we have not added another piece of legislation to its workload at this stage. However, we are considering multiparty or class actions for that final piece of legislation.

**The Convener:** I think that you have just won friends by not giving us another piece of legislation to consider.

**Margaret Mitchell:** The Taylor review was published a year ago but only now are we getting the Scottish Government's response. Had an earlier response been forthcoming, some of the recommendations could have been included in and implemented as part of the Courts Reform (Scotland) Bill. Why has it taken so long for the response to come?

**Roseanna Cunningham:** The report was published last September, which is not quite a year ago. The report is fairly significant and substantial. We have had considerable discussions about aspects of the report and our response reflects that fact. The discussions on how best to proceed are on-going. However, not all the recommendations fall to the Scottish Government to deliver and we had to accurately reflect that, too. In addition, some aspects needed to be clarified and agreed with others. Furthermore, before one makes any formal response, one must have an understanding of how others would be impacted by such a response. We will continue to work with partners across the justice system on all the recommendations.

The Taylor review came out of the Gill reforms, and we focused on ensuring the enactment of the Gill reforms because Taylor's recommendations were all predicated on that having taken place. That is how we have been working on this.

**Margaret Mitchell:** When was the decision taken not to implement the Taylor recommendations in the Courts Reform (Scotland) Bill?

**Roseanna Cunningham:** The Taylor report was not published in time for our consideration. The pre-legislative process that the Government does goes back quite a lot further than the drafting of the bill. The bill must be consulted on. The Taylor review was not published at the point at which we were doing that work. Had it been published, the report would have significantly changed the Courts Reform (Scotland) Bill by a pretty serious magnitude and probably would have resulted in a serious delay to the bill.

**Margaret Mitchell:** Thank you.

**The Convener:** I do not know whether I am further forward with any of this. I do not mean that in a rude way. It is just that the issue is so complicated—

**Roseanna Cunningham:** It is.

**The Convener:** —and so much is still to be discussed and consulted on. However, we have tried and you have tried, minister—we cannot ask for more than that. Thank you very much.

## Subordinate Legislation

### Adults with Incapacity (Supervision of Welfare Guardians etc by Local Authorities) (Scotland) Amendment Regulations 2014 (SSI 2014/123)

10:43

**The Convener:** Item 2 is consideration of two negative Scottish statutory instruments. The purpose of the instrument on adults with incapacity is to allow more flexibility in the frequency of visits by local authorities to adult and welfare guardians in response to the circumstances of individual adults.

The regulations come into force on 9 June 2014. The Delegated Powers and Law Reform Committee considered the regulations at its meeting on 27 May 2014 and agreed to draw them to the Parliament's attention as the meaning of the text inserted by regulation 5 could be clearer. It is groundhog day: the Scottish Government has undertaken to introduce an amending instrument to correct the error. If members have no comments on the regulations other than, "Here we go again," are they content to make no recommendation in relation to them?

**Members indicated agreement.**

### Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2014 (SSI 2014/130)

**The Convener:** The purpose of the second instrument is to amend the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Order 2004 by adding a body, the Yuill Community Trust CIC, as a prescribed rural housing body. The Delegated Powers and Law Reform Committee considered the amendment order at its meeting on 27 May 2014 and agreed that it did not need to draw the attention of the Parliament to it. It seems to me to be a technical matter. If members have no comments on the amendment order, are they content to make no recommendation on it?

**Members indicated agreement.**

## Petitions

10:45

**The Convener:** Because people from Justice for Megrahi are travelling to hear consideration of their petition and I hear that they will not be here until about 11 o'clock, I will take the petitions that we are considering today in a different order from the agenda. If we have reached that petition before they arrive, I will just have a little break, if that is all right with the committee.

**Members indicated agreement.**

### Administrative Justice (PE1449)

**The Convener:** There are four public petitions and members have paper 5, which provides them with an update. We will take PE1449, which is on preserving an independent Scottish administrative justice council, first.

The convener of Accountability Scotland has advised the clerks that he has concerns about representation of the end user on the Scottish tribunals and administrative justice council advisory committee. He wishes to make a submission to the committee detailing those concerns. Does the committee wish to write to him asking for a formal submission with a specific deadline, such as Friday 1 August? Do members also wish to write to the chair of the advisory committee to ask about the extent to which the end user is represented in its deliberations before we do anything else?

**Roderick Campbell:** Yes. That is sensible.

**The Convener:** Do members wish to do both?

**Members indicated agreement.**

### Solicitors (Complaints) (PE1479)

**The Convener:** PE1479 is on the legal profession and the legal aid time bar and urges the Government to amend the Legal Profession and Legal Aid (Scotland) Act 2007 to remove any references to complaints being made timeously. The Scottish Legal Complaints Commission has recently advised the clerks that it proposes an extension to the time bar and will shortly consult stakeholders on the proposal. In light of that, do members wish to advise the petitioner of the SLCC's decision and the forthcoming consultation? That person could also respond to the consultation.

**Members indicated agreement.**

**The Convener:** Do members also wish to write to the SLCC to encourage it to consult the petitioner on the proposal to extend the time bar, so that it is interactive?

**Members** *indicated agreement.*

**Alison McInnes:** In the interim, we should keep the petition open.

**The Convener:** Yes, obviously.

### **Supreme Court (Civil Appeals) (PE1504)**

**The Convener:** Paper 5 provides a fairly detailed narrative on the next petition, PE1504. The committee previously agreed to consider it as part of our consideration of the Courts Reform (Scotland) Bill. We wrote to the petitioner to ask what the point of general public importance was in her case, but she has not completely addressed the point in her submission. Do members wish to write again to the petitioner to ask what the point of general public importance was in her case and to ascertain the precise reasoning that solicitors gave her for not representing her?

**Roderick Campbell:** Yes. It has never been clear to me what the point of general public importance is. The petitioner raises concerns about the procedural issues, which I understand and which we hope to address with the bill if it becomes law, but the point of general public importance has never been clear to me, so we need to ask her again.

**The Convener:** Right, okay. I will suspend the meeting and we will have a little break—

**Christian Allard (North East Scotland) (SNP):** Sorry, convener, can I go back to PE1479? You said that there may be an opportunity to interact with the consultation, but the paper says that the consultation closed on 21 March.

**The Convener:** That is a different consultation. It is a new consultation. We have many consultations.

We will have a little break to allow the petitioners from Justice for Megrahi to arrive for their consideration of their petition. That seems fair.

**Margaret Mitchell:** How long is the break?

**The Convener:** It is until 11 o'clock. You get a 12-minute break. You are not complaining.

10:48

*Meeting suspended.*

10:59

*On resuming—*

### **Justice for Megrahi (PE1370)**

**The Convener:** We turn to PE1370, on Justice for Megrahi. I declare an interest: I am a member of the Justice for Megrahi campaign.

Members have received a letter from Police Scotland that encloses minutes of a meeting with members of Justice for Megrahi. The minutes advise that a full investigation of JFM's allegations is resuming and that Police Scotland and JFM will hold future liaison meetings. Following the issue of committee papers last week, members received a submission from Justice for Megrahi, which has been tabled. The submission makes clear that JFM believes that "constructive progress" is now being made between itself and Police Scotland. In addition, the committee was complimented, which was rather nice.

Do members have any general comments on the police response and the JFM submission?

**John Finnie:** Yes. There is useful information from both parties here. You alluded to JFM's reference to "constructive progress", and the word "progress" is significant, because clearly JFM is not there yet. It is very good that there is confidence in the police personnel who are engaged in the deliberations and that the liaison meetings are continuing.

It goes without saying, but I will say it anyway. A major crime investigation is being talked about, so it was important that after a significant complaint was made—I quote again from the JFM submission—

"Clear lines of communication have been established".

Justice for Megrahi expresses a concern that we would all understand. All criminal inquiries take place at the behest of the Lord Advocate, and there is an important role for the Crown Office there. It is also important to note the three different strands: the call for a public inquiry; the significant criminal allegations; and the anticipated submission from Lockerbie relatives. As the paper says, those three things are inextricably linked; I agree whole-heartedly with that.

As you did, convener, I note the comment about the role that the Justice Committee has played in progressing things. The Justice Committee has articulated widely held public interest and concern about the issues. That has perhaps focused our minds and moved the issue on from the impasse that we saw previously.

JFM's on-going concerns relate to some of the intemperate comments in the press last year, which, process-wise, were wholly inappropriate. It will surprise no one to hear that I agree with the view that there should be some political oversight. This is work in progress, not work that has been concluded, and I do not think that the public would in any way be fazed by us maintaining a watching brief on the issue. Quite the reverse is true, and were we to say that we were no longer interested, that would give entirely the wrong signal.

I hope that committee members will agree that there is a lot of merit in our maintaining a watching brief on this very important public issue and keeping the petition open.

**Roderick Campbell:** I agree with what John Finnie said. We should keep the petition open.

I would be grateful for clarification on the position of the application to the Scottish Criminal Cases Review Commission.

**Elaine Murray:** I was going to say exactly the same as Roddy Campbell said.

**Sandra White:** I thank the petitioners for their submission. There is no doubt that everyone on the Justice Committee who has been involved has done a grand job—even before I was on the committee.

I seek some clarification. The Crown Office will look at Police Scotland's report. A paragraph in JFM's submission says:

"JFM continues to have little faith in any decision the Crown Office might make in respect of its allegations."

The petition requested an investigation, so where does that leave the committee?

**The Convener:** The petition asks for an independent public inquiry. Depending on what comes out of the police investigation into alleged quasi-criminal or criminal actions in the course of the whole matter, one might have to say that a public inquiry is necessary. We do not know, which is why it would be very relevant to keep the petition open.

The Scottish Criminal Cases Review Commission has nothing to do with Justice for Megrahi. It is to do with parties that may have an interest in lodging an application to it for a further review of the matter. Although that is contingent and important, it is not part of the petition.

**Sandra White:** So the matter has been looked at by the police and there have been meetings, which have been very open. However, the matter will ultimately go to the Crown Office.

**The Convener:** It will, yes.

**Sandra White:** If the petitioners deem the Crown Office's deliberations to be unsatisfactory, could the committee have a watching brief and make its own deliberations? I want to know how the process goes.

**The Convener:** We could do that, but the problem is that the Crown Office's past actions might be implicated. If the police referred to a party that might somehow be implicated—depending on what comes out of all this—one might have to stop and say, "This is a big, big issue and might be the thing that requires a public inquiry into the actions of the Crown Office and the

police". I am not saying that that is the case; I am just surmising.

**Sandra White:** I am just asking for myself. I do not know the process.

**John Finnie:** If Sandra White's concern is that by keeping the petition open she would be giving some personal endorsement of the views expressed, that is not how I see it.

**The Convener:** I do not think that that is her concern.

**Sandra White:** I signed the petition, so that is not my concern. I just want to know—

**The Convener:** The question is about process.

**John Finnie:** Yes, indeed. We have to assume that, given the re-engagement, things will progress in good faith and what will be, will be. However, there is an important role for us.

**The Convener:** Do you agree that we should at least keep the petition open, see what comes out of all this and then return to it, as we have done with petitions in the past when the matter has not concluded?

**Members indicated agreement.**

**The Convener:** Thank you very much. We will keep the petition open and keep a watching brief on it.

11:06

*Meeting continued in private until 11:47.*





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