



OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 21 September 2022

Session 6



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CRIMINAL JUSTICE COMMITTEE

24th Meeting 2022, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Jamie Greene (West Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*Collette Stevenson (East Kilbride) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Martin Brown (Scottish Government)
Justin Haccius (Scottish Government)
Ash Regan (Minister for Community Safety)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 21 September 2022

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Audrey Nicoll): Good morning, and welcome to the 24th meeting in 2022 of the Criminal Justice Committee. We have received no apologies. Our first item is a decision on whether to take item 6 in private. Do members agree to take item 6 in private?

Members *indicated agreement.*

Subordinate Legislation

Advice and Assistance (Summary Criminal Proceedings) (Miscellaneous Amendment) (Scotland) Regulations 2022 [Draft]

10:01

The Convener: The committee will now consider an affirmative Scottish statutory instrument. I refer members to paper 1. The SSI seeks to amend the current advice and assistance regulations to support a sheriff court initiative that seeks to encourage appropriate early resolution of summary criminal cases.

I welcome Ash Regan, the Minister for Community Safety, and her officials to the meeting, and I invite the minister to make a short statement on the SSI.

The Minister for Community Safety (Ash Regan): Good morning, convener and committee. Thank you for the opportunity to speak to you about the draft Advice and Assistance (Summary Criminal Proceedings) (Miscellaneous Amendment) (Scotland) Regulations 2022.

The draft regulations have been laid to support the Scottish Courts and Tribunals Service evidence and procedure review, through which three sheriff courts will pilot an initiative to test the benefits of earlier engagement between the Crown Office and Procurator Fiscal Service and defence agents. The purpose of the pilot is to encourage appropriate early resolution of summary criminal cases. Facilitating such early resolution will benefit accused persons and reduce the volume of cases in our courts, aiding the overall efficiency of the justice system.

Remuneration of the legal professionals who are involved also has to play a part in achieving those benefits. Currently, more favourable fee arrangements are available when a pleading diet has taken place in a case, and that might act as a disincentive to earlier resolution. Two situations have been identified in which a case may resolve without proceeding as far as a pleading diet and so give rise to less favourable fee consequences.

One situation is in cases that involve the service of a complaint but that are susceptible to resolution should the Procurator Fiscal Service agree to drop the case and not call it. A second situation is in cases that involve disclosure and/or Crown or defence engagement prior to the date that a complaint is actually served, such as undertaking cases. Again, they might resolve in a way that allows the Procurator Fiscal Service to drop the case.

The provisions in the draft regulations will amend legal aid fee arrangements to allow an inclusive fee to be paid to defence agents at an earlier stage of proceedings, having regard to both of those scenarios. A pleading diet will no longer be required to trigger payments of the inclusive fee.

That gives the committee a brief overview of the draft regulations. I am happy to answer questions.

The Convener: Thanks for that, minister. I will open it up for members to ask questions.

Jamie Greene (West Scotland) (Con): Good morning, minister and colleagues. I have a couple of quick questions. I appreciate that the SSI before us specifically concerns the payment of legal aid fees and the consequences of the pilot for that, but I want to ask about the pilot in a wider sense.

Would it be fair to say that the purpose of the pilot, or one of its potential outcomes, is to reduce the number of cases that proceed to a trial diet? What might be the benefits or consequences of that? I ask because it appears that it might encourage lawyers to sit in a smoke-filled room and do deals together rather than proceed cases to trial. Might we see an increase in the number of deals done in private meetings? There is already a feeling that there is a lack of transparency around what is discussed in those meetings and the outcomes that are delivered from them. The committee has heard numerous concerns from victims and victims' organisations about the consequences of not being kept in the loop on such deals. What are the Government's thoughts about the pilots and how they will be received?

Ash Regan: The first thing to be clear about is that this work is being carried out by the Scottish Courts and Tribunals Service as part of its evidence and procedure review. It is working on this to encourage appropriate early resolution of summary criminal cases, which—as you rightly pointed out—might reduce the number of summary criminal cases that go into the court system. However, I stress that we think that that would happen only for those cases where that is appropriate.

The pilots are taking place in Dundee, Hamilton and Paisley, and they started on 5 September. They are an attempt to look at ways in which efficiency and other things can be improved, and I think that they will bring benefits across the whole system. They will benefit the accused, and I am also quite clear that they will benefit victims and the court system.

The pilots look to resolve cases at the earliest opportunity without the need for a trial to be fixed, reduce the need for full disclosure where cases can be resolved, reduce the number of cases that are called for trial, reduce the number of witnesses

who are called unnecessarily and preserve trials for cases that cannot easily be resolved by other means. As I said, there are benefits to doing those things.

The regulations, specifically those that are in front of you, remove a barrier that exists in the system, so maybe an appropriate way to describe the situation is by saying that many of the cases that will be involved would have gone on to court when, perhaps—with the right fee arrangement—it would be more appropriate for them to have been resolved earlier. I hope that that answers your question.

Jamie Greene: Thank you. It answers it, partially. I can read between the lines of what you said about the current arrangement and why it may not necessarily benefit both parties to resolve cases in the way that is being suggested, rather than in the traditional fashion, but it still raises a flag about who it benefits most. You said that it benefits the accused, but surely we should not make any changes to the system that benefit anyone in particular; the system should be fair and transparent as appropriate. What are the parameters for the types of case that it would be appropriate to deal with in that way? If we move in that direction, would certain types of case be excluded, and who would make decisions on whether a case would be resolved in that more informal setting?

The policy notes state that

“No public consultation was carried out due to the technical nature of the proposed regulations,”

but I would say that this is not just a technical move but quite a substantial shift in how we try and clear the backlog of cases by dealing with them in a more efficient but, perhaps, less public way. Could you comment on that?

Ash Regan: I say again, just to be clear, that the pilots and the improvements to the processes that the SCTS is carrying out are being undertaken by the SCTS itself. The Scottish Government is supportive of moves to make the system more efficient.

The regulations were shared with the Law Society of Scotland, from which we have received no comments. As I said, I believe that the change will benefit the accused, but it will not benefit them solely—we need to be clear on that. I said that it will bring benefits to victims; I also think that it will be beneficial for legal practitioners and will bring efficiencies across the whole system. There is a backlog that we need to resolve, and I anticipate that changes of this nature will lead to fewer cases going to court, which will obviously have a positive effect on the number of cases going through the system—we are all interested in seeing that.

I set out in my opening statement the type of cases that this would apply to, but perhaps Martin Brown could give a little bit more information to Mr Greene about that.

Martin Brown (Scottish Government): It is limited to summary criminal business—sheriff court cases. I understand that the pilots are overseen by sheriffs. Essentially, it is a case management system to ensure that cases proceed in the most effective way, by removing one potential barrier to that. If everything else that the SCTS is doing to improve the system was in place but this measure was not, cases might still proceed to trial diet, even though they could be settled. This feeds into the process.

Jamie Greene: That is helpful.

Katy Clark (West Scotland) (Lab): I welcome the pilots and I think that the minister is correct to identify that funding arrangements can affect how work is done and cases are prepared.

Once the pilots have concluded, it would be helpful if a full and detailed report could be provided to committee members so that we can understand what has happened and the potential implications. Perhaps the minister could take that away for consideration.

I was going to ask whether you have consulted the Law Society or representatives of criminal defence agents on the regulations. You have clearly already had a certain level of engagement, although there has not been a great deal of feedback. Given all the concerns that have been raised about the problems in the funding of criminal defence work, and given the cuts to legal aid over a considerable period of time, will you ensure that you obtain and capture detailed feedback from that side of the profession as the pilots proceed and as the provisions of the regulations are rolled out?

Ash Regan: I do not accept the full characterisation of the situation that the member set out in her question. We have shared the regulations and, as she rightly says, we have not received a great amount of comment on them.

I again note that the pilots are not being run by the Scottish Government. It is not a Scottish Government initiative, and we are not controlling or directing it; if the committee is interested in receiving a report on how the pilots have been run and on the conclusions, the committee should take that up with the SCTS directly. I am sure that it would be happy to facilitate that.

I also note that, although the pilots are taking place in only three areas, the regulations are an attempt to support the direction in which the pilots are going and to ensure that, for appropriate cases, the barrier—relating to the fee structure—to

an earlier-stage resolution is not there. The regulations will allow for the earlier payment of legal practitioners, which I hope will be welcomed.

The regulations that are in front of the committee will apply not only to the three pilot areas but right across Scotland.

Pauline McNeill (Glasgow) (Lab): I welcome these important regulations. Some members of the committee previously questioned the Scottish Legal Aid Board on behalf of practitioners about the fact that there was a disincentive to settle cases early. The regulations are helpful on every level and I support them.

Given what you said to Katy Clark about the pilots being a matter for the SCTS, what is the Government's role? There must be one if we are being asked to consider it. Who has determined the things that we would expect to see in a pilot, such as how its success is measured? Is that the Government or the SCTS? I am seeking clarification on whether it is all a matter for the SCTS.

Ash Regan: It is being run by the Scottish Courts and Tribunals Service as part of its continuing work to improve efficiencies in the system for the benefit of everyone. I will let Justin Haccius give a little bit more detail on how that is working.

The Government's role is to support legislatively the work that the SCTS is doing. The regulations are an example of that. Through them, we are removing the barrier that might create a disincentive—as the member has characterised it—to appropriate early settlement.

Justin, do you have anything to add on the SCTS pilot and how it will measure the work?

10:15

Justin Haccius (Scottish Government): No, I do not have any specific information on that but I expect—I am conjecturing—that we should be able to see, through the case flows and through Scottish Legal Aid Board data, when cases settle. There should be a demonstrable effect.

Russell Findlay (West Scotland) (Con): What will the inclusive fee be?

Ash Regan: It is £550.

Russell Findlay: How does that differ from the current system?

Ash Regan: If the case progressed, the fee was £550. That fee will now be payable at an earlier date. My understanding is that there was not a set fee previously so it depended on the type of case and what stage it reached but I will let Martin Brown give you a bit more detail on that if he can.

Martin Brown: It depends at what stage the case settles earlier. There are fixed payments and fee tables that apply to a case that was settled at an earlier stage or where work was done prior to it settling. However, my understanding is that, generally, cases would proceed to the diet and that the concern is that they did not need to do that.

It is not easy to specify in the abstract what the fees would be because they would vary in each case but they would be less than if they settled at the diet. If the same work, or the bulk of it, is done anyway except for the diet itself—turning up and putting forward the accused person’s position—the diet is really only a procedural step and the feeling is that there is no need to keep that procedural step. The fees will probably be the same but the diet will no longer need to take place to trigger that payment.

Russell Findlay: Churn has been a huge problem in the sheriff courts for decades and I guess that that is what we are talking about. However, is there not a risk that it might financially incentivise a defence lawyer to recommend to their client that they should enter a guilty plea, which might not be in the client’s best interest?

Martin Brown: Nothing changes in the defence solicitor’s duties to the court and the Law Society of Scotland’s rules about the way that they deliver the service, so I do not expect that to make any difference. The key seems to be the appropriateness of the settlement. I do not think that the Crown would take any settlements that it would not otherwise have taken. Therefore, the regulations should not necessarily make any change. My understanding is that it will just happen at an earlier stage without others being involved when they do not need to be.

Ash Regan: I make it clear to the committee that the approach reflects what the legal profession has advised the Scottish Government, which is that fees should be better targeted to the preparation of cases to aid early resolution. Therefore, the approach will support better cash flow and capacity for defence agents as well.

Russell Findlay: The crimes that the regulations would cover are summary cases but those can include acts of violence. Victims often complain that the system is opaque: they are not kept in the loop, are not told of disposals and are often left in limbo for significant periods. Has any consideration been given to informing victims about disposals as part of the change? It seems that there will be even less chance of their being told if there is no formal hearing because it is not needed.

Martin Brown: As I understand it, the approach relates to pleading diets, which means that we

would not always expect victims or witnesses to be there. However, with regard to the process of communicating what happens, I understand that there are initiatives under way in the Crown Office to address that lack of transparency, which is where we would expect those issues to be picked up.

In these regulations, we are simply removing the barrier with regard to legal aid. As for the wider initiative that the SCTS is undertaking, in making the efficiencies in question, the issue of how what has happened in a case is communicated seems to me quite relevant and that initiative seems the natural place to pick up such things.

Russell Findlay: I understand that this is the business of the court and the Crown Office, but could there be a stipulation or requirement with regard to the need to inform witnesses and victims as the work is progressed? Otherwise, there will be a real risk of their being left not knowing the outcome of cases. For victims of violence, in particular, or some other crimes of that nature, it seems only right that that consideration is front and centre of any such change.

Ash Regan: As Martin Brown has said and as the committee will know, there are a number of initiatives in this area. We are all clear that better communication is beneficial, and I am sure that the Crown Office and the SCTS will look at that issue in the work that they are taking forward.

Russell Findlay: Thank you.

The Convener: Did you want to come in, Fulton?

Fulton MacGregor (Coatbridge and Chryston) (SNP): Yes, convener. I welcome the minister and her colleagues to the meeting.

I put on the record that I am very supportive of this. As Russell Findlay has said, the churn in the court system has been a massive issue; indeed, it was a massive issue that the Justice Committee considered in the previous parliamentary session—and, I imagine, even before that. We should therefore be welcoming any steps to address the issue—it is good that the minister has recognised that and has brought forward something with the potential to deal with the matter.

That brings me to my question, minister. I know that this is a pilot, and that you will review it, but do you have any early indications or assessments of the impact that it might have on the backlog from Covid as well as the longer-term backlog? It is okay if you do not have any numbers—I know that Katy Clark has asked for an update in due course—but do you have any early assessments with regard to what this might mean for the numbers?

Ash Regan: We do not have any data of that type at the moment. However, I am quite confident that this approach will have a significant impact on resolving cases appropriately at an earlier stage, which, for all the reasons that we have discussed, will be beneficial across the system.

The Convener: As there are no more questions, I invite the minister to move motion S6M-05162.

Motion moved,

That the Criminal Justice Committee recommends that the Advice and Assistance (Summary Criminal Proceedings) (Miscellaneous Amendment) (Scotland) Regulations 2022 [draft] be approved.—[*Ash Regan*]

Motion agreed to.

The Convener: I thank the minister very much for attending. That concludes our consideration of the SSI.

We now move into private session. Details of the next meeting will be announced in due course in the *Business Bulletin*.

10:23

Meeting continued in private until 12:46.

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