JUSTICE 1 COMMITTEE

Wednesday 17 January 2001
(*Morning*)

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JUSTICE 1 COMMITTEE
1st Meeting 2001, Session 1

CONVENER

*Alasdair Morgan (Galloway and Upper Nithsdale) (SNP)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

Phil Gallie (South of Scotland) (Con)
*Maureen Macmillan (Highlands and Islands) (Lab)
Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Euan Robson (Roxburgh and Berwickshire) (LD)

*attended

WITNESSES

Ian Allen (Scottish Executive Justice Department)
Niall Campbell (Scottish Executive Justice Department)
Robin MacEwen (Scottish Executive Justice Department)
Gillian Russell (Office of the Solicitor to the Scottish Executive)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Fiona Groves

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Wednesday 17 January 2001

(*Morning*)

[THE CONVENER *opened the meeting at 11:30*]

Proposed Protection from Abuse Bill

The Convener (Alasdair Morgan): Good morning, ladies and gentlemen. Before we proceed to item 1 on the agenda, I will say something about the proposed protection from abuse bill. The debate on our report on the proposed bill is scheduled for next Wednesday's meeting of the Parliament. There is likely to be a ministerial statement before that, so the debate will probably start at around 3.15 pm. It would be helpful if committee members could attend the debate and participate in it, as it is an essential step in the progress of the bill—without agreement to our report, the bill cannot proceed further. If the Parliament votes in favour of the report, I can introduce a bill along the lines that have been suggested.

Members who were present at last week's debate on stalking and harassment will have heard the minister say that he wants to explore with the committee whether the bill might provide a suitable vehicle for the proposal to attach a power of arrest to non-harassment orders. Prior to the debate, Jim Wallace had approached me informally on the matter. If he makes a formal approach to the committee—and he has not yet done so—we will consider the matter.

It is too late for the additional proposals to be included in the report that the Parliament will debate next week. That debate will focus on what is in the report, not what others might like to insert into a subsequent bill. If the Parliament approves the report's proposal, the committee will decide whether to instruct the drafting of a bill straight away—and we have taken some preliminary steps to allow us to do so—or to consider whether to include in the bill some of the additional provisions that the minister may suggest.

If we choose the first option, the bill should be ready for introduction before Easter. If we choose the second option, I suspect that we would have to take further evidence and produce a second report, as we would be back in the position that we were in some months ago. We would be dealing with a different bill, which would have to be debated and approved by the Parliament in a debate similar to the one that we will have next Wednesday. That would delay the bill by a considerable time—I alert the committee to that. However, we cannot make any decision until we receive a formal approach from the minister.

Euan Robson (Roxburgh and Berwickshire) (LD): Is there a possibility of the minister framing things in a way that would bring the matter within the parameters of our debate next week?

The Convener: I doubt it, but that is difficult to say until we receive a formal approach from him. He was talking about stalking and harassment, which, although not unrelated, are different from the subject of the committee's report. The report says specifically that we excluded changes to the legislation that Jim Wallace has talked about changing. If he proposes amendments that would do the opposite of what the report suggests, that would pose a difficulty.

Michael Matheson (Central Scotland) (SNP): Given the amount of time that the committee has spent considering the issues surrounding the proposed bill, I feel that it would be wrong to delay it for the minister to make further proposals and for us to take further evidence for another report. We should not close the door on Jim Wallace's suggestion, but a lot of work has been put into the bill and time has been spent examining the issues. Furthermore, the report makes clear the areas that the proposed bill does not address. It would therefore be more appropriate for us to proceed with the bill as planned, and for Jim Wallace to introduce another bill to address his concerns. We will have to wait for Jim Wallace to approach the committee formally.

The Convener: We must wait for two things: for the Parliament's approval of our proposal next Wednesday and for a formal proposal from Jim Wallace.

Interests

The Convener: Item 1 on the agenda is declaration of interests. Apologies have been received from Maureen Macmillan and from Paul Martin. The item is therefore no longer relevant, unless existing members have acquired new interests since the last time they declared their interests.

Items in Private

The Convener: Item 2 is consideration of whether we agree to take item 3, on possible lines of questioning on the Convention Rights (Compliance) (Scotland) Bill, in private. Are we agreed?

Members *indicated agreement.*

The Convener: To save time, do members agree to do likewise at our meetings on 30 January, 6 February and 14 February?

Members *indicated agreement.*

11:36

Meeting continued in private.

11:51

Meeting resumed in public.

Convention Rights (Compliance) (Scotland) Bill: Stage 1

The Convener: We have with us Niall Campbell, head of the criminal and civil law group, Robin MacEwen, head of the parole miscarriages review division, Ian Allen, head of the legal aid branch, and Gillian Russell and John Paterson from the office of the solicitor. Does Mr Campbell want to make a few introductory remarks?

Niall Campbell (Scottish Executive Justice Department): Yes, just to set the scene. I will be brief, as I know that committee members want to ask questions.

As members know, the background to the Convention Rights (Compliance) (Scotland) Bill is the incorporation into United Kingdom law of the European convention on human rights, first—in Scotland—through the devolution settlement, then through the full implementation of the Human Rights Act 1998 on 2 October last year.

As part of the process of implementation, the Scottish Executive has been reviewing its legislation, procedures and activities to identify key areas where change is necessary to ensure compliance and reduce the risk of challenge. That is not a precise process, because the convention allows the courts considerable scope for interpretation and different courts may take different views. A recent example is a case in Dunfermline where the issue of incrimination was raised. The sheriff court took one view, the court of appeal—the High Court—in Edinburgh took another view and the judicial committee of the Privy Council took a different view again.

The Scottish Executive's process of review has already led to the Bail, Judicial Appointments etc (Scotland) Act 2000 and the Regulation of Investigatory Powers (Scotland) Act 2000. There have also been some changes to secondary legislation as a result of the review, for example, the change to legal aid regulations in relation to representation at employment tribunals.

One approach to the risk of ECHR challenge is to wait and see whether there is a challenge. That may be acceptable if the risk of successful challenge is thought to be low and the consequences insignificant. However, if it is judged that the issue is significant and can be dealt with only by primary legislation, it is proper to legislate—that is the background to the bill before the committee.

A further, important factor is that if Scottish legislation is found to be incompatible with the convention, it is immediately struck down. There is no procedure—as there is at Westminster—for a declaration of incompatibility to be made, giving time to correct the legislation while the incompatible legislation remains in force. That difference in Scotland points to the need to make changes to primary legislation where that is shown to be necessary.

There are six substantive parts to the bill. The first part introduces a new procedure for determining the release dates for adult mandatory life prisoners—that is, people who are in prison for murder. At present, the release date is determined by the Parole Board for Scotland, which considers cases on the basis of written reports and assesses the risk of offending if the prisoner is released. In the light of those assessments, the board makes a recommendation to Scottish ministers, who in turn seek the views of the judiciary on whether sufficient time has been served for punishment and deterrence. At the end of that process, it is ministers who make the decision on release.

Under the proposals in the bill, that procedure would be replaced by one whereby the court fixes a period to be served for punishment and deterrence at the time of sentencing an adult mandatory life prisoner. When that period has been served, the prisoner would attend a tribunal of three members drawn from the Parole Board. That tribunal would decide whether a prisoner should be released, not Scottish ministers, and would consider the risk of reoffending if the prisoner were released. That procedure is in operation for the two other categories of life prisoner: discretionary life prisoners and under-18 murderers, who are sentenced under separate statutory powers. As well as making the arrangements for adult mandatory life prisoners compliant with the convention, that would create a more logical and transparent procedure for dealing with the sentences of adult mandatory life prisoners.

Part 2 deals with the constitution of the Parole Board for Scotland. At present it is appointed by Scottish ministers, acting on the recommendation of an interview panel of civil servants and one independent member. However, given that the Parole Board, in certain senses, operates as a court and deals with the detention of prisoners, we have been advised that the terms of appointment and dismissal of any member of the board should be subject to procedures that are in some way similar to those for judicial appointments and should provide a certain security of tenure and a procedure for ending appointments. Part 2 provides those arrangements.

Part 3 deals with the arrangements by which legal aid is provided for summary criminal cases. In 1999, a system of fixed fees was introduced for such cases. It was challenged under the European convention and, although the court did not find the fixed-fees scheme to be non-compliant, criticisms were made of it in relation to certain possible situations. Part 3 enables certain exceptional cases to be removed from the fixed-fees scheme and to be remunerated under what is called time and line, which is payment by the amount of work that is done rather than by a flat-rate fixed fee. Part 3 also enables the Scottish Legal Aid Board to employ solicitors directly, as a safety net, should any person be unable to obtain legal aid in a summary case under the fixed-fees scheme. Part 3 further clarifies the proceedings for which civil legal aid may be made available. It provides a broad enabling power, which will allow civil legal aid to be made available in situations that will be set out in regulations.

Part 4 makes one change to the law on homosexual offences as a direct consequence of a judgment in the European Court of Human Rights in Strasbourg. Homosexual acts between two persons in private are not an offence. The change will extend that situation to homosexual acts in private where more than two people are involved.

Part 5 provides that the procurator fiscal of the Court of the Lord Lyon will no longer be appointed by the Lord Lyon—that is, by the judge in the Court of the Lord Lyon—but by Scottish ministers.

Part 6 introduces a new remedial power, which will make it possible to amend non-compliant legislation by order. That extends to Scottish ministers a power already available to United Kingdom ministers and extends the range of circumstances under which ministers can make remedial orders. The process will, however, be properly controlled by the Scottish Parliament, using a procedure modelled on the procedure for making remedial orders contained in the Human Rights Act 1998.

The Convener: I thank Mr Campbell. We intend to work through the bill part by part, but I want first to pick up on something that you said about the power—of which I am aware—to strike down acts of the Scottish Parliament. If a problem is found, how is what is struck down specified? Would the court specify that, down to the section or subsection? Who determines what is struck down and what stands?

12:00

Niall Campbell: That will depend on what is brought before the court for consideration. The case will presumably have been brought on the basis that a certain power is non-compliant. I ask

Gillian Russell to comment further.

Gillian Russell (Office of the Solicitor to the Scottish Executive): That is correct. It would depend on the provision that came before the court and on the court's deliberation on the circumstances of the individual case.

The Convener: If a person was charged under a certain subsection and the court found the power under that subsection to be incompatible, would that subsection be struck down? Would the rest of the act stand, until such time as it was found wanting?

Gillian Russell: That is correct.

The Convener: Let us turn to part 1, in particular the degree of consultation that has been undertaken. Who was asked about the bill and what did they say? Did any of the consultation affect the bill as introduced?

Niall Campbell: Do you mean consultation in general or purely on part 1?

The Convener: You can answer the question on all parts of the bill if that is more convenient.

Niall Campbell: The position on consultation differs, depending on the part of the bill.

The Convener: In that case, I invite you to answer on part 1 at the moment.

Niall Campbell: There were discussions on the practicalities of part 1, purely with regard to the Lord Justice General. There are implications for the burdens that are put on the courts. It was a matter of considering the effect of the review on compliance—or otherwise—with our procedures.

A letter was sent to the people who would be affected when the proposal to change this area of the law was first announced in September last year. A letter was made available to the prisons and, following the introduction of the bill, a letter was sent to all life prisoners who would be affected. There has not been public consultation like the consultation that sometimes takes place for other bills, or like the consultation that took place for other parts of this bill.

Robin MacEwen (Scottish Executive Justice Department): We spoke to the Parole Board for Scotland, first about the practicalities of the proposals for life sentence prisoners, who will be affected considerably, and secondly about the proposed changes in part 2 to the procedures for the appointment and removal of Parole Board members. We spoke to the Parole Board also about part 1, as its members would be expected to sit on tribunals to consider life sentence cases.

The Convener: Would it be fair to say that most of the people whom we invite to give evidence will be feeding into the process for the first time?

Niall Campbell: It depends to whom you are referring.

The Convener: Anyone, with the exception of those whom you have mentioned.

Niall Campbell: In that case, yes.

The Convener: What factors will judges take into account when they fix the punishment part of sentences? What is the likely range of years for the punishment part of a sentence?

Niall Campbell: That is purely a matter for the court. The court will take into account the seriousness of the offence and the accused's previous convictions. I do not think that it would be proper for us to speculate on what the range of punishment parts should be. We can, however, provide information about lengths of time that have been served by life prisoners, although that is rather different from the punishment part of a sentence—there is a research report on life prisoners, which gives quite a lot of information. However, the length of time served reflects not only the punishment part but the estimate of risk that is made before release—that is not quite the same thing.

The Convener: Prisoners are serving certain lengths of sentence now. There must be some expectation that the lengths of sentences that prisoners serve after the proposed legislative change will not be significantly different.

Niall Campbell: That is right. The effect of the bill on the length of time served is expected to be neutral. The average length of a life sentence is about 13 years. I reiterate that that time covers not only the punishment part of the sentence, but any part that is served because of the risk that the Parole Board considers there to be before it recommends release.

Gordon Jackson (Glasgow Govan) (Lab): I want to press you on that. What you have just said is stated in the part of the policy memorandum that deals with adult mandatory life prisoners, which reads:

"The changes proposed are changes in the release arrangements for AMLPs only and, as such, are neutral so far as the length of sentences is concerned. Sentencing remains a matter for the courts and it is not expected that the changes proposed would lead to any increase or decrease in the period that AMLPs are expected to serve in custody."

I find it difficult to understand where you get any basis for knowing that. I stress the word "remains".

Let me explain. The policy memorandum states:

"Sentencing remains a matter for the courts".

However, the length of sentence for life prisoners, apart from for the small number of people for whom there is a recommendation—which happens

in only a tiny percentage of cases, namely the very serious ones—has never really been decided by the court.

My difficulty with the phrase

"remains a matter for the courts"

is to do with the average figure of 13 years. First, that average will include people who did only three years and people who have done 33 years. It is almost misleading. Secondly, it includes the risk factor. In other words, it covers people who have finished the punishment part of their sentence, but who remain a risk to the public.

How can we know that judges, who—apart from in cases involving under-18 offenders—have never carried out the exercise before, will fix punishment periods that will be anything like those being passed at the moment? Statistically, the punishment periods that are passed may be similar to those being passed today, but that may not accurately reflect the broader situation. I therefore find it difficult to conclude that we know that the proposed changes will have a neutral effect.

Niall Campbell: The judiciary is already consulted on whether sufficient periods have been served—it is already part of the process, as I described. That applies at the end of the process, however, not at the time of sentence.

One cannot forecast exactly what the courts will do—they are entirely independent. The statement in the policy memorandum reflects the fact that we intend the process to be changed, not the effect. The effect on the length of time served is meant to be neutral. The Parole Board will still be doing its job on the risk part of the sentence—that part of the process will not change.

The Convener: More specifically, would you still expect judges to set sentences of at least 20 years for crimes such as the murder of police officers, in line with the current 20-year policy? Should there perhaps be legislative provisions covering sentences in such cases?

Niall Campbell: The 20-year policy is a statement of how ministers would deal with certain types of cases, including the murder of policemen, which you mentioned, the sexual murder of a child and murder by firearms during robbery. Under the present system, the policy is operated by ministers. It would no longer operate as it currently does if the bill were passed. However, when considering the seriousness of the crime and setting the punishment and deterrent part of the sentence, we would expect the judiciary to take account of the same factors.

The Convener: To an extent, ministers made the statement in reaction to public demands in relation to crimes of such seriousness. As it was a ministerial policy, the public at least had some confidence that it would be put into effect. Now that it will no longer be ministerial policy—and will not be backed up by any kind of statute—will not public confidence in the way that crimes of such seriousness are treated diminish? What will happen the first time one of those crimes occurs and a significantly reduced sentence is handed out? Will not there be a political impact?

Niall Campbell: Each case is separate and special factors may lead to a particular outcome. It would be wrong to speak for the courts and to say how they will operate. However, the 20-year rule covers cases that are normally regarded as the most serious types of murder. One would expect the courts still to take the factors—which will be different for each individual case—very seriously.

Gordon Jackson: That is a fair comment; it is fair to say that those kinds of cases are the ones for which judges almost invariably fix the minimum recommended period.

Niall Campbell: Yes—a substantial minimum recommended period.

Problems can arise if more than one person is involved in a murder and all of them are found guilty. The case may be a 20-year-rule case, but the people may be responsible differently. Such situations arise. If there were three people involved in a murder, but one of them had played a smaller part in it than the others, the full 20 years may not be justified for that person. That is an example of where there may be special circumstances.

Gordon Jackson: I was not terribly happy that you could be sure that sentences would stay the same as a result of the bill. In the same way, I am worried about something else and I want to be sure that I understand it.

According to your document, at the moment, people often go to the Parole Board after four years and—

Niall Campbell: I am sorry. May I interrupt? People go to something called the preliminary review committee, which I chair, which has on it a High Court judge, a psychiatrist, someone from the Scottish Prison Service—

Gordon Jackson: What I meant is that people start entering the review system, in the broadest sense.

Niall Campbell: Yes, but only in a very broad sense. All that happens at that stage is that a recommendation is made to ministers of when people should first go to the Parole Board for a formal review. In some cases, that may be quite a number of years off. If it is a 20-year case, that will be reflected.

Gordon Jackson: I appreciate that, but people have at least the possibility of getting into the review system after a comparatively short time. Once things have been changed, can I take it that there will be no way into the Parole Board system prior to the end of the punishment part of a sentence?

Niall Campbell: Yes, that is right.

Gordon Jackson: Is there not a worry that that will decrease flexibility? At the moment, judges do not, by and large, fix such a period. As you have said, people do not get out early, despite what the public think. However, because judges do not fix a period, your committee and others are allowed flexibility when considering when the Parole Board should review people's cases. Is it not slightly worrying that the new system will block that flexibility in those exceptional cases in which circumstances have changed and it may be appropriate for the person's case to be considered earlier than might have been expected? What will happen is that the judge will fix the punishment period at 10 or 12 years and we will block off the flexibility that is needed in exceptional cases. Is there another way of dealing with such cases?

Niall Campbell: The bill does not propose an alternative. In a sense, the flexibility will come when the judge fixes the periods for punishment and deterrence. If there were special features that justified a shorter period being served, they would be taken into account at that point.

Gordon Jackson: But the point that I am making is that sometimes the need for flexibility—

Niall Campbell: Is realised after the sentence starts.

Gordon Jackson: Yes—perhaps three years down the road. You will know of cases in which you thought, at the point of sentence, that the man would not go to the Parole Board for 10 years, but in fact he went after six years because circumstances changed. That is the advantage of the present system: flexibility does not have to be determined at the point of sentence, when a person might be 20 years of age and coming out of drug addiction. Is there not some way of keeping that flexibility?

12:15

Robin MacEwen: The thinking was that anything relevant to punishment will be known at the time of sentence. Therefore, when the trial judge fixes the punishment part of the sentence, he will have all the factors before him to allow him to come to a view as to what will be a sensible period. That period could be quite short. In cases of people who were under 18 years of age, we have seen a period as short as three years being fixed. That is an even shorter time than the period after which a case would normally come before the preliminary review committee.

It would normally be risk factors that would change while a person was in custody and might influence the PRC or the Parole Board into thinking that the person could get out relatively early. There is the flexibility of being able to take account of a person's behaviour in custody. That will be a factor that is relevant to risk. The factors that would have been relevant when fixing the punishment period would all have been known at the time of conviction and sentence.

Niall Campbell: In the system for discretionary lifers, they have their punishment part fixed at the time of sentence. What we are talking about is similar to that.

Gordon Jackson: Yes, but I suspect that these periods of punishment are not likely to be very long: I am worried about there being no flexibility built into what, I suspect, will be very long periods of punishment. That is my practical worry, but we will have to wait and see.

Robin MacEwen: Under the present system, the Lord Justice General and the trial judge are consulted on whether they consider that a sufficient period has been served for the requirements of criminal justice. Of course, that happens only after the parole board has made a recommendation for release, after having considered the risk. Only rarely has the judiciary taken the view that more time required to be served. It does happen, but it is not common. That suggests that the periods that are being served at present—the average of 13 years or so—are longer, in most cases, than the judiciary would view as necessary for punishment.

Michael Matheson: I want to ask about part 1 of the bill, on punishment. In paragraph 35 of your policy memorandum, you refer to the judge's setting of the punishment part of a life sentence. You say that the judge will not be able to specify that the person is to remain in prison for the rest of their life. Instead, the judge will set the punishment part to exceed the life expectancy of individual. Is that really a way of saying "life without parole"? Is that what you are trying to say without putting it explicitly in the bill?

Niall Campbell: Yes. In exceptional cases, that would enable a period to be set that could exceed a particular individual's life expectancy. The offence would need to have been very serious indeed. Another situation that might arise would be of someone who was relatively old and for whom the normal punishment part for that kind of offence might go beyond the time that the person was expected to live. We have to be able to deal with such situations for very serious offences.

Michael Matheson: Why could not a judge specify that the sentence is a life sentence without parole?

Niall Campbell: Provision is not being made for that in the bill. In the normal course of events, parole will be available—that is the basis of the bill, which makes it possible in such cases for the period set to exceed the likely length of an individual's life.

Michael Matheson: I am trying to distinguish the seriousness of the crime. An elderly person with a short life expectancy could be committed to prison for a period that would make it unlikely that that person would leave prison. In those circumstances, the punishment part of the sentence for people who have committed serious crimes will exceed their life expectancy. There are two separate categories: those who have committed a serious crime and those who have not committed a serious crime but who have a life expectancy that is shorter than the length of sentence that they might expect to complete. Why could not it be said explicitly that the latter category is of persons who have been given life without parole? That would distinguish between people who have committed a serious offence and people who have not, and who simply happen to have a short life expectancy.

Niall Campbell: Those people will have committed a serious offence: they will have murdered someone.

The starting point was to continue a situation in which there was a prospect of parole and to recognise that there could be exceptional situations of the two types that you mentioned. That is why it is expressed in that particular way—a figure is always given.

Michael Matheson: Therefore, the only reason for not specifying that a sentence is really life without parole is that the prisoner could apply for parole, even though the punishment part of the sentence—

Niall Campbell: The punishment part of their sentence would need to be completed before the prospect of parole arose. They could not apply for parole before the punishment part—

Michael Matheson: So they would not be able to apply for parole? If that is the case—

Niall Campbell: That would be the effect, if their life expectancy were clearly exceeded by the punishment part of their sentence. They would not come into the system. Robin MacEwen may wish to add to that.

Robin MacEwen: It was also considered that, by requiring the trial judge to state the punishment period, more openness would be brought into sentencing. He must be clear about the period that he thinks is appropriate for a particular crime in its particular circumstances. Situations will arise in which the age of the individual does not matter. Two people of different ages could have been involved in the same crime, and it would seem appropriate for them to receive the same punishment part, which might exceed the life expectancy of one but not the other. If one were simply to require the trial judge to say what period he thinks is appropriate for that case, that would avoid making a judgment about how long an offender is likely to live.

Niall Campbell: Speaking from memory—I will be corrected if I am wrong—and to give members an idea, the longest recommended punishment part that has been set so far is 30 years, which was for an aggravated 20-year rule case.

Gordon Jackson: At present, the average length of sentence before release is 13 years, but that includes the sentences of people for whom the risk period has been long. Can you give us an estimate of the average punishment period? Obviously, some people have been allowed out immediately where it was thought that they had done long enough for the crime and there was no continuing risk, while others have been kept in because of the continuing risk. Is it possible for you to divide those up in your mind, to give us an idea of the average punishment period?

Niall Campbell: We will look into the figures, but, roughly, the average person gets parole about two and a half years after their first appearance before the Parole Board, which follows the recommendation of the preliminary review committee. That rough figure varies quite a lot. Some people will keep coming back to the Parole Board if there are problems in the prison or whatever. The rough rule of thumb would be two or three years.

Of course, the recommendation of the preliminary review committee varies—it is not a standard recommendation. That committee, in turn, varies the number of years that must pass before a person can go to the Parole Board.

Gordon Jackson: Is there a figure that you can give us on the length of punishment period served? Lots of people who were never a risk from the day they went into prison are released after serving the punishment period. The reason for keeping them in prison was their—in inverted commas—punishment period. Can you give us an estimate of the average punishment period served by lifers, rather than the period of 13 years that has been mentioned?

Niall Campbell: The trouble is that the system does not exist at present.

Gordon Jackson: Do you know what I mean?

Robin MacEwen: I know exactly what you mean. You are absolutely right: people are released when their release is recommended on risk grounds. Only then does one look backwards and ask, "Have they served long enough for criminal justice requirements?" In many cases, it is possible that a trial judge would have been satisfied with a much shorter punishment period. However, we cannot know that because all that is said is, "If he is released at this time, when recommended by the Parole Board, that will be enough."

The short answer to your question is no, we cannot provide a figure. All we can have is some confidence that the average must be shorter in the great majority of cases than the period that is being served.

Euan Robson: I will move on to transferred life prisoners. I understand that the bill's provisions apply to prisoners who are transferred from any other jurisdiction. Is that correct?

Niall Campbell: Yes. However, the principal jurisdictions involved will be England and Wales.

Euan Robson: I appreciate that.

Niall Campbell: And Northern Ireland.

Euan Robson: I was going to ask you about that. I looked through the documents but saw no reference to Northern Ireland—forgive me if I missed such references. Will special consideration have to be given to Northern Ireland? Will special amendments have to be made to existing legislation in respect of Northern Ireland?

Robin MacEwen: No. Transfers from Northern Ireland will be in the same position as transfers from other parts of the United Kingdom.

Did you notice that provision is made for both restricted and unrestricted transfers?

Euan Robson: Yes.

Robin MacEwen: That means that it will be possible for someone who transfers from England and Wales or from Northern Ireland to transfer on a restricted basis, in which case they will remain subject to the release arrangements in the jurisdiction from which they came.

Euan Robson: How many transferred life prisoners are there? I do not anticipate a great number.

Niall Campbell: There are half a dozen at the moment.

Euan Robson: Has there been any assessment of the likely impact that the changes to existing legislation that are in the bill will have on the willingness of foreign jurisdictions to transfer life prisoners to Scotland? Is there anything in the amending provisions that would encourage or deter transfers?

Robin MacEwen: We do not expect those provisions to have such effects. As we said earlier, we do not think that the periods that people must spend in custody will be affected. Therefore, the attitude of foreign jurisdictions to transfer should not be affected.

Euan Robson: If a pardon or some such is granted to a transferred prisoner by a foreign jurisdiction, is there anything in these amending provisions that would prevent the release of the prisoner as a result?

Niall Campbell: Transferring prisoners on an unrestricted basis assumes that the foreign jurisdiction is happy for arrangements in this country to apply. However, I think that your question refers to cases in which the unrestricted transfer raises some difficulty—where, for example, the foreign jurisdiction might transfer someone to a prison in this country but retain some kind of control. Although that issue needs to be worked out, it affects only a tiny number of transferred prisoners.

Euan Robson: Will we have resolved that issue satisfactorily before Parliament passes the bill?

Niall Campbell: Yes.

12:30

Euan Robson: So amendments might need to be lodged on that issue.

Niall Campbell: Tiny numbers of transferred prisoners are involved.

Robin MacEwen: We are probably talking about only three or four people. As for foreign jurisdictions, I do not think that any life sentence prisoners have transferred from abroad; they have all been determinate sentence prisoners.

Michael Matheson: I want to refer to any transitional arrangements there might be if the bill comes into effect. Paragraph 56 of the policy memorandum seems to suggest that all cases will have to be reviewed.

Niall Campbell: Yes—the cases of all prisoners still in prison.

Michael Matheson: Would they have to have a mandatory life sentence?

Niall Campbell: Yes.

Michael Matheson: So all those cases would have to be reviewed and the punishment parts of their sentence reset.

Niall Campbell: They will have to be set. There is none at the moment.

Michael Matheson: How many cases will have to be reviewed?

Niall Campbell: About 500.

Michael Matheson: I see that there will also be a cost in time to the judiciary and the courts. What kind of time pressures will reviewing those cases place on High Court staff?

Niall Campbell: As the detailed timetable for reviewing cases will be developed in consultation with the High Court, we have no precise forecast about how long that will take. However, the timing would take account of the point that people have reached in their sentences. It would be more important for some people to have the punishment part set sooner than for others who, for example, might be at the very start of their sentences.

Robin MacEwen: We have had limited experience of something similar. When such arrangements were introduced for discretionary life prisoners and murderers under 18, it was necessary for the Lord Justice General to set punishment parts. Although that is not the same as setting the parts in open court, it gave him an indication of what is involved and he now knows the scale of the exercise. The matter will clearly take many months to undertake; however, we will discuss with the judiciary and the courts how we can best order affairs to suit them.

Michael Matheson: I wanted to explore that point further. Although you have said that there is currently no set time scale, as it has still to be agreed by the Lord Justice General, you must have an anticipated time scale. Do you expect all those cases to be reviewed within a year after the bill comes into effect?

Niall Campbell: I do not want to commit us to any period—that is for the Lord Justice General to decide. I am sorry that I cannot be any more helpful.

Michael Matheson: So it will be exclusively the Lord Justice General's decision.

Niall Campbell: Yes, in that these tasks will be carried out by the judiciary.

Michael Matheson: Would it be exclusively the Lord Justice General's decision to set a time scale?

Niall Campbell: The matter would be subject to discussions between us and the Lord Justice General. He would need to formulate a timetable that fitted in with all the other demands on judges and the courts and that took account of their experience of how long it takes to review individual cases. That is why it is difficult to give a forecast at the moment. That said, it is important to undertake the task reasonably quickly as it concerns individuals.

Robin MacEwen: As we are obliged to refer cases as soon as the provisions come into force, we will begin preparations ahead of that point to ensure that referrals can be made to the courts, after which it becomes a matter for them.

Michael Matheson: One of the concerns is that the reviews could have an adverse effect on court time, given the pressure to consider the cases as quickly as possible. Might the High Court need to be provided with additional resources to undertake the reviews in that time?

Niall Campbell: We do not expect any extra judicial appointments to be made in connection with this matter. There have already been recent increases in the number of High Court judges because of pressures on the courts.

The Convener: The Parole Board currently assesses the risk of release. What factors does it take into account when considering whether a person poses a risk?

Niall Campbell: When considering the release of an individual prisoner, the Parole Board receives quite a substantial dossier which contains information about the crime; the judge's report at the time of sentencing; psychological reports both at the time of conviction and more recently from the prisons; reports from the prison about the prisoner's conduct; and representations from the prisoner himself. As a result, the Parole Board receives a range of reports that are all designed to give an idea of the offence and of any current risk posed by the prisoner.

Robin MacEwen: In some cases, psychological assessments might be carried out while the prisoner is in custody. Furthermore, there might be reports about the prisoner's plans on release and how realistic any proposed arrangements would be.

The Convener: But there is no statutory provision about what the Parole Board should take into account; it is up to the board to decide what it wants to examine.

Niall Campbell: That is right. The board has broad powers to consider anything that might be relevant.

Maureen Macmillan (Highlands and Islands) (Lab): In light of what has been said about Victim Support, will the victim of the crime have any input into consideration of parole?

Robin MacEwen: Which particular element did you have in mind?

Maureen Macmillan: There has been some discussion about victims having a say on whether a prisoner should be paroled, bearing in mind the fact that they have suffered trauma and might have some fears for the future. In the past, victims

have had no such locus.

Robin MacEwen: Victims or victims' families have occasionally asked the department or the Parole Board whether they could make representations or whether they could attend any hearings. The chairman of the Parole Board decides how to deal any such requests; however, victims or their families have usually been allowed to make representations in writing, which the board has then been willing to consider. That said, I should point out that it is often the case that the concerns of the victim's family might not be related to risk, which is the only issue that the Parole Board considers.

The Convener: Does the victim automatically find out that a parole hearing is taking place?

Niall Campbell: If they have expressed an interest in knowing when a hearing will happen, they will be told and given the opportunity to submit views. That is the current practice for tribunals.

Robin MacEwen: That is right. The initiative lies with the victim; we would not get in touch with a victim or victim's family to tell them when a hearing was coming up. It would happen only if they had corresponded in the past to make clear their interest.

Niall Campbell: We are considering how victims can choose to participate and get better information into the Parole Board system. We expect that the use that the board would make of such information would be in the context of consideration of appropriate licence conditions—an important aspect that we have not mentioned—rather than about the release decision.

When a person is released, conditions are often put in a life licence about where they may stay, about keeping in touch with their supervising officers and about treatment in relation to alcohol.

The Convener: That wraps up part 1 of the bill. I do not know if this rate of progress indicates what might happen at later stages of the bill.

We will move on to part 2. I will ask you again about consultation. You said that you talked to the Parole Board for Scotland. What were its views on this provision? Have you talked to anyone else about it?

Robin MacEwen: No. We talked only to the Parole Board for Scotland about the proposals on the changes to appointment and removal arrangements. The feedback was relatively neutral. The board saw that the changes were required as a consequence of the Starrs v Ruxton case and the ECHR. We also asked the board about the tribunal arrangements; it was already familiar with that mode of operation because it deals with such arrangements for under-18s and discretionary lifers. The board was content for those provisions to be extended to mandatory life prisoners.

Gordon Jackson: There will be regulations in proposed paragraph 1A under section 5(2) about appointment to the Parole Board. We have never had regulations like that before, have we?

Niall Campbell: No.

Gordon Jackson: This is the famous question that we always ask—are we going to have sight of those regulations before we pass the legislation? We are a cynical mob when it comes to passing legislation before we see regulations.

Niall Campbell: They are not drafted. We could look into whether we could give you some idea of the measures that will be in the regulations, if that would be helpful.

Gordon Jackson: That would be helpful. Obviously we can guess what is going to be in the regulations, but before we pass legislation it would be helpful to have guidance on that.

Parole Board for Scotland members can now serve for six or seven years, depending on the time of year when they start, but they cannot be reappointed. Is there a legal reason why they cannot be reappointed? Some of them have great experience; and if we wait for another six years, some will not be eligible for reappointment.

Robin MacEwen: That was to ensure that there could be no perception of Scottish ministers exercising influence over the members of the board, if they thought that they might possibly be reappointed at the end of the six years.

Niall Campbell: Six years is twice as long as the current appointment period. It is a long period. In a sense, that would mean consideration of a third term of appointment, which is now unusual in public appointment arrangements.

Gordon Jackson: I understand the rationale behind that.

The Convener: Are those appointments subject to affirmative or negative procedure?

Niall Campbell: I am sorry, but I do not know the answer to that offhand.

Robin MacEwen: I will check, but I think that they are subject to negative procedure.

Niall Campbell: I am told that the appointments are subject to affirmative procedure.

Euan Robson: Are we following custom and practice on the six or seven-year period, or was that time scale chosen for a reason? How was the upper age limit of 75 arrived at?

Niall Campbell: The period of appointment of

six or seven years is a doubling of the current length of appointment. The option of six years or seven years has come about because people might be appointed halfway through a year—it gives us flexibility.

The upper age limit of 75 is partly to enable retired members of the judiciary to serve on the Parole Board for Scotland; they have a crucial function in chairing tribunals.

Euan Robson: The tribunal that is mentioned in proposed paragraph 3B under section 5(4) is to have three members who shall be

"(a) either a Senator of the College of Justice or a sheriff principal (who shall preside);

(b) a person who is, and has been for at least ten years, legally qualified; and

(c) one other person."

The implication is that the other person should be a lay person.

Robin MacEwen: The other person would not have to be a lay person.

Euan Robson: But as proposed paragraph 3B(b) states, it must be someone who has been legally qualified for 10 years, so why not say that two persons should have been legally qualified for 10 years?

Niall Campbell: That is to ensure that one person would have those qualifications. It might depend on who is available to make up the tribunal—which might be another legally qualified member of the Parole Board for Scotland or it might be a lay member. It gives flexibility.

Euan Robson: So the intention is to be flexible rather than to suggest that the "one other person" should be a lay person.

Niall Campbell: Yes. That is right. About a quarter, or perhaps less, of the members of the Parole Board are legally qualified.

12:45

Robin MacEwen: Is Euan Robson referring to proposed paragraph 3B(b) under section 5(4) on page 7?

Euan Robson: Yes.

Robin MacEwen: That paragraph relates to the tribunal that would be convened to remove a member of Parole Board for Scotland.

We might have been talking about tribunals of the Parole Board, which would be convened in order to consider somebody's release. In that case, the other person would not be a member of the Parole Board.

Niall Campbell: I am sorry, we were talking at cross-purposes. I was talking about the composition of tribunals to deal with parole cases. Proposed paragraph 3B is about the tribunal to remove from office. It does not say that the "one other person" must be a non-lawyer, but it is quite likely that the third person would be a non-lawyer as the two other members of the tribunal would both be legally qualified. There is no such requirement. "One other person" could be any kind of person. I am sorry that I was talking at cross-purposes earlier.

The Convener: I am sure that it will all become crystal clear when we go through the bill line by line.

The policy memorandum states that the purpose of the section is to ensure that

"reappointment and removal of members is not at the discretion of the Scottish Executive".

However, then it states:

"Appointments would still be made by the Scottish Ministers".

How do the regulations square that circle? Is appointment by the Scottish ministers just a rubber stamp?

Niall Campbell: The ECHR problem is not so much about appointment as removal or failure to reappoint. That is where the tribunal has been brought in.

The Convener: We will move on to legal aid.

I ask again about who was consulted. I presume that the Scottish Legal Aid Board and the Law Society of Scotland were consulted.

Niall Campbell: Yes, those were the main people who we consulted. We have, through a tripartite group, a system of regular discussions with the Legal Aid Board and the Law Society. We meet regularly and discuss all aspects of legal aid. The proposals have been discussed in that group as ways of dealing with problems that we have come up against in the fixed-fees scheme, which was developed through discussions in that group. The fact that the Law Society was represented enabled us to draw on the views of its members.

The Convener: Does the Law Society think that the proposals go far enough in providing a requisite amount of legal aid to match the ECHR requirements?

Niall Campbell: It is for the Law Society to answer that question, but I hope that it does. We have had a lot of discussion on the problem of how to deal with exceptional cases in the context of fixed fees. We have tried to produce workable arrangements.

Maureen Macmillan: Were there discussions about access to justice through civil legal aid?

Paragraph 114 of the policy memorandum refers to Airey v Ireland and access to civil proceedings. Were representations made to you about lack of access because of financial criteria for eligibility?

Niall Campbell: Issues of eligibility have been discussed frequently with us and we know—following the consultation on access to justice that led to the community legal service working group—that eligibility issues are very important. The Legal Aid Board is continuing research into eligibility and contribution work because of the apparent fall in the amount of civil legal aid. Those issues are being addressed by the community legal service working group.

Maureen Macmillan: You do not regard them as part of the bill.

Niall Campbell: No—not really. The crucial requirements are summary criminal legal aid and the extension of the availability of legal aid to certain types of tribunal.

Maureen Macmillan: The bill contains a very broad definition of tribunals. Does the definition cover, for example, Department of Social Security tribunals, for which advice and assistance is currently unavailable?

Ian Allen (Scottish Executive Justice Department): That is impossible to say. Once we get the powers, we will have to consider the whole raft of tribunals and determine which ones would need representation and the way in which that representation should be provided. These are early days.

Maureen Macmillan: I wonder whether, because social security is a reserved matter, there would be difficulties with that.

Ian Allen: We have made legal aid available for employment tribunals, which is a reserved area, so I do not foresee a problem. Legal aid is a devolved matter. However, we will have to sit down and consider the other tribunals.

Niall Campbell: We are talking about a broad enabling power to meet the requirements of the ECHR on legal aid—

Maureen Macmillan: But not the details. Will the details be worked out later?

Niall Campbell: Yes.

Michael Matheson: Which tribunals—for which legal aid is currently unavailable—might, as a result of the extension of the definition of tribunals, become entitled to civil legal aid? I presume that you have some idea.

Ian Allen: We know that there is a raft of tribunals, but we must take legal advice on their proceedings, the way in which the tribunals operate and the extent to which representation is needed. We are talking about VAT tribunals, social security tribunals and others. I do not want to say which tribunals we will make legal aid available for, because we just do not know.

Michael Matheson: The availability of legal aid would have an impact on the financial memorandum.

Ian Allen: Yes, it would. That is why the financial memorandum says that the costs will be determined by the number of tribunals, the way in which legal aid is organised, the number of applications that are received and the cost of those cases.

Michael Matheson: Do you expect to have a better idea of which tribunals will be eligible for civil legal aid before the bill is enacted?

Niall Campbell: We will see what further information we can provide while the bill progresses, as we develop our thinking on that matter.

The Convener: I know that the ECHR is a moving target, but is it not a bit rich to ask the Parliament to pass legislation on which legal advice will not be taken until later, and the potential costs of which are plucked from the air? If the powers in part 6 of the bill effectively allow Scottish ministers to change any piece of legislation that they choose—including the bill—why do we need a Parliament at all?

Niall Campbell: We will try to provide you with some more information on the kinds of tribunals that are likely to be affected.

The Convener: We will return to the matter, but because of the Parliament's accommodation constraints, we must adjourn at 1 o'clock. The committee must still consider some statutory instruments, which will take up the remaining few minutes.

I thank the witnesses for their attendance. After I have talked the matter over with the committee, we may have to ask the witnesses to return to explain some other parts of the bill to us. I apologise for that.

Niall Campbell: Not at all—we would be happy to come. Thank you very much.

Subordinate Legislation

The Convener: Item 5 is three negative Scottish statutory instruments. The first is the Act of Sederunt (Fees of Sheriff Officers) 2000 (SSI 2000/419). Members have a note from the clerk on this instrument. Do members want to raise any issues?

Members: No.

The Convener: The committee has no comments to make on that SSI.

The second instrument is the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 2000 (SSI 2000/420). Are there any comments?

Michael Matheson: Why do the sheriff officers get 3.5 per cent and the poor solicitors get only 3 per cent?

The Convener: I noted that. Perhaps it is in recognition of the fact that lawyers are probably paid too much already.

Gordon Jackson: Or of the fact that Mr Sheridan's member's bill has removed most of their work.

Michael Matheson: So, this is financial compensation for them.

Gordon Jackson: For the record, my previous comment was not meant to be serious.

The Convener: I take it that members have no further points to raise on the instrument.

Members *indicated agreement.*

The Convener: The third statutory instrument is slightly more interesting. It is The Divorce etc (Pensions) (Scotland) Amendment (No 2) Regulations 2000 (SSI 2000/438). Members will recall that, at one of our meetings before the new year, we considered the Divorce etc (Pensions) (Scotland) Amendment Regulations 2000, a defect in which was pointed out by the Subordinate Legislation Committee. We made representations on that to the Executive, but it turned out that that part of the statutory instrument was not necessary. The Executive has sent us an amending SSI, which removes that provision and expands the instrument slightly in relation to state rights schemes. Do members have any comments to make on the instrument?

Members: No.

The Convener: Thank you. That concludes the meeting. The next meeting of the committee will be on 30 January at 2 o'clock.

Meeting closed at 12:57.

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