# JUSTICE 1 COMMITTEE

Tuesday 6 February 2001
(*Morning*)

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliamentary Corporate Body publications.

# CONTENTS

## Tuesday 6 February 2001



## JUSTICE 1 COMMITTEE
**3rd 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

**THE FOLLOWING MEMBER ALSO ATTENDED:**

Iain Gray (Deputy Minister for Justice)

**WITNESSES**

Michael Clancy (Law Society of Scotland)
Anne Keenan (Law Society of Scotland)
Ian Smart (Law Society of Scotland)

**CLERK TO THE COMMITTEE**

Lynn Tullis

**SENIOR ASSISTANT CLERK**

Alison Taylor

**ASSISTANT CLERK**

Jenny Goldsmith

**LOCATION**

The Chamber

# Scottish Parliament

## Justice 1 Committee

*Tuesday 6 February 2001*

(*Morning*)

[THE CONVENER *opened the meeting at 10:01*]

**The Convener (Alasdair Morgan):** Good morning, colleagues. I have potential apologies from Gordon Jackson, who has a partial clash with the Subordinate Legislation Committee, and I welcome Paul Martin to his first meeting of the committee.

Following on from last week's meeting, Phil Gallie suggested, in relation to petition PE89 from Eileen McBride on enhanced criminal record certificates, that we should consider whether individuals should be informed that a request to view such a record had been made. I said that I would take the issue away and think about it. I will write to the minister to find out whether he intends to inform people as a matter of course and will bring the matter back to the committee.

## Interests

**The Convener:** Item 1 is declaration of interests. Does Paul Martin have any relevant interests to declare?

**Paul Martin (Glasgow Springburn) (Lab):** I have no interests to declare.

## Items in Private

**The Convener:** We will take item 2 in private.

**Phil Gallie (South of Scotland) (Con):** On a point of order. I have no objection to item 2, on consideration of lines of questioning on the Convention Rights (Compliance) (Scotland) Bill, being taken in private, but I object to item 6 being taken in private. I record that at this point and suggest that the item be taken in public.

**The Convener:** We agreed at our last meeting that we would take item 2 in private. Item 3, which will be taken in public, will include a discussion on whether we take item 6 in private. I hope that that is not too confusing.

**Phil Gallie:** That is fine.

**The Convener**: We move to item 2.

10:03

*Meeting continued in private.*

10:09

*Meeting resumed in public.*

**The Convener:** We move to item 3. First, I suggest that at the meeting on 14 February, we discuss the format of our report on the Convention Rights (Compliance) (Scotland) Bill in private, as is usual with draft reports. Is that agreed?

**Members** *indicated agreement.*

**The Convener:** Secondly, we must consider whether item 6, a discussion of the paper from the conveners group on increasing the effectiveness of committees, should be taken in private. I believe that Phil Gallie has a reservation.

**Phil Gallie:** Yes. I feel that there is a degree of creeping secrecy, which does not fit this open Parliament. I do not see anything in the report that means that the item should be taken in private. I suggest that it should be taken in public.

**The Convener:** I have no problem with that. The only problem is that the paper has been designated a private paper, presumably by the conveners group, so it would not be available to the public, which might hamper their understanding of our debate. However, I am quite happy for the debate to be in public.

**Phil Gallie:** I question why the conveners group has determined that this should be a secret paper. I suggest that we accept your guidance on that, but hold the debate in public.

**The Convener:** I take your point. I can check why it is a private paper; it may be that the bureaucracy automatically made it a private paper without giving it a great deal of thought. I suspect that it may be a sin of omission rather than a sin of commission. We will have the debate in public.

**Phil Gallie:** Thank you very much.

## Subordinate Legislation

**The Convener:** We move to item 4, which is consideration of subordinate legislation. Two motions will be moved and debated separately. We have with us Iain Gray, the Deputy Minister for Justice. I ask him to speak to and move motion S1M-1561, on the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No 2) Regulations 2001.

**The Deputy Minister for Justice (Iain Gray):** I will say a few words of explanation.

This Scottish statutory instrument refers to the Terrorism Act 2000. Terrorism is a reserved matter. The overall policy behind the 2000 act is to move towards a single UK-wide counter-terrorist regime. It is therefore desirable that there be a single, consistent approach to the provision of legal aid for proceedings under the 2000 Act. With that in mind, the Executive gave the UK Government an undertaking that it would introduce appropriate amending regulations in due course, hence my appearance before the committee this morning.

The regulations' purpose is to provide assistance by way of representation—or ABWOR—without reference to the detainee's means, for any proceedings in connection with an application for a warrant of further detention or for extension of such a warrant under schedule 8 to the Terrorism Act 2000. That will allow a solicitor not only to provide advice to a detainee, but to represent him or her in proceedings. As the detainee would be in custody and as, in view of the immediacy of the proceedings, it is extremely unlikely that a solicitor would be able to verify his client's financial status, the proposal is that ABWOR be made available to detainees without the solicitor undertaking any form of means assessment.

It is worth putting the proposal in context. Since 1996, only one case has arisen of an individual being detained in Scotland on suspicion of being involved in terrorist activities. We have no reason to believe that such cases will occur more frequently in future, but we believe that it is prudent to provide for the possibility.

I move,

That the Justice 1 Committee recommends that the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No 2) Regulations 2001 be approved.

**The Convener:** Thank you. Do any members want to speak on the regulation?

**Phil Gallie:** Are people suspected of being involved in terrorist activities the only ones who would be in custody without charge and would require ABWOR, or could there be parallel cases involving others involved in criminal law procedures?

**Iain Gray:** The regulations refer only to detentions under the Terrorism Act 2000, because the provisions are so specific and unusual. The detention requires an extension to take place within 48 hours of the arrest taking place. During those 48 hours, the person involved will be in detention. That is why there is no opportunity for a proper financial assessment to be done. The danger would be that if proper legal representation were not available, someone who was suspected of terrorist activity might escape the criminal justice system. It is prudent to ensure that legal assistance is available.

10:15

**Phil Gallie:** I am on the side of prudence, minister, but it seems to me that the terrorism legislation has been in place for a long time and that there has been no difficulty with it in the past. I wonder why the Executive feels it necessary to introduce this new proposal now. If there is a reason under the European convention on human rights, I should point out what Michael Matheson reminded me of last night: that the ECHR has had some influence on UK law since 1952 without being incorporated. Perhaps the minister could expand on that.

**Iain Gray:** I do not know whether I can expand on the final point. It is true that the situation that we are dealing with today—the extension to detention that must be made within 48 hours—was introduced by the Terrorism Act 2000. The situation that is being dealt with is new and different.

**The Convener:** The question is, that motion S1M-1561 be agreed to.

*Motion agreed to.*

That the Justice 1 Committee recommends that the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No 2) Regulations 2001 be approved.

**The Convener:** The second motion before us is S1M-1560, on the Legal Aid (Scotland) Act 1986 Amendment Regulations 2001.

**Iain Gray:** The main purpose of this instrument is to add proceedings before the proscribed organisations appeal commission under the Terrorism Act 2000 to schedule 2 to the Legal Aid (Scotland) Act 1986, which sets out the civil proceedings for which civil legal aid is available. The 2000 act re-enacts and extends the proscription regime that exists under the Prevention of Terrorism (Temporary Provisions)

Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996. To ensure that the provision is fully compliant with the ECHR, the 2000 act introduces a new route of appeal for a person affected by an organisation's proscription. The person first applies to the Home Secretary for de-proscription. If the Home Secretary refuses that application, the applicant can appeal to the POAC.

It is difficult to predict whether people affected by the proscription of organisations will take advantage of the right of appeal. The UK Government has estimated that there may be no more than four such cases in any year and it seems unlikely that any of those will take place in Scotland because, although the UK Government believes that it is important for the proscription regime to be available for domestic as well as Irish and international terrorist groups, it is unlikely that any group based in Scotland would be proscribed. Nonetheless, it is prudent to introduce the amendment to ensure that, should a case arise, the necessary provisions are in place.

The instrument also takes the opportunity to make two minor technical amendments to schedule 2 to the Legal Aid (Scotland) Act 1986. The Competition Act 1998 reformed competition law and one of the effects of that was the repeal of the statutory provisions that established the restrictive practices court, effectively ending its existence. The instrument removes the reference to that court. The second change involves updating a reference to article 177 of the EEC treaty, since that has become—for reasons about which I have no idea—article 234. Those technical amendments bring the act up to date.

The regulations, along with the more substantive provision, are a worthwhile addition to the system in Scotland.

I move,

That the Justice 1 Committee recommends that the draft Legal Aid (Scotland) Act 1986 Amendment Regulations 2001 be approved.

**Phil Gallie:** The regulations are somewhat different. I have no argument with the minister's technical amendments, but I have strong feelings about civil legal aid. There are many reasons why civil legal aid should be extended, but the last one that I can think of is one that is linked to terrorist involvement. I do not understand why terrorist organisations should be given any additional privileges with respect to civil legal aid. I am aware that the legal aid process is under review and that the committee is examining the issues. Perhaps this issue could be considered later as part of that examination. I am not persuaded that the regulations represent a good extension of our civil legal aid requirements, irrespective of the fact that the right of appeal may not be used much, if at all.

**Iain Gray:** Mr Gallie makes the important point that this committee is conducting an inquiry into legal aid. That might be a better forum for an examination of the extent of availability of legal aid than today's discussion.

It is worth pointing out that someone who uses the appeals procedure might not be a member of the proscribed organisation but might be affected by the proscription. For example, they might seek civil legal aid for a reason that is not directly connected with their involvement in terrorism.

**The Convener:** I assume that we are talking about an individual acting on his own behalf. What are the provisions for an organisation to appeal against its proscription? Would the proposal cover a person appealing on behalf of an organisation rather than on a personal ground?

**Iain Gray:** It would cover both those situations, but the organisation could not appeal against its proscription; an individual would have to.

**Phil Gallie:** With regret, I have to say that I am not persuaded by the minister's arguments. I can think of many just cases in which civil legal aid should be made available, but cases of the sort that we are discussing fall well outside the priorities that I would list. On that basis, I cannot accept your comments.

**The Convener:** I am surprised that Phil Gallie did not pick up on the fact that the second technical amendment is presumably caused by the insertion of another 57 articles in one of the European treaties, most of which I presume he thinks are burdensome on us.

**Phil Gallie:** May I answer that? I took the minister's word that the amendment was merely a technicality. I did not want to go through each article in turn.

**The Convener:** I do not share Phil Gallie's view on the more substantive issue. If the Home Secretary has proscribed an organisation, it is fundamental that individuals who are affected should be able to appeal, on the basis that even secretaries of state have been known to get it wrong on occasion. Proscribing an organisation is a draconian step and is open to appeal. The question is whether that kind of appeal should be any less liable to assistance in the courts than any other kind of appeal.

**Maureen Macmillan (Highlands and Islands) (Lab):** Does the measure affect organisations that are already proscribed or are we talking only about new organisations?

**Iain Gray:** Organisations that are already proscribed would be covered and it would be possible for an individual to appeal on that basis. I stress to Mr Gallie that we are talking about an individual right of appeal and that there is no

question of civil legal aid being made available to the organisation that has been proscribed. As the convener implied, legal aid would be available only to the individual.

**Phil Gallie:** I want to make it clear that I am not against the right to appeal, but I am against the right for an individual to get state aid for an appeal in such cases. As I have said, there are higher priorities. However, despite the minister's comments about the various groups, I can assure him that any such person would have the backing of the proscribed group. Many of those groups are very well funded and could afford to fund the appeal on behalf of the individual. If we follow this line, we will have got our priorities totally wrong.

**The Convener:** Presumably a person appealing under that provision would be someone who was resident in Scotland. I assume that the decision on whether to grant legal aid would be subject to the usual checks on their financial status.

**Iain Gray:** That is absolutely correct. In answer to Mr Gallie's final point, I should say that if there were an alternative source of financing for the appeal, it would be open to the Scottish Legal Aid Board to refuse civil legal aid.

**The Convener:** The question is, that motion S1M-1560 be agreed to. Are we agreed?

**Phil Gallie:** No.

**The Convener:** There will be a division.

**FOR**

Jackson, Gordon (Glasgow Govan) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Morgan, Alasdair (Galloway and Upper Nithsdale) (SNP)
Robson, Euan (Roxburgh and Berwickshire) (LD)

**AGAINST**

Gallie, Phil (South of Scotland) (Con)

**The Convener:** The result of the division is: For 6, Against 1, Abstentions 0.

*Motion agreed to.*

That the Justice 1 Committee recommends that the draft Legal Aid (Scotland) Act 1986 Amendment Regulations 2001 be approved.

**The Convener:** We are required to report to the Parliament on the affirmative instruments. Usually the reports on such instruments are fairly short and follow a formula. I propose that we circulate the draft report on the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No 2) Regulations 2001 by e-mail and send it out subject to comments by members. I would propose the same procedure for the draft Legal Aid (Scotland) Act 1986 Amendment Regulations 2001, but perhaps Phil Gallie would like more time to consider that draft report and discuss it in committee.

**Phil Gallie:** I would be happy for us to follow the arrangements for the report on the first instrument, providing that my views are reflected. If there were any disagreement after the e-mail had been circulated, it could come back to the committee for discussion.

**The Convener:** I am told that we have to report to Parliament by 12 February, which would take us up to our next meeting. We will circulate a draft by e-mail taking account of the views that have been expressed in committee. If that draft is accepted, it will form our report; if it is not, we will consider how best to proceed.

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

**The Convener:** We will now take further evidence on the Convention Rights (Compliance) (Scotland) Bill. We are joined by witnesses from the Law Society of Scotland: Ian Smart, the convener of the legal aid committee, Michael Clancy, the director, and Anne Keenan, the deputy director.

To what extent was the Law Society of Scotland involved in consultation before the bill was drafted? How wide was that consultation?

10:30

**Michael Clancy (Law Society of Scotland):** We were not consulted on the provisions of parts 1, 2, 4, 5 and 6. We were specifically involved in discussions on part 3, which relates to legal aid. The text of the provisions was not shown to us, but there was discussion about issues such as exceptional cases and the employment of solicitors by the Scottish Legal Aid Board. The first time that we knew what the Executive was proposing was when the bill was published.

**The Convener:** Did you expect a wider degree of consultation, perhaps not on the precise text, but on the more general issues floated in the different parts of the bill?

**Michael Clancy:** The Executive has been renowned for being more open since devolution. One may say that there should have been more consultation; however, we were quite happy with the level of consultation in the discussions with the tripartite working group.

**The Convener:** Did that include any discussion of the areas that such a bill should cover? In other words, were you aware that a bill was going to be introduced that would cover roughly the same subjects—perhaps not the detail—that are included in the bill that is before us?

**Michael Clancy:** Yes, we were. The Executive wrote to us in October, informing us that such measures were being considered.

**The Convener:** At that time, did you write back and say that you agreed that those subjects should be covered, but suggested that the bill should cover additional topics?

**Michael Clancy:** We had thoughts that there might be other issues that could be considered. However, having canvassed only one or two, we were told that the scope of the bill was pretty set.

**The Convener:** Could you outline any matters that should be included in the bill or in a second compliance bill to be introduced at a later stage?

**Michael Clancy:** We had been thinking about amendments to solicitors' legislation, to assist us in our compliance with the convention.

**The Convener:** Okay. Let us go through the bill beginning with part 1, which relates to prisoners on parole.

**Michael Matheson (Central Scotland) (SNP):** As you are aware, under part 1, a mandatory life sentence will include a punishment part and a risk element. When the Executive gave evidence, it suggested that the reason for a distinction between punishment and risk was to make the sentencing process more transparent. The policy memorandum suggests that it is at the judge's discretion what factors he should take into consideration when setting the punishment element. Do you think that judges should be issued with guidance on what factors should be taken into consideration when setting the punishment part?

**Anne Keenan (Law Society of Scotland):** The provisions will make the system more transparent. They should give the prisoner greater certainty about the term of their sentence and allow the prison authorities an idea of the period in which they can work towards rehabilitation. The judges will have to set the punishment part, but that is something that they already do in relation to discretionary life sentences. The difference is that they will now have to do it in open court.

In regard to guidance, I was reading a case from 1999—O'Neill v Her Majesty's Advocate—in which the whole issue of guidance and what factors judges should consider in setting discretionary life sentences were discussed fully. Given that the provisions will mirror section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993—provisions that exist for discretionary life prisoners now in a mandatory setting—the judgment of the Lord Justice General will provide guidance to members of the judiciary.

**Phil Gallie:** I am sorry to interrupt, but Anne is talking away from the microphone and my old ears are not picking up what she is saying.

**Anne Keenan:** Sorry. I shall try to speak a bit louder. Have you heard what I have said so far, Mr Gallie?

**Phil Gallie:** Pardon? [*Laughter.*]

**Anne Keenan:** Basically, guidance is given in case law—in the case of O'Neill v Her Majesty's Advocate—that would be of assistance to the judiciary. However, the provisions in the bill should allow members of the judiciary sufficient flexibility to consider the individual circumstances of each case and to take into account both the mitigating factors and the aggravating factors of various

cases, where that is appropriate.

**Michael Matheson:** In England, a board has been established to examine the provision of guidance to judges and to determine what factors should be considered. You say that case law exists to which judges can refer, but there is potential for inconsistency in the cases that judges consider. I wonder whether guidance might help to provide greater consistency on specific issues that judges should consider when they are issuing the punishment part of a sentence.

**Anne Keenan:** The 1993 act provides some guidance, in that it states that judges should consider the individual circumstances of each case and have reference to previous convictions, which are of assistance to them in any event. However, they should not forget that the 1993 act contains an appeal provision, and that the punishment part of a sentence would become part of the sentence that would be open to appeal, both by the accused person and by the Crown. That should allay any concerns about inconsistency in sentencing, as sentences would always be subject to the right of appeal.

**Michael Matheson:** When establishing the punishment part of a sentence for an adult mandatory life prisoner, the judge will be able to give a punishment part that exceeds the individual's natural life expectancy. For example, someone may be 25 or 26 when they are judged, and the judge may say that the punishment part will be 60 or 70 years. That is life without parole. Do you think that it would be more explicit to say that the punishment part would be life without parole?

**Anne Keenan:** The current provisions allow the court to operate in a way that is appropriate to each case. Stating the provisions as they are stated in the bill allows sufficient discretion for the judges to operate in that manner. I do not see the need to specify life without parole. It is up to judges to specify the punishment part that they think is appropriate. Someone may exceed that life expectancy, in which case they would be eligible for parole, so that right would not be taken away completely.

**The Convener:** There seems to be a contradiction. The Executive's policy memorandum suggests that a judge should

"specify a period of years which, if appropriate, clearly exceeded the individual's life expectancy."

That assumes that, apart from being a lawyer, the judge is also a medical practitioner. Is that satisfactory?

**Anne Keenan:** The judges must consider the crime in itself and constrain themselves to giving what they believe is an appropriate punishment part—an appropriate way in which to measure deterrence and punishment to reflect society's concerns. If the crime is of sufficient seriousness, the punishment part may exceed the person's life expectancy, and that may be another consideration that the judges have to take into account.

**The Convener:** You seem to be saying that it would be coincidental that the punishment part would exceed the person's life expectancy not, as is suggested in the policy memorandum, that the punishment part should be set deliberately to exceed the person's life expectancy.

**Anne Keenan:** I am saying that life expectancy is another factor to be taken into account when judges are considering the punishment part as a whole.

**Michael Matheson:** You will be aware that, in its evidence, the Executive indicated that 500 cases of mandatory life prisoners will have to be reviewed by judges to establish the punishment part of the sentences. I am concerned about the implications that that may have for judges' time and about the impact that it may have on High Court proceedings. Do you think that that review could have an adverse effect on proceedings in the High Court? If so, what might that impact be?

**Anne Keenan:** That is difficult to say. The review will have some impact, as approximately 500 cases will have to be dealt with. The issue is being considered by the Lord Justice General and provisions are being made to accommodate it. I cannot comment further on the matter.

**The Convener:** The policy memorandum says that the review will

"create a considerable amount of work".

As we do not have judges sitting around idly, I presume that that will result in delays to other cases or that more judges will have to be recruited. Have you given any thought to which outcome there might be?

**Anne Keenan:** We have not discussed the matter in detail. Timetabling will be an issue for Scottish courts and the Lord Justice General to consider.

**The Convener:** Let us turn to the issue of risk assessment, which is an important factor in determining parole. We have asked other bodies about it, and there seems to be no clarity in the bill or the guidance notes about the way in which risk is assessed. Given that risk assessment will never be an exact science, do you think that the criteria should be made more explicit to the public? The public is concerned that people will be released into society who are, allegedly, no longer a risk but who will proceed to commit an offence.

**Anne Keenan:** The Parole Board for Scotland receives extensive reports. I have no personal experience in the matter, but practitioners in the field to whom I have spoken say that those reports are fairly detailed. A number of professionals, such as psychiatrists, have input to those reports as well as the accused person.

I appreciate what you are saying. In the wider context of the proposed reforms, the MacLean committee has recommended the formation of a risk management authority. That may be a recommendation for us to consider in conjunction with the proposals in the bill.

**Maureen Macmillan:** When the 500 cases are reviewed, will there be any real change in the length of time served? On one hand, newspaper headlines are saying that all the murderers are going to be released; on the other hand, lawyers are saying that their clients in jail are worried that their sentences will be increased considerably. What do you think will happen?

**Anne Keenan:** It is difficult to say, because the procedure is not in force just now. It will depend on how the judges operate the punishment part. According to what the practice is supposed to be at present, the judiciary should be consulted before a mandatory life prisoner is released, to ascertain whether the deterring from punishment part of the sentence is fulfilled. However, that decision is actually arrived at after the Parole Board for Scotland has made a recommendation for release, based on the risk assessment period. In a way, we have only an inverse version of the procedure whereby the judiciary set the punishment part first and the risk assessment comes later. In theory, there should not be a difference in the length of the sentences, but we will have to wait to find out how the judiciary will operate the punishment part.

**Phil Gallie:** The current system has been with us for a long time. To a degree, it could be justified on the basis that ministerial involvement is a democratic responsibility. Ministers' responsibility for social order must be a factor. Can you give any examples of perceived injustices under the current system?

**Anne Keenan:** I have with me no examples of perceived injustices.

**Phil Gallie:** Could not it be argued that, if it ain't broke, don't fix it?

10:45

**Anne Keenan:** We have to consider areas that may be non-compliant. In one view, the current provisions may in theory comply with the European convention on human rights. However, in practice, the intervention of a minister in the process results in what is, in effect, a review of an indeterminate sentence and the lawful detention of a person. If a minister intervenes in the process, issues of compliance with ECHR law may have to be addressed. A review under article 5.4 of the convention should be carried out by a court-like body, which in the circumstances would be the Parole Board. If the practice of intervention continued, I could understand concerns that the current system was not ECHR compliant.

**Phil Gallie:** The key phrase that you are using is "may be". Again, we seem to be acting without confirmation that there is a real need to do so. Why should we legislate on the basis of "may be"?

**Anne Keenan:** I can see the merit in intervening in such situations. The case law of the European Court of Human Rights shows that there has been a gradual trend towards the procedure that the Executive has put in place. The judgment in Wynne v UK, which was decided in 1994, refers to the opinion of one of the judges in the House of Lords decision that

"discretionary and mandatory life sentences . . . may now be converging"

and that

"the time is approaching when the effect of the two types of life sentences should be further assimilated",

but that that was a job for Parliament rather than the judiciary to address. That matter was addressed in the context of the European convention on human rights, so it is fair to assume that there is tendency to assimilate the two types of sentences, and that therefore there is a need to intervene.

**Phil Gallie:** I will change tack. Your submission states that there are benefits to giving prisoners greater clarity about their release. The Parliament recently debated the issue of victims. There seemed to be general agreement that victims' interests were paramount. There is some benefit to stating fixed periods for which sentences must be served before parole is considered. Will that have an effect on sentences? Will sentences be lengthened? Will judges consider the seriousness of crimes, take into account the effect that they have had on victims, and set longer periods for detention than exist at present?

**Anne Keenan:** As I said to Maureen Macmillan, it is difficult to say how judges will react when they set the punishment part of sentences. Judges are used to dealing with those aspects and taking into account all the circumstances of the case, including—quite properly—the impact of the crime on the victim. Therefore, I do not know whether it will have any greater effect. All we will have is a statement of what the punishment part of the sentence is. The accused person will have a greater understanding of the minimum time that

they must serve. The victim will also have more information than they currently have; victims previously had to guess when the accused would be eligible for parole. Ultimately, decisions are a matter of risk assessment for the Parole Board.

**Phil Gallie:** I think that I read somewhere that in only 5 per cent of sentences does the judge set recommended periods of detention. Otherwise, a life sentence means life. What is your view of that? Will there be a major change in judges' and the Parole Board's interpretations as a consequence of setting the punishments? I do not think that I am being very clear.

**The Convener:** We are agreed on that.

**Phil Gallie:** Let me ask a simple question: is it the case that if a recommended period of detention is not set, a life sentence means, in effect, life?

**Anne Keenan:** Under the terms of the statute, judges will have to set a punishment part of a sentence. The confusion may have arisen in relation to discretionary life sentences, where there is case law to the effect that if the judge does not state a punishment part, the assumption is that the person is detained for life. Under the proposed legislation, judges will have to set the punishment part of the sentence, so that difficulty should not arise.

**Gordon Jackson (Glasgow Govan) (Lab):** I confess that Mr Gallie has asked everything that any human being could think of asking.

**The Convener:** I assume that that is a veiled compliment to Phil Gallie.

If there are no further questions on part 1 of the submission, we will move on briefly to part 2, on the Parole Board. There is nothing in the bill or the explanatory memorandums about the rules that will regulate the appointments procedure. Although they do not have to be covered in the bill, do you think that we should have more detail on them before the bill is enacted?

**Anne Keenan:** It would be helpful to see the regulations before the bill was passed. I think that that point has been made many times in relation to other bills—certainly in relation to the Regulation of Investigatory Powers (Scotland) Bill. It is helpful to have regulations in advance so that they can be read in conjunction with the provisions of the bill.

**The Convener:** In general, do you think that the procedures are compliant with the ECHR, in so far as you can judge from what is in the bill?

**Anne Keenan:** I have no difficulty with the provisions. Clearly, the appointment of members of the Parole Board will still be made by Scottish ministers, but their security of tenure—the important factor for independence under article 6—has been guaranteed by the provisions on the length of time for which members will serve and on their removal from office by an independent tribunal.

**Euan Robson (Roxburgh and Berwickshire) (LD):** I have some brief questions on part 2. I see that you consider the bill to be basically acceptable.

New paragraph 2C in section 5(3) refers to an age limit of 75. Is it a departure to specify an upper age limit in that way?

**Anne Keenan:** I understand that that is also the upper limit for judges, so that does not represent a departure.

**Euan Robson:** It is consistent with the age limit for judges.

New paragraph 3B states that the tribunal will consist of a senator of the college of justice, a person who is legally qualified and "one other person". Is it intended that that person should be a layman?

**Anne Keenan:** I assume that that is the intention. That tribunal is for removal from office.

**Euan Robson:** Yes. Does the Law Society think that it is important that there should be a lay person on that tribunal?

**Anne Keenan:** An important part of any tribunal is that there should be lay involvement in its decision-making process.

**Euan Robson:** The new paragraph says "one other person". It does not say "one other lay person". One has to infer that that person is not legally qualified.

**Michael Clancy:** You are spot on. New paragraph 3C requires to have an inference brought to it. In other legislation, the phrase "who shall not be legally qualified" is used. That would therefore be an appropriate amendment to the bill to make it clear beyond peradventure that that was what was intended.

**Euan Robson:** Should such an amendment be included in the bill?

**Michael Clancy:** That would be appropriate.

**The Convener:** We move to part 3, on legal aid.

**Maureen Macmillan:** Is the Law Society concerned that the measures that are proposed in part 3 of the bill do not go far enough to meet ECHR requirements in respect of the provision of legal aid? In your written submission you quote Airey v Ireland—is that relevant here?

**Ian Smart (Law Society of Scotland):** We think that there are remaining ECHR issues, especially in relation to financial eligibility for civil legal aid,

that have yet to be addressed. I do not want to trespass on other areas of the committee's work, but members will be aware from the submissions to the inquiry on legal aid that financial eligibility in civil legal aid is a big issue. Further submissions on that are still to come in from the Law Society. To be fair, this is a non-money bill—to deal with the issue of financial eligibility would have significant financial consequences for the Executive. We think that that matter cannot be addressed in the bill.

**Maureen Macmillan:** But perhaps in another bill?

**Ian Smart:** We hope that financial eligibility will be a significant matter in the recommendations that emerge from the Justice 1 Committee inquiry into legal aid. Questions on financial eligibility for civil legal aid are raised in the preliminary submissions, not only from the Law Society but from other interested parties, including—interestingly enough—the Scottish Legal Aid Board. We think that those questions should be addressed.

**Michael Clancy:** The community legal service working group is also considering those issues. As you know, the Executive plans for that group to issue a report by the end of October.

**Maureen Macmillan:** So the bill is probably not the appropriate place to address the matter.

**Ian Smart:** We do not need primary legislation to address that matter. We could bring in secondary legislation to amend the current financial eligibility regulations. I cannot remember what those are, but the civil legal aid financial regulations are made as subordinate legislation to the Legal Aid (Scotland) Act 1986.

**Maureen Macmillan:** I understand.

On tribunals, sections 6(1) and 6(2) of the bill concern the extension of assistance by way of representation and civil legal aid to tribunals and other bodies. So far, the Executive has been unable to specify which tribunals might be affected. Does the Law Society have a view on which tribunals should be covered by legal aid that are not already covered?

**Ian Smart:** For the committee's guidance, we have provided a list of tribunals. Members can probably work out for which tribunals it would be inappropriate for people to be granted legal aid. It can sometimes be difficult to imagine the circumstances in which someone who was eligible for legal aid would appear before a tribunal.

The Executive has indicated that it intends to extend assistance by way of representation to industrial tribunals—that is significant. There is an argument for assistance by way of representation to be extended to social security tribunals. The sheer number of such tribunals means that we would not suggest that legal representation was always required. The drafting of the criteria that would apply to legal representation is not insignificant. However, matters often end up with the social security commissioners because a point of law is involved that might have been addressed at an earlier stage, had the appellant had legal representation.

**Maureen Macmillan:** Is there any problem about legislative competence with Department of Social Security tribunals?

**Ian Smart:** Legal aid is a devolved matter—it is open to the Parliament. Employment tribunals are not devolved, but no one has suggested that it is not within the vires of the Parliament to extend legal aid to them. The situation is somewhat anomalous in that Scottish employment tribunals from the Borders can, in certain circumstances, go to England. One might be entitled to Scottish legal advice and assistance to appear before an English tribunal. One can foresee interesting equality-of-arms arguments, if Westminster does not respond to that.

11:00

**Maureen Macmillan:** Indeed.

You have provided a list of tribunals, but you are not sure which ones—

**Ian Smart:** We knew, from the Executive's evidence, that the committee was interested in which tribunals could conceivably be covered. We are not suggesting that the tribunals that we have listed are all applicable for legal aid cases. It is difficult to imagine even a theoretical case in which a matter that was before the building societies appeal tribunal would be eligible for legal aid.

**Maureen Macmillan:** What criteria will be used? How we can we get a handle on this?

**Ian Smart:** The criteria that are used at the moment in relation to ordinary grants of civil legal aid—other than the financial criteria that are always there—are that it is in the interests of justice that someone is granted legal aid and that it is necessary. We do not have to over-define the criteria. You may have seen the Scottish Legal Aid Board's guidelines on its approach to advice and assistance for employment tribunals. It takes into account various matters, not least the importance of the case and the financial issues that are involved. It is absurd that, in the ordinary courts, one can get legal aid to bring an action of £1,500. If one attends an industrial tribunal, where one might be seeking £20,000 or £30,000 compensation, one is not eligible for state assistance for legal representation.

It is entirely proper that the value of the matter

should be taken into account in assessing the reasonableness of granting advice and assistance. The legal complexity of the case is significant. In my practice, we do quite a bit of social security work. In relation to, for example, appeals against refusal of disability living allowance or the grading of disability living allowance, sometimes the matter of whether the person's medical condition has been correctly assessed is reasonably straightforward. However, on other occasions, the person's medical condition has been correctly assessed, but the rate of DLA to which they are entitled, based on that assessment, is a matter of law rather than a matter of medical practice. It is for the solicitors to make a case to the board on why legal representation is necessary. Two reasons might be to avoid an appeal and to focus the issue at the earliest opportunity.

**Maureen Macmillan:** The solicitor would judge whether the client would be disadvantaged in relation to the ECHR and would apply to the board for legal aid.

**Ian Smart:** To be blunt, the solicitor always has an interest in saying that the client should be legally represented. The state should have a right to say that some criteria should be used to judge whether that is necessary.

**Maureen Macmillan:** You seem to be happy with the proposals on moving to fixed payments for criminal legal assistance.

**Ian Smart:** We should say for the record that the position of the Law Society of Scotland is that, as a policy matter, we are opposed to fixed payments for summary criminal legal aid work. However, we have always taken the view that summary criminal legal aid, remunerated on the basis of a fixed fee, would, in certain cases, fall foul of the ECHR. That was our position when the legislation was proposed and it remains our position today. The McLean v Buchanan case is the decider, although it is under appeal. Although the decision of the court of appeal was that there had been no breach of the ECHR, it was suggested in the leading judgment that it was possible to conceive of circumstances in which there would be a breach.

If you are asking whether, as a matter of law, we think that that provision would make the legislation ECHR compliant, the answer is yes, subject to two provisos. First, McLean is still under appeal and it may be that the judicial committee of the Privy Council will take a different view. For what it is worth, our view is that it will not, but we must wait to see what happens. Secondly, we have not seen the regulations. The provision gives the Executive power to introduce regulations on exceptional cases. We would need to wait until we had seen the regulations before we could say with certainty that the provision made the legislation ECHR compliant.

**Maureen Macmillan:** Would you prefer to return to time-and-line payment?

**Ian Smart:** We would. I do not want to get bogged down in the technicalities, but the Law Society's proposal was for the capped fee, which was time and line up to a limit. Above that limit, one would have to show that expenditure was reasonable.

**Maureen Macmillan:** Have you discussed that with the Executive?

**Ian Smart:** Yes. As Michael Clancy said, extensive consultation has taken place with the Executive. To be fair, negotiation with it continues. The Executive will—properly—say that it cannot publish draft regulations until the primary legislation has been approved, but we hope that it will consult on the draft regulations.

**Phil Gallie:** I have a quick question on employment tribunals, on which legislation was passed recently. Will the bill give small employers the right to civil legal aid when defending cases in employment tribunals?

**Ian Smart:** There is no reason in principle why a small employer who is eligible for legal aid and meets the other criteria should not be entitled to legal aid. However, they would have to be a sole trader to be eligible. They cannot be any other business entity such as a company or a partnership. I do not comment on the merits of that requirement. I say that as a matter of law.

**Phil Gallie:** A small retail outlet could be a partnership between a couple of individuals. If they were not given some support, their human rights could be breached. Given the criteria that you described, should we consider extending the bill to cover such people?

**Ian Smart:** You ask a complicated legal question about the extent to which the ECHR applies to corporate rather than individual entities. I hesitate to volunteer an opinion on that off the top of my head.

**Michael Clancy:** I think that only individuals are covered. The issue is interesting. We will consider it and write to the committee.

**Phil Gallie:** I would welcome that. Thank you.

Has anyone done a costing of the effects? Have you a ball-park figure of the additional cost of the recommendations?

**Ian Smart:** We do not have the resources to produce that and we have no idea how the board will apply the criteria. That is a matter for the Executive and, to a lesser extent, the board to advise the committee on.

The committee will be aware that the policy memorandum posits that question and gives a

how-long-is-a-piece-of-string answer. However, to be blunt, the legal profession does not expect a huge additional stream of income from the provisions, much as we would like to see such a development.

**Michael Matheson:** I will return to the point about the extension of legal aid in criminal cases and exceptional cases. If I recall correctly, when the Executive gave evidence, it said that there would be two criteria for time and line. The first would be complexity of the law. The second would be the involvement of a considerable number of witnesses, who could take much of a solicitor's time in preparing a case.

I understand that it is difficult for the witnesses to comment, as they have not yet seen the regulations that will cover those cases. I agree that the regulations need to be published before the bill completes its passage through Parliament. My concern is about the identification of the cases. What process will be adopted to flag them up sufficiently? That process could be quite bureaucratic. What will the time frame be? How could such a process work? How would you like such cases to be flagged up?

**Ian Smart:** We have had preliminary discussions with the Executive about that. For that reason, I do not want to say too much about the matter, because I do not want to breach the confidentiality of those discussions.

I think that it is suggested that the legislation will follow the previous position. Under what was commonly referred to as criminal legal aid regulation 13.2, it was possible for a solicitor to make an application at an early stage to the judge to lift the cap that used to be placed on criminal legal aid fees if a case was of exceptional length, complexity or difficulty. We rather like the words "length", "complexity" and "difficulty", because they give greater flexibility than more precise wording.

If the solicitor could identify that a case was exceptionally long or involved exceptional complexity or difficulty, they should be able to make an administrative application to the board on a simple form to explain why they thought that. The board should be able to grant that application administratively. One can get into an argument about how many hairs a bald man has, but everybody would recognise that some cases fall into those categories and others do not.

For an application that the board was minded to refuse, we think that there should be a fairly straightforward system of instant arbitration. For example, a summary criminal case might have to be concluded within 40 days because the client is in custody. That does not allow time for extensive litigation. We suggest that some sort of board could be established at which the solicitor could appear and from which they would receive a decision instantaneously. That would happen only when the board was minded to refuse the application, so the board would deal with only a small number of cases. If the solicitor was at too great a distance from the board to be present in person, we hope that such a hearing could take place through teleconferencing or some other form of modern technology.

We do not think that the administrative difficulties are insurmountable. It was suggested that the application would have to be made at the outset of a case. We welcome the greater flexibility in the bill, which says that the application can be made when the exceptional element is identified.

**Michael Matheson:** Would the appeals process to which you just referred exist outwith the Scottish Legal Aid Board?

**Ian Smart:** To some extent, that process would have to involve the board. However, we hope that to secure a system that demanded confidence, the board would agree to involve an external individual—not necessarily formally from the Law Society—such as an experienced criminal practitioner, to advise the board. We want to have certainty and a system in which we have confidence, and—to put it bluntly—we want to reduce the prospects of people applying for judicial review. That opportunity will be greater if people do not have confidence in the board. If the board reviews its own decision, people will not have as much confidence in it.

**Michael Clancy:** The criteria that Michael Matheson mentioned at the start of his question are about as objective as one can get in the circumstances of a criminal case. The number of witnesses and the complexity of the law are just about all that can be identified objectively. That is an important characteristic of the proposals.

**Ian Smart:** However, a case that involves eight police officer witnesses might be less complicated than one that involves four civilian witnesses. The number of witnesses is not the beginning and the end of considerations.

**Michael Matheson:** In fairness to the Executive, it highlighted the fact that arrangements exist for solicitors in rural areas, who may spend much time in visiting witnesses in far-flung places such as Thurso or Wick, from Inverness. The example that was given was that if a small number of witnesses were involved, all in rural areas, that would be taken into consideration. That is an issue to which we can return when the regulations are published.

**The Convener:** I have two further points. One may have nothing to do with the bill, but it follows from something that the witnesses mentioned. You said that legal aid was available to someone who

was being represented in a tribunal south of the border. Does a statute make that available? Given that we have free movement of labour within the European Union, does such a provision apply anywhere in the EU?

**Ian Smart:** Simply for the administrative convenience of the Central Office of the Industrial Tribunals and sometimes for the applicants and respondents, people who live in what is effectively the East Lothian part of the Borders will often find that their tribunal takes place in Newcastle rather than Edinburgh. As the system is unified, a tribunal that sits in England can apply Scottish procedure. However, the legally qualified chairperson is often an English qualified lawyer rather than a Scottish qualified lawyer. Cross-border issues arise with that system.

That is a specific lacuna. What is more interesting is whether someone who is domiciled in Scotland—for example, a Glaswegian who has lived in London and allegedly been unfairly dismissed, who returns to the bosom of his family in Scotland and then makes an application to an English industrial tribunal—is entitled to Scottish advice and assistance and Scottish representation in English proceedings. You would need to ask the Executive about that.

11:15

**The Convener:** A similar example might involve somebody who lives in Coldstream and works in Berwick. We will make a note of that question and ask it of the Executive.

Is it always going to be clear at the outset that someone's civil rights or obligations are affected? Could it be realised that civil rights are affected only when the tribunal process is under way? Would there be any provision to go back?

**Ian Smart:** Legal aid is not available retrospectively, but a case might begin as one in which the applicant is not eligible for legal aid according to the criteria that have been set by the Legal Aid Board and a matter arises that makes the applicant eligible. The solicitor/applicant could apply for advice and assistance at that point and, assuming it was granted, the process thereafter would be covered. Equally, someone might start off financially ineligible for legal aid but become financially eligible during the process.

**Gordon Jackson:** I apologise for having to leave. The Subordinate Legislation Committee is meeting and, if I do not attend, I shall be in trouble again.

**The Convener:** We would hate for you to be in trouble.

**Michael Clancy:** There is an obligation to inform the Scottish Legal Aid Board if there is a change of circumstances. In the circumstances that Ian Smart identified—if a person's finances changed—one would have to notify the Legal Aid Board.

**The Convener:** Let us move on to part 4.

**Phil Gallie:** There is no doubt that some of the provisions in part 4 contravene the ECHR. I refer to the decision of the European Court of Human Rights in the case of ADT v UK in respect of multi-individual sex acts between males. The individual concerned had what would normally be considered pornographic videos in his home. Would the bill change the courts' ability to act on an individual's having pornographic material on his premises?

**Ian Smart:** That depends on the privacy issue that is involved. If one had a pornographic video in Scotland—of whatever nature—and it came into the public domain through one's own deliberate or negligent act, there would almost certainly be a breach of the current criminal law that would constitute lewd and libidinous behaviour or a breach of the peace. I am thinking aloud about the issue.

**Anne Keenan:** There are also statutory provisions under the Obscene Publications Act 1959 on the possession and broadcast of various pornographic materials. Your example would constitute a separate criminal offence and should be considered separately from the issue that is dealt with in part 4.

**Phil Gallie:** As the bill is about compliance with the European convention on human rights, should not the Scottish Executive address such issues? Should pornographic material be redefined?

**Ian Smart:** That would be a matter for the Executive; it is not for us to say.

**Phil Gallie:** I was considering the issue from a legal perspective, bearing in mind ECHR requirements and the fact that the bill is all about long-term compliance.

**Michael Clancy:** It is fair to say that we have received no expressions of concern about the definition of pornographic material. We are therefore not in a position to take a view on that.

**Phil Gallie:** Recognising the implications of ADT v UK, we must acknowledge that there are areas of Scots law in which one or other sex is unprotected—situations involving, for example, male rape. Should the Scottish Executive be considering such issues, as this is a compliance bill?

**Anne Keenan:** Provisions at common law could cover the situation you describe. There is a common law crime of sodomy. Scottish criminal law already provides for the offences to which you refer and I do not know whether the Executive

needs to address such issues.

**Phil Gallie:** I will have to read that response in the *Official Report* and may return to it later. I did not catch it all.

**Michael Clancy:** There are passages in both the "Stair Memorial Encyclopaedia" and Gerald Gordon's "The Criminal Law of Scotland" about the crime of sodomy. It might be helpful if we sent them to you, to increase your information about the matter.

**The Convener:** The issue is obviously problematic, as the law for homosexuals and for heterosexuals differs. Are there any other areas in which the law treats those two groups differently, which could be subject to challenge in future, or is that the only problem area that has been identified?

**Anne Keenan:** We have not received correspondence raising concern about any such problems, so we have no evidence to suggest that further areas would require reform.

**The Convener:** Let us move on, then. Surprisingly, there are no questions about the procurator fiscal for the Lyon court.

**Michael Clancy:** We should have provided a briefing note on the matter; you are speaking to the three living experts on the Lyon court.

**Michael Matheson:** What is the view of the Law Society of Scotland on the remedial powers in part 6? When we took evidence from the Executive, committee members were anxious about the fact that ministers are to be left with such powers in their own hands.

I understand that there are likely to be two types of remedial power. The first will become apparent only when an order is laid, at which point a piece of primary legislation will already have been amended. The second type will require the order to be laid for 60 days before the powers come into force. There is always potential for points of difference and the Executive may introduce an order because an act is not compliant with the ECHR. Would you consider it appropriate for ministers to hold such powers? If you feel that you cannot comment on that, do you think that it would be more appropriate to amend primary legislation through a bill? Can you cite any examples, from the past couple of years, of situations in which you recognised the need for such powers?

**Michael Clancy:** Those are interesting and probing questions and we have thought about some aspects of them. The explanatory memorandum says that the provisions in the bill mirror those in the Human Rights Act 1998. I remember when that act was under scrutiny in the House of Lords. It contains provisions—under section 10 and schedule 2—that are substantially similar to the provisions in sections 12, 13 and 14 of the bill.

There was much discussion of those provisions in the House of Lords and concern was expressed that they were the creation of what are termed Henry VIII clauses in England and Wales. I suppose that we should redefine that concept, as Henry VIII was never a monarch here. At the risk of stereotyping myself, I suggest that "James VI clauses" would be more appropriate in a Scottish context.

In any event, there was a lot of concern. Amendments were tabled and the issue was debated in the House of Lords on 29 January 1998. I can do no better than cite what Lord Lester of Herne Hill, a Liberal Democrat peer and a well-respected human rights lawyer, said:

"I do not share the view of noble Lords who have criticised Clauses 10 and 11 as creating a vast Henry VIII clause with jackboots added on, doing violation either to parliamentary accountability or rule of law. I made clear at an early stage that I approve of this fast track procedure for the reasons given by the Lord Chancellor—that is to say, it is to uphold the rule of law to ensure that a declaration of incompatibility in judgments of the European Court are speedily and effectively translated by Parliament into effective remedies required, among other things, by Article 13 of the convention."—[*Official Report*, *House of Lords*, 29 January 1998; Vol 585, c 403.]

Lord Lester hit it on the head. When the courts have declared that a piece of Scottish legislation is incompatible with the European convention on human rights, it is important that there is a swift and effective remedy. I ally myself with Lord Lester's point of view, even though he would not think that that was much of an alliance. He would probably say, "Who cares what Michael Clancy thinks?"

We cannot say that these provisions are incompatible with the ECHR. Section 13(1) states:

"A remedial order shall be made by statutory instrument."

That highlights the problem to which you alluded, which is that a statutory instrument cannot be amended and it either stands or falls after it has been considered by the appropriate committee of the Parliament and the appropriate report has been brought to the attention of a plenary session. Therefore, that would be an issue if the Scottish ministers found that it was necessary or expedient to lodge a remedial order under section 12, because it would be a take-it-or-leave-it situation. It would be up to the Subordinate Legislation Committee—because the order would be a statutory instrument—to take a view on whether it thought that it was an appropriate response to the incompatibility. Does that answer your question?

**Michael Matheson:** It does. In fairness to the Law Society of Scotland, it is a fair answer. I have political concerns, because if you give ministers

such powers the Parliament may as well pack its bag and leave; we could just leave bills in the hands of ministers and give them powers to amend any primary legislation they choose.

The difficulty that I have with the Executive's evidence—this was also reflected in your answer—is that in the past couple of years, no one has been able to give us an example of when these powers would be required. We have been in situations when emergency legislation had to go through Parliament—for example when we had to pass primary legislation to deal with the issue of temporary sheriffs—so I find it difficult to see how ministers can say that they must have these powers on the basis of what might happen, given that challenges to date have not supported that view.

**Michael Clancy:** You are right: it is a political issue and it is not for us as a non-political body to comment on political issues. According to section 12,

"Scottish Ministers may . . . make such provision as they consider necessary or expedient".

Section 10(2) of the Human Rights Act 1998 says:

"If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may . . . make such amendments to the legislation as he considers necessary to remove the incompatibility."

Although the explanatory memorandum is correct in saying that this Scottish legislation mirrors the Human Rights Act 1998, it perhaps does so through smoked glass, rather than reflecting the panoply of measures using a Hubble-style mirror. In a non-political way, one can make observations about necessity, expediency and other issues that arise from looking closely at the Human Rights Act 1998 and comparing it closely with the provisions of this legislation.

I have heard that some people are saying that it would not be within the power of the Scottish ministers to make a remedial order in respect of an act of Parliament, because to do so would somehow impinge on reserved areas. I think that the vires of the Scottish Parliament and the Scottish ministers, as contained in sections 28 and 29 of and schedules 4 and 5 to the Scotland Act 1998—members know them all—would constrain the Scottish ministers from exceeding their authority.

11:30

**The Convener:** You gave the example of something becoming obvious as a result of a court judgment. However, nothing in section 12(1) of the Scottish bill indicates what made the ministers think that an incompatibility had arisen.

I suspect that some of us might be happier if the section had a preamble referring to various events, one of which might be a judgment in certain courts, or—and this leads on to another question that I will ask later—a decision by the Scottish human rights commission. It seems that the minister can make decisions just because he fancies it and that he does not need any other statutory body to have advised him of the incompatibility.

**Ian Smart:** The danger is obviously that, in certain circumstances, while involved in litigation, the Executive might be advised that its position was unstatable as a matter of law. In such cases, it may even be ultra vires for it to go forward in the face of that legal advice and argue the case knowing that its legal advice was that it would lose. That is why it is impossible to set hard and fast criteria on the circumstances in which ministers would take action. It is very difficult to conceive of a practical example. Our view is, I think, that only legislation of this Parliament is covered. We do not think that it would be within the vires of Scottish ministers to deal with UK legislation that they had inherited, even if it fell within the devolved sphere.

**Michael Clancy:** No. I think devolved legislation is covered too.

**Ian Smart:** I am sorry—I withdraw my last remark.

Members will remember that, during the discussions on temporary sheriffs, it was suggested that every decision ever taken by a temporary sheriff was null and void, that the prisons would have to be opened and that all sorts of people would come out. One can just about conceive of something such as that arising, in which the time scale for the legislative processes of this Parliament would be simply inadequate for the task. Equally, if one considers how it was possible to put through the amending legislation on the Ruddle case in one day, it would take exceptional circumstances to cause such a problem.

To some extent, the protection is the proportional representation system of the Parliament. If there were an absolute majority for one party, there would be dangerous constitutional issues, but as that is almost inconceivable because of the way in which this Parliament is elected, I would suggest that the democratic system will be the constraint on ministers.

**Euan Robson:** The final sentence of section 12(1) includes the phrase

"which is or may be incompatible".

The words "or may be" could be removed; I would not object to a remedial order if it were made quite clear that the incompatibility arose as a result of a

court case. My concern is whether the Scottish ministers have the power to introduce an order if they have been advised that incompatibility "may" exist.

I have a supplementary question on section 12, which deals with statute and the functions of the Scottish Executive that are derived from statute, but which does not necessarily cover common law. In other words, parts of common law might not be compatible with the convention. Because section 12 is silent on common law, I presume that provisions to cover common law would have to be introduced. For example, I am not clear about whether the age of criminal responsibility is a common-law matter or whether it is covered by statute. That is the sort of circumstance that does not appear to be covered under section 12, which relates only to statute law. Is my understanding correct?

**Michael Clancy:** The short answer is maybe. Section 12(1)(d) says that the Scottish ministers may make provisions in consequence of

"any exercise or purported exercise of functions by a member of the Scottish Executive."

That reference to the Scottish Executive includes the Lord Advocate, many of whose decisions on prosecutions rely on the common law. Therefore, whether to prosecute young Master Clancy, who is seven or eight years of age, is a question that could come within the ambit of that "exercise or purported exercise" of a function.

The non-inclusion of common-law rights, or the incompatibility of the common law with convention rights, might not be problematic. However, it would do no harm to specify in section 12 that the Executive envisaged that common-law matters would be included.

**Euan Robson:** It would be sensible to consider amending section 12 for the sake of clarity. I do not know what the Executive's intention is—I cannot determine that from the policy memorandum and I do not recall that a question on intention was put to the Executive's witnesses.

To revert to my first point, if the words "or may be" are removed from section 12(1), I presume that the matter would be left as one of firm judgment.

**The Convener:** As there are no more questions on part 6, I will ask a final question about a human rights commission. It has been suggested to us that there might be a role for such a statutory body. Does that suggestion find favour with the witnesses?

**Ian Smart:** The danger of making policy on the hoof is that it is not clear where a human rights commission would fit in between the Parliament and the courts. The courts are the determining body, in relation to both the Scotland Act 1998 and the Human Rights Act 1998. In relation to new legislation, the determining body is, to an extent, the Scottish Executive and, ultimately, the Parliament. If one is considering bringing into the field another body with deliberative powers, one must first ask, "What is the purpose of the body? Is it to advise the Parliament, the Executive or the courts?" In the absence of much greater detail, it is difficult to be sure where a human rights commission would fit into the system. We are here only to give evidence about the bill—we cannot make policy for the Law Society on the hoof.

**Michael Matheson:** Perhaps I could highlight an example of where a human rights commission might have a role. During last week's evidence session, it became apparent from a response to a question asked by Phil Gallie that the Executive's legal advisers advised what provisions the bill should contain. The same legal advisers said that the bill was compliant with ECHR. Such a potential conflict of interest should be sent to the Presiding Officer for certification. It seems that a group of solicitors in the Executive is advising on what should be in the bill while stating that the bill is compliant with ECHR. A mistake could easily be made if a third party does not consider other potential problems before the bill is introduced. Although the Parliament technically fulfils part of that role, an independent body could examine the matter to find out whether additional consideration is needed.

**Ian Smart:** That is not just a matter for the Parliament. On the basis of the case of Whalley v Watson, the courts can intervene at any stage if they think that the Parliament is acting in a non-compliant way. We must also bear in mind the fact that the bill must be certified by the Parliament's legal officers. What additional authority would some other body have? You or I might claim that certain legislation is ECHR compliant; however, in the end, the matter must be tested in the courts. We cannot take the matter away from the courts by giving it a certificate from some other body. As a result, it is difficult to imagine how involving another body would advance matters rather than just complicating them.

Since the Human Rights Act 1998 came into force, a public authority has had to consider whether each of its actions is ECHR compliant. It would be a mammoth undertaking for an external organisation to advise every public authority in Scotland and this Parliament, which frankly has greater resources for legal advice than many of those authorities. As I said, no matter what advice the Parliament receives from such a body, the courts will determine the matter.

**Michael Clancy:** The issue must be addressed, however. The Northern Ireland Human Rights

Commission has done a lot of work to ensure that legislation is ECHR compliant. Notwithstanding Ian Smart's comments, we are not closing the door to the idea; it just needs to be far more developed before we can reach a policy decision.

**The Convener:** That ends this part of the meeting. I thank the Law Society of Scotland for its extensive evidence.

After Phil Gallie's suggestion at our previous meeting, we have contacted the various police organisations, which will provide written evidence within the next two or three days. It is still possible for members to ask any further questions of the Scottish Parliament information centre. Have members had a sufficiency of the bill for the moment?

**Members** *indicated agreement*.

## Committee Effectiveness

**The Convener:** The next item on the agenda is consideration of the paper on increasing the effectiveness of committees, which has been circulated to members. Do members have any comments? If you wish, I can go through the paper paragraph by paragraph. I came to this process on the conveners liaison group fairly late in the day and certainly did not feel like trying to make any large changes, even though there are some aspects about which I am not particularly excited. However, most of the paper is advisory and the recommendations have enough flexibility to allow committees to decide their own priorities.

11:45

**Phil Gallie:** As I am concerned that some of the paper's recommendations might be adopted, I think that we should comment on several issues. For a start, the paper suggests that standing orders could be amended to allow committees to meet at the same time as the Parliament. As the Parliament meets for nine hours a week, it would be absolutely atrocious to overlap its work with committee meetings. That would deprive members of involvement in the plenary meetings, which are already short. I would like to think that the committee will express reservations about that.

I would also like us to comment on the time scales that are sometimes imposed on committees during stages 1 and 2 of bills. We have to recognise that, in comparison with other legislatures, the committees virtually comprise the second chamber of the Scottish Parliament. The committees' work can be vital in analysing the details of bills. I have, at times, got the impression that the Parliamentary Bureau is more set on achieving goals by certain time scales than proper bill scrutiny. I therefore have reservations about paragraph 6 of the paper.

The paper does not refer to substitutes. The value of the committees is totally dependent on member input. I feel that, particularly in committees that contain only one individual from some of the parties, we are missing out if, due to unforeseen circumstances, that individual cannot be present and is unable to ensure that they have some form of cover.

I recognise that all parties and every MSP can attend any committee meeting at any time. However, committees go into private session, particularly to discuss the drafting of committee reports, often following a lengthy investigation. It would be wrong to exclude party representation in such unforeseen circumstances. In summary, I see several shortcomings in the paper, on which I

would like this committee's views to be expressed.

**The Convener:** I think that I am correct in saying that the paper does not refer to substitutes because the issue has already been referred to the Procedures Committee, following the committee restructuring. It was felt that proposals for that were already under consideration, so there was not much point in including the issue in the paper.

**Michael Matheson:** I echo Phil Gallie's comments on the idea of amending standing orders to allow committees to meet while the Parliament is in plenary session. Although that might appear to be a good thing for the management of committee business and an attractive option from the conveners' point of view, I think that, if we were to make that change, we would soon realise what a mistake it was. For example, if Phil Gallie was involved in a debate in the chamber, that would put him in considerable difficulty as the only Conservative member of this committee. I strongly oppose the idea of amending standing orders in that way.

**Maureen Macmillan:** The middle point under paragraph 5 states:

"Exceptionally, meetings could be scheduled on Mondays, Fridays and Wednesday evenings".

We have meetings on Mondays anyway. Fridays and Wednesday evenings should be used not just exceptionally, but very exceptionally. A distinction should be drawn between Monday meetings and Wednesday and Friday meetings, because of members' constituency commitments and, in the case of meetings on Wednesday evenings, because of family considerations.

**The Convener:** I was a bit unhappy about the idea of timetabling committee meetings at the same time as meetings of the whole Parliament, especially because committees do not generally meet on Mondays, Fridays and Wednesday evenings. It is not as though there is no time during the week when committees could meet, although they choose not to meet at those times. I did not think that the idea of committees meeting on Wednesday afternoons or on Thursdays stood up to much argument, given that we have Mondays and Fridays available. Clearly, other people felt differently. Although diaries may treat Mondays and Fridays as free at the moment—and I hear what Maureen Macmillan says about the difference between them—things could change in the fullness of time, if we know that Mondays and Fridays are no longer as free as they used to be.

I do not know whether the conveners group would consider changing the paper. We ought to write a letter encapsulating some of the remarks that have been made and see what happens as a result of that.

**Michael Matheson:** The process has to be two-way.

**The Convener:** Yes, consultation has to be a two-way process.

**Phil Gallie:** I have a general observation on the committee system. I have already referred to the fact that we act as an investigatory power and as a second chamber. I am sometimes concerned by the narrowing of expertise that is evident in the legislative process in the Scottish Parliament. When bills come before the chamber, the people who participate in the debate always tend to be the ones who have been involved all the way through the committee stages. Those are the people, perhaps understandably, who have picked up the expertise.

The committee system tends to work against a more embracing view. Perhaps that is down to the time available for debate in the Parliament, but the committee system seems to apply a restriction, as the same people are involved in the investigatory stage, in the detailed scrutiny of legislation and in debate in the chamber. I recognise that this is a difficult question to address and that there are advantages as well as disadvantages in our committee system. However, I think that that general observation may be of interest.

**The Convener:** It is up to the parties to decide who they want to represent them in any debate. It is not up to us to comment on that. It could also be argued that it is of benefit to have somebody speaking in a debate who knows what they are talking about rather than, as happens in another place that I can think of, people who do not know what they are talking about.

**Michael Matheson:** This committee may suffer because many members of Parliament tend to shy away from justice issues, which can involve complex legal points. Bills such as the Regulation of Investigatory Powers (Scotland) Bill are not exactly going to attract many folk to consider our reports. From my point of view, it is down to individual members to choose whether they want to consider the matter in detail. I do not think that the committee can really do anything to improve that.

**The Convener:** I am not sure that that is necessarily to do with our response to the paper on the effectiveness of committees. We shall write to the conveners group encapsulating the remarks that have been made.

Our next meeting is on Wednesday 14 February in committee room 3 and is likely to start at 9 am. We will be considering the Leasehold Casualties (Scotland) Bill at stage 2. The deadline for lodging amendments to that bill is 5.30 pm on Monday 12 February. We shall also be hearing evidence on the Convention Rights (Compliance) (Scotland)

Bill from Lord Ross and Dr Jim McManus of the Parole Board for Scotland, and from Professor Gane and the Minister for Justice, so it will be a busy day.

*Meeting closed at 11:53.*

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

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

**Monday 19 February 2001**

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

*Single copies: £5*
*Meetings of the Parliament annual subscriptions: £500*

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committes will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

*Single copies: £3.75*
*Special issue price: £5*
*Annual subscriptions: £150.00*

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

*Single copies: £3.75*
*Annual subscriptions: £150.00*

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

**The Stationery Office Bookshop**
**71 Lothian Road**
**Edinburgh EH3 9AZ**
**0131 228 4181 Fax 0131 622 7017**

**The Stationery Office Bookshops at:**
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF12BZ
Tel 029 2039 5548 Fax 029 2038 4347

**The Stationery Office Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:**

**Telephone orders and inquiries**
**0870 606 5566**

**Fax orders**
**0870 606 5588**

**The Scottish Parliament Shop**
**George IV Bridge**
**EH99 1SP**
**Telephone orders 0131 348 5412**

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

**Accredited Agents**
(see Yellow Pages)

and through good booksellers

Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178