JUSTICE 1 COMMITTEE

Wednesday 14 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

Wednesday 14 February 2001

JUSTICE 1 COMMITTEE
4th 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 ALSO ATTENDED:

Iain Gray (Deputy Minister for Justice)
Adam Ingram (South of Scotland) (SNP)

WITNESSES

Professor Christopher Gane (University of Aberdeen)
Dr Jim McManus (Parole Board for Scotland)
Lord Ross (Parole Board for Scotland)
Mr Jim Wallace (Deputy First Minister and Minister for Justice)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 3

Scottish Parliament

Justice 1 Committee

Wednesday 14 February 2001

(*Morning*)

[THE CONVENER *opened the meeting at 09:09*]

Items in Private

The Convener (Alasdair Morgan): I propose that we take items 2 and 6 in private. Those items are ancillary to other items on the agenda and will allow the committee to discuss its mode of working. Is that agreed?

Members *indicated agreement*.

Phil Gallie (South of Scotland) (Con): I want to make a point. I can understand that, given that this is a new committee, we might want to discuss our work programme in private. However, we continually make up work programmes and that wish list should be made known to the public at some point. While I accept that we should discuss our work programme in private on this occasion—it is the first time that the Justice 1 Committee has discussed that—I suggest that subsequent discussions of our work programme should be published; people should know what we are doing.

The Convener: I have no problem with publishing a firm work programme. However, there would be a problem with publishing a wish list that would include matters that we might never get to because of other pressures. The inclusion of such items might excite organisations unnecessarily. In discussions of work programmes, members come up with lists of subjects that they want the committee to discuss, but the subjects that are at the end of the list might never be reached.

Phil Gallie: I am well aware of that, but I am also aware that, since the Justice and Home Affairs Committee started, there has been a suggestion that we should consider self-regulation of the legal profession. That has been on our wish lists in the past and people have referred to it time and again. There is nothing wrong with listing areas that we want to tackle—I see no need for secrecy. I accept your view that it might raise expectations, but I do not think that it will. It will, however, show people that we have shown an interest in and that we want to address certain subjects in future.

The Convener: Okay. Under item 6, we can discuss how much of the results of our discussion we want to make public.

Phil Gallie: I accept the suggestion that we deal with item 6 in private today.

09:12

Meeting continued in private.

09:30

Meeting resumed in public.

Leasehold Casualties (Scotland) Bill: Stage 2

The Convener: We move to stage 2 discussion of the Leasehold Casualties (Scotland) Bill. I am sorry about the cramped accommodation. I hope that the fact they must sit next to each other does not give the impression of collusion between the minister, Mr Iain Gray, and the promoter of the bill, Mr Adam Ingram.

I do not think that the presence of a television camera indicates any surge of interest in the bill; I think that it is here for a later agenda item.

Section 1—Extinction of leasehold casualties

The Convener: Amendment 1, in the name of the minister, is grouped with amendment 6, which is also in the name of Mr Jim Wallace.

The Deputy Minister for Justice (Iain Gray): As I said during the stage 1 debate, the bill as introduced will affect only leases that are granted for periods of not less than 300 years. That is to avoid inadvertently catching other provisions in modern commercial leases. The Scottish Law Commission has, however, revealed that very few commercial leases exist for periods longer than 125 years. A small number of residential leases of less than 300 years have been found, which include casualty clauses. The bill's intention, of course, is to abolish all such liabilities. Amendment 1 proposes to reduce the length of a relevant lease from 300 years to 175 years. That is also the longest period of commercial lease that will be permitted under the Abolition of Feudal Tenure etc (Scotland) Act 2000. Under other legislation, residential leases can be granted only for periods of up to 20 years.

Amendment 6 is grouped with amendment 1. The Scottish Law Commission has suggested putting it beyond doubt whether certain leases with renewal or break points fall within the scope of the bill. Amendment 6 clarifies the definition of the length of relevant leases for the purposes of the bill. It would provide that, in relation to leases with renewal periods, those periods should be included when calculating the length of the lease. For leases with break options, the lengths of those leases and not the period until the next possible break option will be treated as the full term. In other words, a lease with two break points at 100 year intervals would be treated as a lease of 300 years and therefore a relevant lease under the bill.

I move amendment 1.

Mr Adam Ingram (South of Scotland) (SNP): I am happy to support amendments 1 and 6. It seems entirely sensible to accept the advice of the Scottish Law Commission on both matters. The commission has developed a considerable body of knowledge about long leases. The most recent survey suggests that limiting the bill to leases of 300 years or more would not include all leases with casualty clauses.

The 175-year limit that is proposed in amendment 1 would cover all the leases that could contain casualty clauses, without encroaching on modern commercial leases. Amendment 6 would provide sensible clarification. Like other amendments that we will consider this morning, it is designed to ensure that the bill protects those whom it is designed to protect.

The Convener: As all the amendments this morning are Executive amendments, I will first call the minister, followed by Adam Ingram. If any other committee member wishes to say anything, they may do so.

Amendment 1 agreed to.

Section 1, as amended, agreed to.

Sections 2 and 3 agreed to.

Schedules 1 and 2 agreed to.

Section 4 agreed to.

Section 5—Irritancy provisions in certain leases to be void

The Convener: Amendment 2 is in the name of Mr Jim Wallace.

Iain Gray: Section 5 of the bill removes the landlord's right to irritate an ultra-long lease for non-payment of a trivial amount of rent. The section is, at present, confined to leases that are granted for 300 years or more with a ground rent of not more than £100. Amendment 1 has already been agreed to, which will decrease the qualifying period of lease to 175 years. That was in light of research by the Scottish Law Commission. The same research revealed some leases that had a rent of just over £100. Amendment 2 brings such leases within the scope of section 5.

I move amendment 2.

Mr Ingram: I support that amendment.

Amendment 2 agreed to.

Section 5, as amended, agreed to.

After section 5

The Convener: Amendment 3, in the name of Mr Jim Wallace, is grouped with amendments 4 and 7. I call the minister to move amendment 3 and to speak to the other amendments in the

group.

Iain Gray: As I indicated at stage 1, we propose that the bill be extended to provide that all rights of irritancy, which allow the landlord to terminate for breach of the lease by the tenant, will be void. Amendment 3 would ensure beyond doubt that the provisions cover the landlord's common-law right to terminate a lease for non-payment of two years' rent, as well as covering conventional irritancy clauses.

Amendment 4 would make the proposed new section retrospective to 12 February—the day on which amendment 3 was lodged. Amendment 7 would simply extend the long title of the bill to accommodate the proposed new section.

I move amendment 3.

Mr Ingram: I support amendments 3,4 and 7.

Phil Gallie: Since the bill was first published, have any incidents been reported that amendment 3 would address?

Iain Gray: Not to my knowledge.

Amendment 3 agreed to.

Section 6 agreed to.

Section 7—Transitional application of sections 5 and 6

Amendment 4 moved—[Iain Gray]—and agreed to.

The Convener: I call the minister to move amendment 5.

Iain Gray: Amendment 5 would simply correct a slip-up in the drafting of the bill and replace "repeal" with "appeal". It has no policy implications. I move amendment 5.

Amendment 5 agreed to.

Section 7, as amended, agreed to.

Section 8 agreed to.

Section 9—Interpretation

Amendment 6 moved—[Iain Gray]—and agreed to.

Section 9, as amended, agreed to.

Section 10 agreed to.

Long Title

Amendment 7 moved—[Iain Gray]—and agreed to.

Long title, as amended, agreed to.

The Convener: That concludes stage 2 consideration of the Leasehold Casualties (Scotland) Bill.

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

The Convener: We now move on to item 5 on our agenda, which is further evidence on the Convention Rights (Compliance) (Scotland) Bill. With us are Dr Jim McManus, who is chairman of the Parole Board for Scotland and Lord Ross and Mr Hugh Boyle, who are members of the board. Thank you for coming, gentlemen. We have read your written submission.

I shall start with a question to which I probably know the answer. How much opportunity were you offered to comment on the bill before it was published?

Dr Jim McManus (Parole Board for Scotland): We were given a very full opportunity. The Executive consulted us early and we were able to present the outline of what was being proposed to a general purposes meeting of the Parole Board, so that all board members had an opportunity to feed in their reactions. We had no specific problems and no member of the board expressed any great concern about the bill.

The Convener: So there were no significant changes to the original proposals, and what has subsequently been published in the bill reflects your thoughts.

Dr McManus: Yes.

Michael Matheson (Central Scotland) (SNP): I will ask about the part of the bill that deals with punishment and which says that, when passing sentence, judges will set a punishment part and a risk part. I understand that the Parole Board's responsibility will be to look at the risk element when parole is being considered. However, a number of the factors that will have to be considered at that time will probably be similar to the factors that the judge will consider when setting the punishment part of a sentence. Should guidance be issued to judges to encourage greater consistency in setting the punishment parts of sentences?

Lord Ross (Parole Board for Scotland): As far as judges are concerned, this is a new exercise for most of them. Judges will probably find it somewhat difficult because it is, in a sense, an artificial exercise. Hitherto, in imposing a determinate sentence or a discretionary life sentence, we have taken into account punishment, deterrence and public safety and have arrived at a conclusion. However, we do not divide up quantitatively the number of years that are being given for each element.

Now, judges will have to address that new exercise. I have wondered how they will set about that and—wearing another of my hats, as

chairman of the Judicial Studies Committee for Scotland, which is responsible for the training of judges and sheriffs—I have been wondering whether we could assist. I have had preliminary discussions with the Lord Justice General and I can say that consideration is being given to the question of how we might assist. I have in mind a meeting of all the judges, at which we could give them information and remind them of what the bill says. We could tell them what happens in England and in Northern Ireland. We could also tell them what the practice of successive Lord Justice Generals has been in fixing the designated part of the sentence for murderers who are under 18. We could then have a general discussion.

In that way, I hope that we would be able to get, if not a consensus, at least a realisation on the part of every judge of how their colleagues propose to go about dealing with the changes. Inconsistency would be most undesirable. If there is inconsistency, people lose confidence in the criminal justice system. I therefore agree that some steps will have to be taken to assist judges. We cannot direct them—judges must be independent and must exercise discretion. We can assist them, however, and I anticipate that we will do that.

09:45

Michael Matheson: My understanding is that judges in England are issued with guidance on sentences for their consideration. The aim of that is to provide greater consistency. Do you think that something of a similar nature might be appropriate in Scotland?

Lord Ross: I am always slightly nervous and apprehensive about guidance becoming direction. As I said, it is very important that a judge retains discretion and is independent. However, it is possible to assist a judge by giving him more information and I anticipate that that will be done.

The Convener: I hear what you say about the difference between discretion and direction. We are clearly proposing a fairly fundamental change, which might give rise to some public concern. It seems that this area is a bit vague. You have said that inconsistency would be most undesirable, but there is obviously no guarantee about that. It is not quite a wing-and-a-prayer situation, but it is almost as if we are being asked to pass the bill, to hope for the best and to see if it works out. Are you able to give us more reassurance?

Lord Ross: Yes, I think so.

I sit on designated life tribunals and I happen to have in my room a number of past cases. This is not a scientific analysis, but my experience over the past few cases. There were three cases of murders that were committed by persons under the age of 18. The first accused person was 17 at the time of his offence. He murdered and sexually assaulted an older woman. The Lord Justice General fixed the designated part of the sentence, which is now equivalent to the punishment period, at nine years. That person is still in custody after 21 years.

The second accused was 15 when he murdered an old man, with intent to rob him. The designated part of his sentence was 10 years; he was released after 10 years. All that he had to serve of his sentence was the designated part. The tribunal was satisfied that he did not require further detention to protect the public.

In the third case, when the accused was 15 he murdered a woman by stabbing her, possibly while he was under the influence of drugs. The designated part of his sentence was 13 years, but he was still in custody after 15 years.

The reason why I cite those examples is that, on the whole, the designated parts of sentences have, in my experience, been about 10 years. Obviously, those periods have been much shorter in some cases and longer in others. I expect that judges would be informed of what the practice of successive Lord Justice Generals had been, and that plus or minus 10 years would be the sort of period that would be fixed in Scotland. That is less than the figure that is regarded as normal by the Lord Chief Justice in England. I think that his note to judges indicates 14 years as a rough starting point.

Dr McManus: That is correct.

Lord Ross: The Scottish experience has been of a somewhat shorter period. Nobody knows what the judges will do, but I anticipate that the Scottish figure would tend to be around the 10-year mark.

The Convener: Before returning to Michael Matheson, I will bring in Phil Gallie for a second—sorry, Michael.

Phil Gallie: Does the system as it stands serve Scotland well? Is there a need for change? Is there a risk of failure to comply with the European Convention on Human Rights?

Lord Ross: Yes, there is a need for change. The important element of that relates to transparency and to the fact that the designated parts of sentences are being fixed by judges, not by ministers. I say that, although I suspect that judges will not welcome having this additional duty to perform, particularly when they will have to give a lot of thought to it because it is new. The change is necessary, however, with regard to the terms of the ECHR.

The Convener: Does Michael Matheson have a question?

Phil Gallie: I would like to continue, convener.

Michael Matheson: If Phil Gallie wants to ask about that point, I am happy for him to do so as my question is not related to that matter.

Phil Gallie: Thanks. Lord Ross referred to the need for additional training and has suggested a way forward. Do you think that, once the bill comes into force, you should be given a reasonable period of time to ensure that you have met training and guidance requirements?

Lord Ross: We need a reasonable period of time but, even if the bill is not enacted immediately, we know that it is before us. I have already had a preliminary discussion with the Lord Justice General and I hope that it will be possible to have some sort of training for judges and an opportunity for them to exchange their views before the bill is enacted.

Phil Gallie: How long would that take?

Lord Ross: Much of the information that we would give the judges would be in written form and we would need only one day for the training. I must emphasise that it is difficult to set aside a day—it would mean that the courts had to close for a day, which would cause problems. However, the point is to get all the judges together at one time to consider the material, have a frank exchange and help one another to come to a view on the appropriate way in which to fix the punishment period. I hope that it will be possible to do that during the summer.

Phil Gallie: This might be a niggling point, but you talked about the need for consensus among the judges and you talked later about inconsistency. What progress might be made on those issues?

Lord Ross: I meant that there was a need for consensus on the broad approach that should be adopted. Of course, when we talk about consistency, we must remember that no two cases are the same. It is difficult to demonstrate inconsistency because there might be a good reason why two apparently similar cases were dealt with differently.

Michael Matheson: I want to address an issue that relates more to the Parole Board for Scotland. The bill will provide judges with the ability to exercise discretion in setting the punishment part of a sentence that might exceed the anticipated life expectancy of the offender. The Executive's view is that that will allow a life sentence to mean that the offender will be imprisoned for life, in certain cases. Does the Parole Board have a view on whether we should be saying that such a sentence is life without parole, rather than putting judges in a position in which they must try to anticipate what an offender's life expectancy might be, given that they might be dealing with somebody who is in his early 20s.

Dr McManus: The Parole Board would not like to see the door being closed permanently on somebody. Saying that life means life means that there is no hope for a person. If there is a determinate period, there is a chance of consideration being given to a person's being released. If the determinate period is 40 years and the offender is 60 years old, clearly that chance is not great, but it allows a programme to be developed that will allow offenders to be dealt with positively during their sentences. I stress that the possibility of liberation would be extremely remote in such circumstances and that I am sure that, in some cases, that would be appropriate.

Michael Matheson: It seems that the Executive intends that the power should be used when it is felt that life should mean life. On that basis, it is reasonable to be concerned about whether we are putting judges in a difficult position by making them try to estimate somebody's life expectancy. I take on board the point that specifying that a sentence was life without parole would undermine any work that could be done with that prisoner once they were in the system.

Dr McManus: That would be my main concern.

Phil Gallie: As Lord Ross suggested, when a judge makes a decision on the punishment element of a sentence, he takes account of many factors. Surely, however, the personal interest of the person who has been convicted of a crime is not a factor when determining the punishment element.

Dr McManus: One of the beauties of the bill is that it separates the punishment part of the sentence from the prediction of risk. The Parole Board would take no part in determining the punishment part, which in the bill becomes purely and properly a judicial decision. The board can come into the picture once that part has been served. Our criteria are markedly different from those of the sentencing judge, and properly so.

Phil Gallie: I accept that point entirely. However, from Michael Matheson's question, it seems that the punishment part set by the judge could well exceed the individual's life expectancy. If so, is it correct that the crime itself determines the punishment part?

Dr McManus: Yes, indeed.

Gordon Jackson (Glasgow Govan) (Lab): Obviously the public will be interested in whether the bill's provisions will mean that people are likely to spend a shorter or longer time in jail. The Executive's memorandum goes out on a limb by saying that it will make no difference at all. Do you have a view on that position?

Dr McManus: It is impossible to determine that at this stage. It depends on the punishment part set by the judges, which is not the Parole Board's business.

Gordon Jackson: We have been told that people with a life sentence spend an average of 13 years in jail—although others serve much longer sentences—which must include a punishment part. Theoretically, one could work out the average punishment part, even though it would be impossible to do. Can I take it from Lord Ross's comments that if, all things being equal, the average punishment part were kept to about 10 years plus or minus, things would work out much the same as at present?

Lord Ross: I think so. However, as you say, when one talks about averages, some people are kept in jail for far longer than others, which complicates the matter. I cannot say whether the average punishment part will remain at 10 years, because I am not even a serving judge any more. In fact, nobody knows whether that will happen. That said, I agree with you: if the average were kept at 10 years, the situation would remain much the same.

Dr McManus: The average life sentence figure of 13 years is calculated on the basis of prisoners who have been released, which means that people in the system who have served more than 13 years, of whom there are many, are not taken into account. The real average is perhaps 14 or 14 and a half years, which is a significantly larger figure than it was 15 years ago. There has been a tremendous inflation in the average length of life sentences over that time.

The Convener: The memorandum says that the 20-year policy that applies to prisoners who have committed certain offences no longer operates. You say that you do not have a view on whether the 20-year policy should be applied in guidance to the punishment part. However, in view of the fact that that policy covers aspects such as the person's history of offending—which is an issue that the Parole Board would include in its deliberations—could the 20-year policy be continued in the form of guidance to judges?

Dr McManus: No such guidance should come from politicians. In determining the punishment part of any case, judges would properly take into account many of the factors involved in the 20-year policy. However, it seems quite irrational to have a general policy that stipulates 20 years as opposed to 15 or 25 years. I would rather leave that decision to the judges themselves.

Lord Ross: I agree with Dr McManus. It is undesirable to tie the hands of judges in that way. However, in practice, judges might well fix a much longer punishment period in cases that are currently covered by the 20-year rule.

The Convener: We will move on to the assessment of risk.

Paul Martin (Glasgow Springburn) (Lab): The issue of determining whether a prisoner still presents a risk to the public is obviously important. Will you describe the risk assessment procedures that are followed when considering the release of a prisoner?

Dr McManus: A variety of processes are involved. As you will have seen from the papers, the board receives reports from a range of people who have been involved with the prisoner, in addition to details of previous convictions and details of the index offence. We know what has been happening to the prisoner throughout his time in prison. We know the potential details for his release. There will be a home background report, which tells us what is available in the community to manage any risk that he poses.

In the prison papers, increasingly we get psychological risk assessments. No one pretends that those are 100 per cent accurate—not even the psychologists would claim that—but they do give a good picture of static factors in relation to the person, which are correlated with the risk of reoffending. The job of the board is to make a personal assessment of the individual in the face of all that information, so the board members are charged with the duty of assessing the risk that the individual would pose if he or she—although most of our customers are male—were in the community.

10:00

The particular composition of the board is partly required by statute, but it also consists of non-statutory members who have experience in dealing with crime and criminals, or who have knowledge of living in the community, which is equally important, because our job is to assess how a person will behave if he is released into the community.

Paul Martin: Is there clarity and consistency in the approach of the system?

Dr McManus: My view is that there is. I have only been in the chair for just over a year, but I am impressed by the quality of board members and by the amount of time and care that they put into the job. No one is making decisions on a wing and a prayer. All cases are carefully considered before a decision is made.

Phil Gallie: It is proposed that the Parole Board be given a decision-making role with no oversight from ministers. On how many occasions in the past have ministers overturned Parole Board decisions? Is it a regular occurrence? At the end

of the day, ministers have a responsibility to society. If something goes wrong, they are seen to take a level of responsibility. How do you feel about the Parole Board's collective responsibility, and about actions that are taken against the Parole Board if things go wrong?

Dr McManus: First, it is rare indeed for Scottish ministers not to accept a recommendation of the board. I am told that that happened on two occasions last year, so it does not happen a lot. If it did happen a lot, I would be worried about the quality of the board's decision making, and I would examine that first before daring to examine the decisions of Scottish ministers. However, it is clear that we are generally in agreement.

Secondly, on taking responsibility for the outcome of decisions, it is far better that the board accepts that responsibility, because we have a full and open opportunity to examine all the facts of a case before we make a decision, whereas ministers come into the process at the end, and rely for advice on officials and the board, so they take responsibility for something that ultimately they do not control. It is not a good idea to impose responsibility on someone for something that they cannot control.

Phil Gallie: I accept that argument, but at the end of the day, if something goes seriously wrong, the minister is there to take responsibility. He has been put into his position democratically, and he almost certainly will have a price to pay. What price should the Parole Board pay if it makes a decision that goes drastically wrong?

Dr McManus: It should have the same responsibility as all judicial bodies, that is, as long as it acts responsibly and reasonably, it should have no ultimate responsibility for decisions.

Phil Gallie: So decision making without responsibility.

Dr McManus: That is the judicial model.

Gordon Jackson: One thing has just occurred to me. It is a clearly defined system that after an average of 10 years the punishment is over, and there will be a risk assessment. Should we publish the basis on which risk is assessed more clearly so that prisoners and those with an interest know precisely how the process works and what criteria will be considered by the board? At the end of the period, the prisoner or their representatives would then know what they were benchmarked against.

Dr McManus: The factors that the board must take into account are already included in the Parole Board rules. I am not sure whether it is possible to be any more precise about that, given the present state—and I imagine the future state—of psychological knowledge. No psychologist would ever claim that risk assessment is a 100 per cent scientific task. As the McLean committee said in its report, the best risk assessment is a structured clinical judgment. Risk assessment contains a scientific element, but there must always be room for individual judgment. I am not sure that we can articulate the criteria more fully than they are articulated at present.

Lord Ross: The committee might be interested to know that we have designated life tribunals for discretionary cases and for under-18 murderers. More and more prisoners have been getting legal aid to commission their own psychological risk assessment. That is one of the great advantages of the tribunal system—the prisoner has an opportunity to appeal and lead evidence. In several recent tribunals we have been faced with conflicting psychological evidence. There was a case where psychological risk assessment that had been carried out by the Scottish Prison Service disagreed with one that the prisoner had commissioned independently. The tribunal must consider the whole evidence and reach its own conclusion. Prisoners seem perfectly aware of the way in which risk assessments work and what they involve.

Gordon Jackson: Forgive my total ignorance, but can I ask whether, in the new system, prisoners will be able to bring their own evidence to bear at the end of the punishment period? Will that be an option?

Lord Ross: Yes, because they will fall under the tribunal system and they have the right to lead evidence before the tribunal. The experience hitherto is that prisoners can get legal aid in order to commission their own report.

The Convener: I want to ask about part 2 of the bill, which deals with the composition of the Parole Board. I assume from your answer to my first question that you are now happy that that complies with the ECHR as a fair and impartial tribunal. Could you explain the rationale behind elements such as the compulsory retirement at 55? [*Laughter.*] Sorry, I mean 75—that was wishful thinking.

Lord Ross: If the retirement age was 55, I would not be here.

Dr McManus: We wanted to keep Lord Ross as a member.

The Convener: Could you explain the logic behind the provisions on retirement age, the set appointment period followed by a six-year gap and the 20 days' minimum work?

Dr McManus: It is important that every member of the board develops some expertise in the full range of the board's work. We would expect a minimum commitment of 20 days per year from members. At the moment, most members

undertake about 40 days a year. That allows them to build up a good understanding of the business of the board. It is necessary that they participate regularly, to keep that up to date.

The six-year appointment period was lifted straight from the provisions relating to temporary sheriffs in the Bail, Judicial Appointments etc (Scotland) Act 2000. I do not know why six years was chosen rather than eight or five—it is not a magic number. However, that would allow members time to develop. The first year is a learning curve and they would then have another five years to make a full contribution to the work of the board. I am not sure about the logic of the six-year gap in membership, unless it is to ensure that it spans more than one Scottish Administration, ensuring that there is no political input in the appointment process. As we said in our written evidence, there does not appear to have been any political influence in the appointment of board members in the past, so it is not something that we are particularly concerned about.

The Convener: Six years seems to be a fairly big gap, particularly if it takes someone a year to get up to speed. That leaves six years to forget everything that they have learned.

Dr McManus: Yes. The case could be made for reducing that gap to three years. It is important to have some gap, so that there is a constant turnover of board members. However, six years might be too long, particularly in the case of a good member whom we would like to bring back.

The Convener: How many members come back for a second shot?

Dr McManus: Under the current arrangements, two members have come back.

The Convener: Out of how many?

Dr McManus: There are 15 current members. I was a member of the board in the 1980s and returned a year ago. Only two people have done that in the history of the board.

Phil Gallie: I will take a step back. When you are considering release, what weight do you give to the views of victims? Should the board have a more proactive role in ensuring that it has the opinions of victims when it makes its decisions?

Dr McManus: In some cases—perhaps in fewer than 20 per cent of cases—in the dossier of information that we receive we will be notified of the current state of the victims or the victims' relatives, if the crime was murder. We certainly do not have such notification in every case. The board's concern is to predict what will happen in future. We would be very concerned about any risk of continued victimisation. If we had information on that, it would be a very important factor.

It is not part of our job to look to the past, as victims sometimes want us to do. It is our job to look to the future and we look at the past only in so far as it provides evidence of how the person might behave in the future. We would be very concerned if there were a particular risk to a particular victim, but in most cases we do not have such detailed information.

Phil Gallie: Do you think that victims should be invited to make representations? I understand that they can choose to do so at the moment, but should you invite them?

Dr McManus: No. I agree with the present system. If the victim wants to remain involved throughout the process, the option to do so is open to them. Victims have been victimised enough without the criminal justice system inflicting on them continued involvement in the system if they do not want it. If victims want to be involved, I am very happy that they should be, but if they do not want any involvement, I am keen that we should not add to their problems by insisting on it.

Phil Gallie: On the transitional arrangements, it is suggested that we should look back at the 500 or so individuals who are affected by the bill. What will be the effect on the work of the Parole Board? Will it add to your work, or will the effect be felt elsewhere?

Dr McManus: The bill will add to our work, certainly in the first year, as we come up to speed with those who will already have passed their punishment period. If the bill is enacted on schedule, the influx of cases will start in October or November. We will have to be ready for that and we will have to hold a series of tribunals thereafter. The immediate impact will be on the courts.

Lord Ross: As you will appreciate, there will be a considerable burden on the courts. There are 500 cases, on each of which there will have to be a hearing. However quickly one manages to deal with them, they will obviously take up a lot of judicial time and impose a lot of pressure on a system that is already under pressure. That is where the pressure will occur. The Parole Board can see what is happening and will have to have arrangements in place so that it can provide the tribunals that are necessary to deal with the qualifying cases.

Phil Gallie: Your comments on the courts will be useful in our next session with the Minister for Justice, but I will concentrate on the Parole Board. Precisely what arrangements will have to be put in place to cover the additional work in November? Will your 15 members be able to cope?

Dr McManus: We think not. We will need more members who are qualified to chair tribunals. At

the moment, we have four judicially qualified members. One of them is a full-time sheriff and another is a full-time High Court judge, so, clearly, the amount of time that they can devote to the board's work is limited. We need to recruit more people who are able to chair tribunals. We will probably also need two or three ordinary, non-judicial members to cover the whole range of the work.

The problem is that, as I said, the current commitment of board members is about 40 days per year. We anticipate that, with the present membership, that would go up to around 65 days a year, which would make the job unattractive, and indeed unavailable, to many people who cannot obtain that time off their other employment or who, being retired, want to have some time off.

Phil Gallie: Thank you.

The Convener: Do you want to ask a question, Michael?

Michael Matheson: No. I would have welcomed an opportunity to be brought in on issues that I have highlighted an interest in, convener, but that issue has now been covered.

10:15

The Convener: We shall move on then. As there are no further questions for Dr McManus and Lord Ross, I thank them for attending.

Our next witness is Professor Gane, who is professor of Scots Law at the University of Aberdeen. He has also submitted written evidence to us in advance. Were you involved with the bill before it was published, Professor Gane?

Professor Christopher Gane (University of Aberdeen): I was not directly involved with the bill. I was involved at the very earliest stage, when the Executive engaged in its review of human rights compliance issues. I was therefore aware of the proposal to assimilate the discretionary and mandatory life sentence provisions and of the question about the compatibility of the tenure of office of Parole Board members with the European convention on human rights. However, I was not directly involved in the way in which those measures were drawn up.

The Convener: Are there any proposals that are not in the bill that you think should be in the bill? In other words, are there areas of Scots law where you think that we are not ECHR compliant and in which there may be challenges in future?

Professor Gane: I think that there are areas in the common law, particularly in relation to the criminal law, where there are potential challenges for the future. However, I am bound to say that, if we understand the Human Rights Act 1998 correctly, those challenges can be met reasonably adequately by the appropriate interpretation of the common law by the courts. In other words, there may be difficulties ahead that would not actually require legislation to resolve them. There is a dispute about that and there are definitely different views, but the generally held view is that there is a clear statutory obligation on the courts to interpret the common law in such a way as to make it compatible with the ECHR.

The difficulty arises when there are legislative rules that may be incompatible with the convention and which the courts cannot disregard. They must do their best to interpret the statutory rules in such a way as to make them compatible with the convention, but the courts will inevitably be faced with occasions on which they simply cannot, by a process of interpretation, bring the statutory law into line with the convention. That is when legislation will be required.

The Convener: With regard to the areas that are covered in the bill, do you think that it goes far enough to ensure compliance?

Professor Gane: In the areas that are covered, especially the areas that I have commented on in my written evidence, I think that the bill does, broadly speaking, go far enough. Indeed, for the process of assimilating life sentence prisoners, the bill goes beyond what is strictly required by the convention as the European Court of Human Rights interprets it.

I realise that committee members may not have had the chance to read my written evidence in detail, but it mentions the case of Wynne v United Kingdom. In that case, the applicant invited the European Court of Human Rights to assimilate discretionary and mandatory life sentences, in the light of the procedures of the Parole Board for England and Wales for release and pre-release review. The court declined to do that and said that there remained justifications for maintaining the distinction between discretionary and mandatory life sentences. In that sense, the bill goes beyond what the court requires.

However, my view is that the Executive's judgment is correct, because it is not clear why the European Court of Human Rights reached that conclusion in Wynne's case. There is a significant inconsistency in what the court said. The Scottish courts are obliged to have regard to what the court says when construing convention rights, but they are not bound to follow the letter of every decision. It is possible that a challenge to the decision in that case might be successful domestically.

The Convener: I suspect that we may return to that issue.

Do we have satisfactory arrangements in place to ensure that Scots law is kept compliant with the ECHR?

Professor Gane: More independent and systematic review is needed over a wide range of the legal system. I am not sure whether that can be achieved by the Executive's introducing ad hoc—I do not use that term pejoratively—legislative reforms. Under the existing structures, the Scottish Law Commission has an obligation to keep all Scotland's law under review. My view is that it has not done that. It has not kept the criminal law under review. The criminal law has formed no part of the regular law reform programmes of the Scottish Law Commission since it was created in the mid-1960s. I have written about that. I consider it a substantial flaw in the mechanisms that are available in Scotland for the proper review and maintenance of a modern legal system.

Phil Gallie: You seem to suggest that we have not been properly prepared, to an extent, for ECHR compliance. You mentioned the Scottish Law Commission and said that the criminal law had not been sufficiently examined to take account of the effects of the ECHR in full. Was the ECHR incorporated into our law prematurely?

Professor Gane: No. There is a difference between the capacity of the system to respond to the incorporation and the timing of the incorporation. The timing of the incorporation was inevitable, given the nature of the devolution scheme. Devolution was premised on the basis that the Parliament and the Executive would be required to act in a way that was compatible with the European convention on human rights. Once the decision was taken to devolve power to Scotland in that way, it was inevitable that it would take that form. The incorporation of convention rights cannot be separated from the process of devolution. They go hand in hand.

Phil Gallie: Is there a major difference now between the situation in Scotland and that in England and Wales, where the Human Rights Act 1998 is now in force?

Professor Gane: Absolutely not. The only difference is that we were in advance of England and Wales by about 18 months. The courts in England and Wales are facing precisely the kinds of questions and issues that have been raised in Scotland. Indeed, that will happen on a much grander scale there simply because of the size of the jurisdiction. The Westminster Parliament and ministers of the Crown are in a somewhat different legal position from the position that obtains in Scotland. The Westminster Parliament is not bound by the European convention on human rights and can if it wishes pass legislation that is incompatible with the convention. Ministers of the Crown are public authorities and must act in a way that is compatible with the convention rights; however, there is no question of their actions being ultra vires. If a member of the Scottish Executive acted in a way that was incompatible with the convention rights, the action would be a complete nullity. In England and Wales, it would not be a complete nullity, but there could be a challenge to the legality of the action under section 6 of the Human Rights Act 1998.

Phil Gallie: That clears things up.

The Convener: You were suggesting, Professor Gane, that the Scottish Law Commission was perhaps not doing its job in relation to the criminal law and human rights compliance.

Professor Gane: I did not go so far as to say that.

The Convener: You suggested that it was too busy to consider that issue in addition to its other work.

Professor Gane: The commission has many other tasks to perform.

The Convener: Yes, I am sure. What alternative mechanism would you suggest?

Professor Gane: I would favour the creation of a human rights commission. It could have a variety of responsibilities, including the responsibility for maintaining a watching brief on human rights compliance in Scotland. I am not sure that I would favour a human rights commission that involved itself directly in individual personal cases, as there are adequate legal mechanisms through which to pursue individual interests. Nevertheless, there are good arguments in favour of the creation of a body to keep our house in order in relation to human rights.

The commission should be non-reactive and non-responsive. The trouble with ordinary processes of legislation is that they often tend to be reactive. Reactive legislation can sometimes be okay, but sometimes it can be too narrow and miss broader issues. I would favour a more systematic process.

The Convener: Let us move on to the punishment part of sentences.

Michael Matheson: Professor Gane was present when I questioned the Parole Board for Scotland on the punishment part of sentences. As drafted, the bill will allow judges the discretion to set the punishment part of a sentence. Do the proposals give judges sufficient guidance on that?

Professor Gane: That is an extremely difficult question. I have some sympathy for judges who say that sentencing is the hardest part of the job. It would be difficult to set out usefully in statutory language much more than very broad guidelines. We are talking about the part of the judges' job that requires most experience and I suspect that they would anyway be aware of whatever the

Parliament might include in such guidelines. There would be no harm in setting guidelines, provided that the bill did not go beyond saying that they were factors to which judges should have regard. However, I doubt that statutory language could do better than that, and I am not sure that such guidelines would add much value to the bill.

Michael Matheson: We do not want to start directing judges on what they have to do. We all recognise that that is not the route that we should take. In England, an independent board has been established to provide guidance to judges.

Professor Gane: Under the chairmanship of Professor Wasik.

Michael Matheson: Yes. It provides general guidance to ensure consistency in sentencing. Given the fact that we are going down the road of setting a punishment part, might such a board provide assistance in Scotland?

Professor Gane: I am not particularly aware of the workings of the committee to which you refer. As I understand it, it has made little progress in producing sentencing guidelines of any kind.

We have to remember the important differences between us and the folks south of the border. First, the need for judicial consistency has, I think, been much sharper south of the border, simply because of the much larger number of judges who are involved in sentencing. In the Crown courts, a very large number of judges deals with cases.

Secondly, there has been a transitional phase in England and Wales. Before the sentencing review committee was established, there had been a long period during which the Court of Appeal in England and Wales had laid down sentencing guidelines in specific areas. The courts were therefore already attuned to the process whereby guidelines were initially set for them by a judicial body. That probably made it easier for judges to come to terms with the system before the introduction of an independent body.

The success of a body making sentencing guidelines will be influenced by the extent to which judges have become used to getting guidelines that they are expected to follow. I find it disappointing that the power that is already available to the High Court to make sentencing guidelines is not exercised. There has been consistent unwillingness by the High Court or the appeal courts to lay down guidelines.

Evidence that it is not beyond the wit of judges to set and follow guidelines can be seen from the cases arising from the appeals by the Lord Advocate against sentences that were regarded as unduly lenient. Although the court would say that it is not laying down sentencing guidelines when it hands down decisions in those cases, the effect is that it gives broad guidance to sentencing judges. Perhaps it would be better to encourage, by whatever appropriate means, the courts to use the power that they already have before we think about setting up another body to regulate judges.

10:30

Michael Matheson: I want to talk about something that I raised with the Parole Board for Scotland—the fact that judges will have the discretion to set a punishment part that could last for the life expectancy of the offender. In effect, that is life without parole. That is the Executive's stated intention in the policy memorandum that accompanies the bill. Should we be talking about life without parole? Should we be sticking to the idea of a judge having to estimate the life expectancy of an offender who may be in their early 20s?

Professor Gane: I would be reluctant to go down the route of saying that there will be cases in which the court could say to a person, "You will go to jail for life and there will be no question of parole." I know that it is difficult for judges to estimate life expectancy, but the system should encourage the courts to consider the circumstances of the offence and the offender and to set what they consider to be the punishment that the nature of the crime demands, having regard to what the community is looking for. If that means that, on occasion, a judge will say that a crime is so terrible that he or she cannot contemplate the Parole Board releasing the person for 40 years, we would have to accept it.

I have a niggling concern about the European convention on human rights. Although the European Court of Human Rights says two things—first, that indeterminate sentences are not, in themselves, incompatible with the convention and, secondly, that very long determinate sentences are not incompatible, either—we have to be aware that the court changes its views over time.

In general sentencing parameters, we are substantially out of line with other western European democracies. We impose, on average, much more substantial periods of determinate sentences than offenders would get for equivalent crimes in other European countries. There may come a time when the European Court of Human Rights will say, "Listen, we do not think that it is compatible with the convention to tell someone that they will go to jail for ever." We have to justify the punishment more explicitly in terms of what the person has done and how long they deserve to serve.

Michael Matheson: So, from your point of view, it is because the judge has to justify the setting of

the punishment part—

Professor Gane: Can I just add that, although I am unconvinced of the value of setting guidelines for judges, I think it extremely important that judges give reasons for reaching decisions. Under the convention, there is an obligation to do that anyway. In addition, the convicted person will have the right to appeal against the tariff period, in the same way as they have the right to appeal against the current recommendation. It is extremely important that judges give clear and defensible reasons for fixing a particular period.

Michael Matheson: I think that that brings us back to the guidance issue. We will have to consider that matter, but I am happy with what I have heard.

Phil Gallie: Is it correct to say that the prosecution as well as the criminal will have the right to appeal against a sentence?

Professor Gane: I am not sure that that is clearly envisaged in the bill.

Phil Gallie: Does that right not exist in Scottish law?

Professor Gane: It exists at the moment, in that the Lord Advocate can appeal against an unduly lenient sentence. I have to confess that I am not sure whether the bill addresses that point. However, the Crown should clearly have the right to appeal against a punishment period that it considers unduly lenient.

Phil Gallie: That is an important issue, which we can follow up.

The Convener: Professor Gane, you said that the High Court already had the power to issue guidelines or guidance, although we had better not get into the difference between those two words. That does not necessarily fill people with confidence about what may happen once the bill is passed, does it?

Professor Gane: It would be difficult to disagree with that observation. As I say, I think it unfortunate that the courts have not taken advantage of the existing power.

Michael Matheson: There is legal provision, but I cannot remember the name of the act.

Professor Gane: The courts have had the power since 1995.

The Convener: We will now ask about the Parole Board for Scotland.

Paul Martin: I would like to ask about the constitution of the Parole Board and about procedures for appointments, re-appointments and removal from office. Are you satisfied that the constitution of the Parole Board is ECHR compliant?

Professor Gane: Yes. I reiterate that it has to be compliant because of article 5 of the convention, which says that the person who is deprived of their liberty must have access to a court that has the power to determine the legality of the detention. For those purposes, a court is basically the same type of body as referred to in article 6, which means that it must be independent and impartial.

"Independent" means independent of the Executive. That is the critical thing. Independence relates not only to the state of mind of the individuals, but to the way in which they are appointed and their security of tenure. As Dr McManus suggested, what is being pursued in the bill broadly follows what happened following the issues that arose with regard to temporary sheriffs. Having considered those matters in some detail, I am quite confident that the bill will secure the independence and impartiality of the Parole Board within the meaning of currently understood law under the ECHR.

The Convener: Let us move on to legal aid. Under certain circumstances, a case can be classified as exceptional and can be paid for out of the legal aid fund on a time-and-line basis rather than as a fixed payment. Under what circumstances would such time-and-line payments be made, to ensure that the fixed-payment scheme is compliant with ECHR?

Professor Gane: That is difficult to predict for any individual case. When the High Court reviewed the compatibility of the current fixed-fee system, it indicated that, although it was satisfied that there was compliance in the case that it was considering, it was unable to say that there would be compliance in every case. My concern with that decision was that it came close to saying that there would be a failure of compliance only if someone were deprived of representation. A failure of compliance must be deemed to have occurred a long way short of that.

I cannot say more than that we should construct a system that ensures that each individual has effective representation before the courts. What that is depends on the circumstances of individual cases, such as the kind of extra investigation or expert evidence that is required. As I am not in practice as a solicitor, I am not qualified to judge and cannot give the committee clear guidance on that. There is a substantial gap between what was said by the High Court in that case and what the European Court of Human Rights is seeking.

Michael Matheson: As I understand the Executive's oral evidence and its explanatory note, the classification of exceptional cases will be based on the regulations. We may return to that

issue when we see the regulations, which I hope we will receive before the bill is passed. The Executive gave two examples of what it expected would be classed as exceptional cases: cases involving areas of complex law and cases in which there are many witnesses. Given what you have said, it may be unfair to ask you this, but can you envisage any other exceptional cases?

Professor Gane: Complex factual questions can arise, not just when there are many witnesses, but when difficult factual issues are in dispute. There may be difficult questions of technical evidence to be assessed. Cases in which those arise might be another exception, in which good-quality, expert evidence on a technical matter is required.

The Convener: The bill talks about the extension of legal aid and advice and assistance to tribunals dealing with civil rights and obligations. To what tribunals does that refer? For example, do Department of Social Security tribunals deal with people's civil rights and obligations?

Professor Gane: That is one of the traditional exam questions in this area. Questions of private right, contractual obligation and delictual obligation, for example, are matters of civil right and obligation. Some things are clearly outside that concept, as it is set out in article 6. Typically, one's obligation to pay taxes would not be regarded as a matter of civil law obligation; it is a public law obligation and a relationship between a person and the state.

The trouble is that the middle ground is very vague. There is a line of authority in the European Court of Human Rights saying that disputes over social security questions are matters of public law and nothing to do with private law obligations, and so are not matters of civil right and obligation. Unfortunately, in two important decisions on access to certain types of social security in Germany and Netherlands, the European Court of Human Rights said that although generally it would not regard such questions as matters of civil right and obligation, in the circumstances of those cases it would do so.

There may be an increasing tendency to call disputes arising over access to contributory benefits—benefits that arise from a person's contribution to the national insurance system—matters of civil right and obligation. However, the opposite view may be held on access to a non-contributory benefit. I am afraid that I cannot be any more specific than that, because the European Court of Human Rights has not been.

The Convener: Does that mean that we are walking into a potential minefield?

Professor Gane: There is the potential for frequent challenges in this area.

The Convener: Might other tribunals give rise to such problems? We have a list of tribunals from the Law Society that is as long as your arm.

Professor Gane: I can give no clear advice to the committee off the top of my head. I will respond to you once I have considered the question. I think that I probably have the same list as the Law Society has.

10:45

The Convener: Section 10 of the bill deals with homosexual offences. The change that the bill introduces has to be made because a certain offence was dealt with differently if the people involved were heterosexual as opposed to homosexual. Are there any other areas of the law in which people are treated differently on the basis of whether they are heterosexual or homosexual and which might need to be brought into line?

Professor Gane: At the moment, it is unlikely, in the range of statutory crimes involving sexual offences, that there are many cases in which a challenge on the ground of discriminatory treatment would be successful. The challenge that has been consistently raised is discriminatory interference with private life. A commission of the European Court of Human Rights has dealt with most of the issues that are likely to arise, but I think that certain issues need to be addressed in relation to areas of sexual offending.

One of the curious features of the law is that an accidental anomaly has developed whereby men who commit heterosexual offences in the family are treated differently from men who commit homosexual offences within the family. That arises because the Scottish legal definition of incest deals only with sexual intercourse, not with other forms of sexual abuse. There may be other anomalies that need to be addressed, but none that arise in the context of the bill.

Phil Gallie: You referred to your concern about interference in private life. Earlier, you referred to other European states that perhaps do not imprison people for as long as the UK does. We recognise that, in other European countries, the age of consent could drop as low as 14 or 12. Do you think that any challenges will come from Europe on the rights of those between the ages of 12 and 16 with respect to exposure to sexual activity?

Professor Gane: The European Court of Human Rights takes the view that that is a matter on which, generally speaking, national Governments have a better case for judging what is acceptable to their society than it does. Within broad parameters, the court tries to adopt a hands-off approach. Having said that, it is clear that its view has evolved during the past 10 years.

The challenge based on discriminatory age, particularly in relation to homosexual relations, has resulted in a gradual lowering of the age limit; there is no doubt about that. I suspect, however, that for some time to come there will be no shift on the question of the age of consent. That is because most Council of Europe countries fix at about 16 the age at which they permit people to have an active sexual life without criminal law interfering.

It must also be remembered that there are slightly different approaches in other European countries in cases in which there is a significant age difference between the individuals who are involved. Some countries might go as low as 14 for the age of consent, provided that the older person is no more than two or four years older than the younger party—we do not do that. However, I do not think that there will be any significant pressure from other European legal systems to shift our law in any particular direction. We will be in a fairly robust position if we fix the age of consent for heterosexual and homosexual acts at 16. There is unlikely to be a successful challenge to that in the next 10 to 15 years.

Phil Gallie: Although that carries some relief, I would like to think that the same could be said of our attitudes to prison sentences. The matter is best dealt with at national government level.

Professor Gane: Again, the European Court of Human Rights leaves that sort of issue for national governments to determine. That court has shown significant reluctance to interfere with prison sentencing, conditions and so on. The case law of the Commission and the European Court of Human Rights on prison reform is very dispiriting; both take a very hands-off approach and feel that even very substantial sentences are perfectly compatible with the ECHR. If somebody was sentenced in circumstances in which there was never any real prospect of their release, the European Court of Human Rights might then decide that such behaviour was inhumane. However, we are a long way from that point.

The Convener: We move to the final part of the bill, which concerns remedial orders.

Michael Matheson: I do not know whether Professor Gane has been able to read any of the committee's previous evidence on remedial orders.

Professor Gane: Not yet.

Michael Matheson: As you will be aware, the legislation will provide powers for Scottish ministers to lay down remedial orders to amend any primary legislation that might, in their view, be incompatible with the ECHR. Is the scope of such powers justified?

Professor Gane: I have some substantial reservations about that. It was debated at considerable length during the debates on the Human Rights Act 1998, which contains analogous powers. Under that act, remedial powers cannot be exercised until a UK court has declared provision in a UK act of Parliament to be incompatible with the ECHR, or until incompatibility has arisen because of a decision of the European Court of Human Rights. In other words, the Human Rights Act 1998 contains no provision that allows ministers of the Crown to take remedial steps if they think that something might be wrong with Westminster legislation.

The Convention Rights (Compliance) (Scotland) Bill's provisions probably derive from section 107 of the Scotland Act 1998, which contains an equivalent measure that allows remedial steps to be taken where an act of the Executive or the Scottish Parliament might be ultra vires. I am not sure that it is constitutionally a good idea for the Executive to bypass Parliament when it believes that something might be wrong. It is significant that the Justice 1 Committee's discussions on the Parole Board and life prisoners could be bypassed because the provisions are being introduced in good faith in the belief that there is a potential incompatibility. However, such incompatibility has not yet been demonstrated, so discussions such as this morning's could be bypassed if such measures will be available in future. It is up to the Parliament to decide whether it wants to allow the Executive to go so far as to bypass Parliament.

Michael Matheson: For ministers to justify such wide-ranging powers, they should be able to provide us with examples of when they would have required those powers since the incorporation of the ECHR. Can you think of any examples of cases from the past couple of years in which ministers would have required those emergency powers to amend a piece of primary legislation?

Professor Gane: I suppose that the concerns over temporary sheriffs might have been one of the issues that could have been dealt with in that way. However, it is one thing to identify a problem, but quite another to identify its solution. We might all agree that there is a problem and that we need to do something about it, but just because something needs to be done quickly does not mean that the Executive will necessarily get it right with its proposed solution.

My view is that, in relation to life sentences, the bill's proposals are good, but they must be tested through the democratic process. Amending legislation to take account of human rights problems might often give rise to quite controversial proposals. I am not wholly convinced that there should be too extensive a power;

perhaps a proposal that includes a big democratic interest would be better.

Michael Matheson: It is interesting that you referred to temporary sheriffs; the Parliament has dealt with legislation on that issue. If I recall, when we took evidence during stage 1 of the passage of the Bail, Judicial Appointments etc (Scotland) Bill, it was found to be incompatible with the ECHR and had to be amended to ensure compatibility. That is probably a good example of why we should not provide ministers with such wide-ranging powers. Do you think that such powers should be tempered, as they are under the Human Rights Act 1998?

Professor Gane: The Human Rights Act 1998 probably achieves the right compromise between Executive authority and democratic scrutiny. Apart from anything else, the Executive will not necessarily identify a problem or its solution correctly. It is better to wait for somebody to say clearly what the problem is; there may then be ways of responding quickly to deal with that. However, leaving it to the Executive to make a judgment about a problem is a different issue altogether—I am not terribly happy about that.

Michael Matheson: When you say that somebody should say that there is a problem, do you mean that there should be a court case to challenge the law?

Professor Gane: That is what the Human Rights Act 1998 requires. If you want a halfway house, a human rights commission could identify that and could bring forward clear and objective justifications to advise the Executive that something should be done. However, in such circumstances, emergency powers would probably not be needed anyway. Such cases could be handled through the normal legislative process. That would, no doubt, take account of the views of a human rights commission, which would, I presume, have considered matters in detail. However, it would not have to be a court decision.

Gordon Jackson: I have reservations about the breadth of the powers. In fact, I have been chasing the Executive's officials from committee to committee. I would like to run their answers past you, because I would like to hear your comments on their responses. First, the Scottish Executive has an urgency that Westminster does not have. It is all very well for Westminster—under section 10 of the Human Rights Act 1998—to wait for a court decision, because a court cannot strike out a piece of Westminster legislation. Therefore, the Westminster Parliament can fix problems in its own time. There is a problem in Scotland in that, if a court finds against an act of the Scottish Parliament, that act is done away with. We must therefore be able to anticipate such an eventuality in a way that Westminster need not.

Secondly, those powers would not bypass Parliament. In this matter, your comments on what is known as the super-affirmative procedure would be helpful. The officials would say that that procedure provides as much scrutiny of remedial orders as anybody could reasonably want, except in cases of extreme urgency, which are dealt with in section 14. Orders could be laid before Parliament and there could be a debate. I do not think that anybody has a problem with cases of extreme urgency, but other cases might worry us.

Thirdly, as you pointed out, section 107 of the Scotland Act 1998 gives Westminster powers that are quite apart from its powers under the Human Rights Act 1998, which the Scottish Parliament has—to some extent, anyway. If Westminster has power on the basis that law may be incompatible, surely there is nothing wrong with Scottish ministers—under some supervision by the Parliament—having at least the same powers as Westminster ministers.

11:00

Professor Gane: I will deal with Gordon Jackson's last point first. The fact that something was done badly is not a good reason for doing it badly again. The flaw lies in the argument that the pass was to some extent sold by section 107 of the Scotland Act 1998. I am not convinced by that argument.

On bypassing Parliament, it is true that remedial orders are not pure Executive legislation but, none the less, such legislation does not follow the normal procedures or face the normal standard of scrutiny. I was impressed by the extent to which the members of Parliament who debated this issue at great length during the passage of the Human Rights Bill seemed to think that there was a constitutional flaw in this kind of provision. It is simply made worse by the fact that the bill says that ministers "may" make such orders, rather than "will" make such orders.

The argument about urgency and vires is stronger in the case of Executive acts and omissions, but is not likely to be strong in relation to acts of the Scottish Parliament. There is concern that something that is beyond the powers of the Scottish Parliament might be tucked away in one of the Parliament's acts, but we must have confidence in the process of scrutiny. Is it likely that we will find such things often in Scottish legislation? There is extensive scrutiny. Ministers have to certify that legislation is compatible with the ECHR. The argument is justified more in relation to Executive problems, than in the context of primary legislation by the Parliament.

The Convener: It is also the case that section 107 of the Scotland Act 1998 refers only to acts of

the Scottish Parliament, whereas the provision in part 6 of the Convention Rights (Compliance) (Scotland) Bill refers to every statute at any time.

Gordon Jackson: The problem is with acts of the Scottish Parliament. While acts of the Westminster Parliament may need remedial action, there will not, in those circumstances, be the same need for urgency, because the courts cannot strike down Westminster acts.

Professor Gane: That is true, but my point is that we must judge how likely it is that acts of the Scottish Parliament will be struck down on vires grounds. Legislation can be struck down by any court in the United Kingdom, not just the Scottish courts, but today's discussion shows that there are considerable levels of scrutiny of Scottish legislation, which should ensure that legislation will not be struck down.

My impression is that our judges have no appetite for constitutional review of legislation. There might be reluctance to do that, but it is not likely to be the major problem.

Gordon Jackson: I am not sure what the minister is going to say in the next 10 minutes or so. I hope that we will get a compromise, but maybe not. The compromise that has been suggested—and which semi-appeals to me as being a reasonable in-between position—is to add to the bill something along the lines of the words in section 10 of the Human Rights Act 1998. In other words, if the affirmative procedure is used, there is an obligation to show that there are "compelling reasons" for proceeding that way.

Professor Gane: Unfortunately, I do not have a copy of that act.

Gordon Jackson: The point is that such action can be taken only under section 10 of the Human Rights Act 1998, where it is considered that there are "compelling reasons" for proceeding in that way, as opposed to using primary legislation, I presume. There is a statutory obligation to have "compelling reasons", and I presume, in order to be intra vires, one would have to be able to state what those reasons were.

The Executive tells us that it does not intend that there will never be another ECHR compliance bill. However, in theory there would be no need for another ECHR compliance bill if this bill were passed. The Executive would need to use the power to bypass the normal legislative procedures only if there was a reason to do so. It might be suggested that the Executive put into this bill the "compelling reasons" argument that is mentioned in the Human Rights Act 1998. Is that a reasonable compromise?

Professor Gane: Given the concerns that I have expressed, I would not be happy with less than that.

Gordon Jackson: Would that be enough?

Professor Gane: I am not wholly convinced by the argument that such a power should be used when it is thought that something might be wrong. I am more inclined to say that such powers should be assumed only when it is known that there is something wrong—when the Executive has been told so authoritatively and the matter is not merely a matter of Executive judgment.

Gordon Jackson: The trouble with that is that people are often critical if problems are not anticipated. Professor Gane is not involved in politics. The same people who want to wait until a problem arises are often those who are most critical when a problem is not anticipated.

The Convener: Gordon Jackson puts the case for saying that there should be compelling reasons for acting. However, that would not necessarily cover the action that was taken. The bill goes beyond the solution that is provided in part 1—removing the Executive from the whole business of parole—and beyond the minimum that is required to satisfy compliance with the ECHR. That might be a concern. Although there might be compelling reasons to act, the actions that are taken might go beyond what is necessary to address the problem, and there would be no control over that.

Gordon Jackson: I was saying that there should be compelling reasons to act by statutory instrument. Compelling reasons are not necessary for the way in which the Parole Board for Scotland is being handled, because that is being done through primary legislation.

Professor Gane: Yes. It is important to bear in mind three separate issues: why something is being done; what is being done; and how it is being done. If the principle is incompatible, there is a problem with the first issue of why something is being done. As I said, bypassing primary legislation tends to reduce the level of scrutiny of the solution that is proposed, and in that situation the Executive is not required to say why it has chosen a certain action. I accept the fact that I am not involved in politics. However, to avoid embarrassment, that might not be good enough justification for bypassing what I consider to be appropriate levels of democratic scrutiny.

The Convener: Thank you for your very useful evidence. Feel free to write to the committee about tribunals, if you wish.

Professor Gane: I shall. Thank you.

The Convener: I adjourn the meeting until 11:15.

11:08

Meeting adjourned.

11:15

On resuming—

The Convener: Let us resume our consideration of the Convention Rights (Compliance) (Scotland) Bill. We welcome Jim Wallace, the Minister for Justice, and a bevy of assistants whom I am sure that he will not need.

I begin with a question on consultation. Some of the witnesses have said that—Sorry. Would you like to make a statement in advance, minister?

The Deputy First Minister and Minister for Justice (Mr Jim Wallace): Yes, I was going to say a few words.

The Convener: I am getting used to witnesses who provide their submissions in advance and do not want to say anything further. Please continue, minister.

Mr Wallace: I shall be brief. I am grateful to the committee for the opportunity to discuss the bill. I do not intend to rehearse all the provisions of it, as you are more than familiar with them. However, I shall speak on some issues about which the committee has expressed concern, which might help to facilitate further discussion.

Part 1 of the bill deals with adult mandatory life prisoners. We believe that our proposals are necessary for compliance with the European convention on human rights. They will also increase the transparency of the system. I am aware that concerns have been expressed about the judiciary setting punishment parts of a length that could lead to prisoners serving longer or shorter sentences than at present. That matter will be for the courts to decide. Our proposals are intended to be neutral in respect of the period that is served in prison by life-sentenced prisoners and are intended to make the system more transparent.

Already, judges specify designated parts for discretionary life prisoners and for those under the age of 18 who commit murder. In addition, whenever the Parole Board for Scotland has recommended the release of an adult mandatory life prisoner, the Lord Justice General and the trial judge, if they are available, offer their view on whether the prisoner has served long enough to satisfy the requirements of punishment and deterrence. That is not a novel function for judges. In my view, judges are better placed than ministers to decide how long such a prisoner should serve in terms of punishment and deterrence, and can be expected to apply the same principles that they apply in making other sentencing decisions and in offering a view on the release of adult mandatory life prisoners under the present system.

With regard to existing life prisoners, concerns have been expressed over the transitional arrangements in the bill, which propose that short court hearings be held to allow each prisoner who is affected to receive a punishment part. In no sense is that a review of the sentence, which is a life sentence and remains unchanged. Neither is there a suggestion that prisoners will automatically be released as a result of the bill. If a judge decides that a prisoner has served the requisite number of years for punishment, that prisoner's case will still have to be considered by a Parole Board tribunal, chaired by a legally qualified person, for the risk to be assessed. In no circumstances would the Parole Board direct the release of a prisoner whom it considered a danger to the public.

I offer some reassurance to the families of victims. We have written to victims organisations to alleviate any concerns that they might have had, following several slightly misleading press reports. The Executive is firmly committed to protecting the interests of victims, and the bill should be viewed in the wider context of the Executive's actions in that area. The strategy on victims, which I announced last month, aims to provide victims with better information about matters such as prisoner release and to develop in ways that will ensure that, when victims or their next of kin have relevant concerns, those are made known to the Parole Board.

I am aware that the committee has expressed concerns about the use that ministers intend to make of the powers that we seek on the extension of civil legal aid. I will offer some clarification. The first step is that ministers must determine which of the many tribunals and similar bodies should become eligible for ABWOR—advice by way of representation—or civil legal aid.

Once bodies to which there is a strong case for making legal aid available have been identified, the second step will be for ministers to determine what additional criteria should apply to individuals who apply for legal aid for proceedings before any such body. I stress that the exercise is complex, which is why a list of names has not been provided now. I understand the reasons for the concerns that the committee expressed, so I have asked my officials to begin at once the work of determining the bodies to which legal aid might be extended. I undertake to the committee to provide a list of eligible bodies in time for stage 3 of the bill.

I know that this committee and the Subordinate Legislation Committee have concerns about the general remedial power. The key point is that we want Scottish ministers to have access to the

powers that United Kingdom ministers have to take swift remedial action under section 107 of the Scotland Act 1998. There is no doubt that Scottish ministers will have to be able to act quickly in some circumstances, because our courts can strike down legislation or functions of Scottish ministers that they find incompatible. United Kingdom ministers are in a different position.

However, I assure the committee that there is no intention that the general remedial power should become a replacement for primary legislation, which will remain the key route for bringing provisions into line with the ECHR. The Executive will make every effort to ensure that we identify areas in which we are at risk of challenge and plan accordingly. We will limit the use of the power to urgent cases for which the proposed changes were of such a scale that they would be more suited to subordinate legislation.

To underline the use that we intend to make of the power and reflect the concerns that committees have raised, I am prepared to lodge an amendment to the bill at stage 2 to introduce a higher test, along the lines of that which appears in the Human Rights Act 1998, which ministers will have to meet when using the power. Ministers will require to prove that they have compelling reasons for using the remedial order route. I would be more than happy to appear before the committee to discuss any proposed remedial order and assist members in their scrutiny role.

It is my intention and hope to work closely with the committee and ensure that the bill is satisfactory. I hope that the announcements that I made this morning show my willingness to respond to committees' concerns. I am happy to provide any further explanations now.

The Convener: Thank you, minister. That was helpful.

I will ask the question that I started asking earlier about the level of consultation. Some organisations expressed some disappointment that the first that they knew of the proposals was when they saw the bill. Given that it was not a surprise that a bill on compliance with the ECHR would be introduced, was the consultation adequate?

Mr Wallace: We have introduced the bill to try to secure compliance with our obligations. In our view, the action is necessary, so we want to legislate as soon as possible. The Lord Justice General, the Lord Lyon, the Scottish Legal Aid Board, the Law Society of Scotland and the chairman of the Parole Board for Scotland were involved in discussion of our proposals.

The committee will recall that the bill was announced on 14 September as part of the legislative programme, and some information was made available at that time. In addition, on introduction, a copy of the bill, with its explanatory documents, was sent to a large number of interested organisations. Information was also made available to life prisoners whom the bill will affect. The committee is undertaking worthwhile and proper consultation with interested bodies.

The bill is unusual, as an audit has been done before it. Professor Gane helped the Executive by auditing functions not only in the justice department but in other Executive departments. He considered the current state of law and practice in the light of relevant decisions by our courts and that in Strasbourg. Having received a report from him, we thought it important that we made progress.

Phil Gallie: The bill's intent is radical, but your Executive officials, Lord Ross, Dr McManus and Professor Gane have suggested that there is no need for action on many of the subjects in the bill, because we already comply with the ECHR. In that case, why are you intent on pursuing this?

Mr Wallace: As I indicated, an audit was undertaken of all aspects of our law. The view was taken that, given the way in which ECHR jurisprudence is moving, and given what Professor Gane said in his evidence, the introduction of the proposals contained in part 1 was a wise step.

It is slightly galling—and, at times, irritating—to be harangued at one stage by people who say that the Executive sat on its hands, did not do anything and waited for a court decision, when the roof fell in, and then to be told that it is wrong for the Executive to do the work, spot where there might be a deficiency and address it, instead of waiting for the roof to fall in. I think that we are being prudent. We are taking the measures as covered in part 1 because the issues that it addresses have been highlighted to us as a likely source of challenge.

What we are doing is perhaps not as radical as Mr Gallie makes out. It is about what already happens with regard to discretionary sentence life prisoners—meaning people who have been sentenced to life imprisonment for crimes other than murder—and what happens to people who commit murder when they are under the age of 18. The relevant provisions were introduced with the Crime and Punishment (Scotland) Act 1997, which Mr Gallie said he was 100 per cent behind. The bill is not that radical. It makes the setting of the punishment and deterrence part of sentences transparent. At the moment, that is not the case. Many people take the view that justice not only should be done, but should be seen to be done.

Phil Gallie: I accept what I think was the minister's slight chastisement about my questions. I remind him that, in his days of opposition, he

applied similar tactics over many years. He is now experiencing a different role and position. I make no apologies whatever for suggesting, as I have done in the past, that the incorporation of the ECHR was premature, given that certain issues had not been fully examined.

I fully support measures that will ensure that the Scottish Parliament and the Scottish legal system fall into line, as we are now obliged to ensure. However, I ask the minister to explain some of the current differences between the Scottish system and the system south of the border, particularly in view of the fact that the home affairs minister south of the border, the Home Secretary, seems to be retaining the right to have a say on whether prisoners on life sentences are released.

Mr Wallace: I have no doubt that one of my officials will nudge me if I get this wrong, but Mr Gallie will recall that, at the time of the Jamie Bulger murder case, a distinction was drawn between Scotland and England, in that the provisions of the 1997 act, which was passed under the previous Government to meet what was perceived in Scotland at the time as a deficiency in our criminal justice system with regard to the ECHR, applied before the Human Rights Act 1998 was passed. It is useful to remember that. The 1998 act brought the convention home, as it were, so that litigation could proceed in our own courts. That did not apply in England, but it now appears, following that particular case, that remedial action will have to be taken south of the border. We properly anticipated the situation.

Those are legal matters, and it is possible to get different opinions north and south of the border. On this particular issue, there is a case outstanding with regard to the position in England.

Phil Gallie: The minister has considered the matter of compliance. He has come up with what are relatively few changes to the Scottish system, on the basis that they are not quite necessary but desirable. He has also included a catch-all, which will, no doubt, be debated by others. Is the minister able to identify any other areas where the bill falls short in relation to the ECHR?

Mr Wallace: In the bill, we have tried to take account of those areas in which we are at most risk of challenge. We are aware of the issues involved, not least because litigation is already taking place before the courts. However, a balance must be struck, because a court's decision sometimes identifies weaknesses, such as the decision on temporary sheriffs. Views were expressed before that decision was given that the use of temporary sheriffs might be questionable. Most people would have said—most commentators probably did say—that the problem lay with the appointment of temporary sheriffs by the Lord Advocate.

11:30

When we received the decision in the Starrs and Chalmers case and analysed it properly, it became clear that the court praised the steps taken by the Lord Advocate when he appointed temporary sheriffs but found a problem with the lack of security of tenure. Members will recall that we addressed that lack of security of tenure in the Bail, Judicial Appointments etc (Scotland) Act 2000, which the Parliament passed last summer.

The advantage in the court identifying that weakness was that, had the Executive taken remedial action in that case before the court's decision was given, we might have tilted at the wrong target. However, that was a judgment that the Executive had to make. I emphasise that such judgments are not simply for the justice department, as all public authorities must comply with the ECHR and we must judge which matters ought to be dealt with now and which ought to wait for clarification.

I am confident that the bill addresses the issues that are in greatest need of immediate attention, and that legislation is the correct way in which to tackle them.

The Convener: The issue that may be in contravention of the ECHR is the involvement of ministers in deciding the length of sentence to be served. That is addressed in part 1 of the bill. The remedial action that you are taking goes beyond dealing with that issue alone. You have done more than simply removing the involvement ministers. Why did you take that course?

Mr Wallace: I apologise if I start to get a bit technical, but the points that I want to make are important.

We perceive two potential challenges. To all intents and purposes, the sentences of adult mandatory life sentence prisoners are split into two. The sentence consists of a period that satisfies the interests of justice and a period that might be described as the risk period. I am sure that this has been explained to the committee before, but after a prisoner has served four years of their sentence, ministers are asked how much time should elapse before the Parole Board starts to consider the prisoner and their sentence.

The risk part of the sentence potentially breaches article 5.4 of the ECHR. Once the justice or punishment part has been satisfied, the question of continued detention on the ground of risk should be considered by a court-like body. That is why we are constituting the Parole Board as a tribunal, so to speak. The Parole Board sits in a similar way at present when it sits as a designated life tribunal.

The punishment or justice part of the sentence is

potentially challengeable under article 6 of the convention, as that part of the sentence is not set by a court—it is set behind closed doors. The Parole Board makes a recommendation to the Lord Justice General, and if the trial judge is still available or if he can remember the case, his views are sought. The Lord Justice General intimates to me whether he thinks that the purpose of the justice period has been achieved. I must then make a judgment on the basis of what the Lord Justice General and the Parole Board say to me about risk. That is all done behind closed doors and no one could possibly believe that that process amounts to the same thing as setting the punishment part in a court of law.

Those are the two areas where we believe that we are vulnerable and those are the two areas that we are addressing.

Phil Gallie: That was my final line of questioning. However, I would say that, to a degree, there is a level of democratic accountability if a minister decides to release someone who is perceived by the public at large to be extremely dangerous. We have heard that there is no comeback on the members of the Parole Board, who make the decisions. At the moment, ministers face the consequences, because people can take it out on them in a ballot. Do you not regret that loss of accountability? The advocates certainly seem to regret that.

Mr Wallace: I do not think that anyone would suggest that, because judges and sheriffs pass sentences day in, day out without the degree of democratic accountability to which you refer, somehow our justice system is lacking. The important part of my responsibility and that of ministers in general is to try to ensure that the system functions effectively and that—

Phil Gallie: Lord Ross feels that it has functioned effectively over many years.

Mr Wallace: That is a tribute to the Parole Board and the work that it has done. I can think of very few times when I have disagreed with the Parole Board. The information that it receives in respect of risk assessments is pretty thorough and, arguably, the range of expertise on the Parole Board means that its members are better positioned to make judgments on risk than are lay ministers. Our accountability is important in making sure that we have a system that ensures that the tribunal will be supplied with information properly and that the prison system addresses the circumstances of individual offenders.

Michael Matheson: In fairness to Lord Ross, who is not here, I should say that he welcomed the bill, although he raised some issues of concern. I want to turn to some issues that have arisen in the course of our evidence, particularly those relating to the punishment part of the sentence. There are some concerns about a potential inconsistency between judges in setting the punishment part. There is a question about whether there is a need for some form of guidance to be issued to judges. People often associate guidance with directives, although they are very different things. Do you have a view on whether there is a need to issue judges with guidance on setting the punishment part of a sentence?

Mr Wallace: We considered the possibility of including in the bill those factors that should be taken into account, such as aggravating or mitigating ones. We concluded that that was not necessary because the factors other than risk that the judge would take into account are the same factors that are taken into account in setting the punishment part of any sentence. The judges will have a great advantage, even over ministers—when they make decisions at the time of the trial, after the backlog has been cleared—in being the people who heard all the evidence.

There is a risk that—I do not want to over-egg it—the minute we start setting down criteria, they will suddenly be elevated to being the only criteria. Factors may emerge in the course of a trial, which anyone would consider relevant to determining the sentence, and those might be excluded simply because they were not in the bill.

We gave that some consideration but, on balance, we decided that it was better left to those who deal with such issues regularly as part of their professional lives. When judges set the punishment part, we expect them to pay attention to three things in particular: the seriousness of the offence, perhaps combined with other offences; any previous convictions; and, if the prisoner pled guilty, at what stage and under what circumstances the plea was made. The most important part of all that is the seriousness of the offence. I repeat that, at the moment, judges take that into account for discretionary lifers and under-18s.

Michael Matheson: Lord Ross from the Parole Board gave evidence earlier. He was on the bench for some time. He said that there was probably a need to train judges to deal with that issue. Is the Executive making or considering making any plans for training judges on it?

Mr Wallace: That is primarily the responsibility of the Lord Justice General. Of course, Lord Ross is experienced too—he has been responsible for the judicial studies committee.

Michael Matheson: He referred to that.

Mr Wallace: I take the opportunity to praise that committee's work. I am sure that the issue is on its agenda, but the Executive does not direct the committee. The matter is one for the Lord Justice

General. Judges are experienced in imposing sentences, and I am sure that collective judicial consideration will facilitate management of the backlog that will exist.

Michael Matheson: Lord Ross said that judges would have to receive some training for the backlog, given that about 500 mandatory life sentences will also have to be reviewed for the punishment part to be applied.

Mr Wallace: The figure is in the order of 500.

Michael Matheson: Judges will have to take time out to consider the issues. What impact could that have on the court system?

Mr Wallace: I am acutely aware of the issue. Officials have discussed it with the Lord Justice General's office. It is the Lord Justice General's responsibility to set the priorities for the order of business in the court. We are addressing the issue.

The Lockerbie judges are returning, although an appeal of that case will have to be heard. Lord Cullen will return from the Paddington rail inquiry later this year. We have the highest complement of judges in our history. When the Lord Justice General said that additional resources were needed—not least because of Lockerbie and Lord Cullen's departure to head the Paddington rail inquiry—the Executive responded.

Michael Matheson: Do you expect problems?

Mr Wallace: I would not say problems, because that could be misconstrued. I do not underestimate the substantial additional load that the courts will have to deal with. I am conscious of that. We are discussing it with the courts. I repeat that we have made available the highest number of judges ever. I intend to ensure that the number of judges is maintained at 32.

I have just been reminded that the Lord Justice General has set up a working group to consider the issue, of which Executive justice department officials are members.

The Convener: The evidence from the Executive officials suggested that you expected the bill's effect on the length of sentences to be broadly neutral. Is that just a pious hope, or does any evidence lead you to think that?

Mr Wallace: Experience leads us to think that. For example, there is no suggestion that things have got out of kilter in existing designated life tribunals. No real challenge has taken place there. The part of the system that is the closest comparison is performing and delivering. In addition, as I said, the Lord Justice General makes a recommendation or gives an indication about the length of sentence that will satisfy the interests of justice.

We have a Parole Board that examines the question of risk. Those components are already in place, and there is no suggestion that they are getting things horribly wrong. In many ways, we are formalising the position by making the judicial part of the system transparent and turning the Parole Board's examination of risk into a proper tribunal. I have no reason to think that the functions, which are similar to those that they have been discharging until now, should lead to any drastic difference in sentences—they should not lead to either longer or shorter sentences.

11:45

The Convener: We will consider the 20-year rule, which will lapse in the sense that it is something that the Executive enforces. Once it is left to judges to decide on the punishment part, how can you be sure that an equivalent rule of thumb will operate in particularly serious cases?

Mr Wallace: I am trying to remember the cases to which the 20-year rule applies.

The Convener: Murdering a policeman is one.

Mr Wallace: I think that the policy applies to the murder of a police officer, the murder of a child in which there is a sexual element and the use of a firearm in the course of a crime. The judiciary already considers such cases as matters of the utmost seriousness. It would obviously be wrong of me to go into too much detail on any particular case, but I will refer to a case that has a high profile in the press today—the recommended sentence in 1970 that the then Lord Justice Clerk, Lord Grant, stated was 25 years, which was in excess of 20 years. There is no indication that judges do not take seriously the murder of a police officer, for example, and every indication that they treat it as a very serious crime, as do all members here.

The Convener: We will change tack and consider the evidence from the Faculty of Advocates, which said:

"Judges could come under increasing and inappropriate pressure to impose longer and longer determinate 'punishment periods'. In that scenario the prospect for possibly the majority of affected prisoners would change from one of hopeful uncertainty to hopeless certainty, with harmful consequences for prison morale"

Mr Wallace: I think that that is a very gloomy prediction by the Faculty of Advocates. It shows a perhaps surprising lack of confidence on the part of the writers of the submission in the ability of their faculty brethren who now sit on the bench to discharge their judicial functions in the way in which they have done until now. Of course, on matters such as the murder of a police officer, judges reflect that such crimes more than usually offend the public and our civil life. However, there

is no evidence to bear out the view that judges are easy prey for public outcries. If, once we get through the backlog, the punishment period is set at the time of the trial, there is a degree of certainty when the prisoner embarks on his life sentence that is not there at present.

The Convener: I will pick up on one minor point about restricted transfer prisoners—those who remain under the jurisdiction of where they came from. I do not know how many people are in that category. The bill does not deal with them. Do any consequences arise from having a different type of prisoner? Could that give rise to an ECHR complaint?

Mr Wallace: We are considering that matter. However, my recollection of restricted prisoners is that we receive them subject to the prison sentence of the jurisdiction from where they come. Generally, the arrangements are a product of negotiation over the years. It is therefore not something that we could overturn lightly, given that those balances have been considered. We are aware that the issue has been raised in the committee and we are considering it, but we are not immediately aware that it would offend against the ECHR.

The Convener: Is it possible that they could have come from a jurisdiction that is not a signatory to the ECHR?

Mr Wallace: The distinction between restricted and unrestricted applies only to prisoners from within the UK.

The Convener: That is a relief.

Mr Wallace: I also have details of the information on the transfer of sentenced prisoners that is given to prisoners who are being transferred. If it would be useful, I can make it available to the committee.

The Convener: Let us move on to the existing prisoners.

Gordon Jackson: I have a question about legal aid for the new hearings. I have a passing interest in legal aid, as it happens, but this is a concern raised not by practitioners but by the Scottish Legal Aid Board. It has pointed out that there is no reference to what form of legal aid is to be available to a prisoner in those circumstances. Obviously there would be a court hearing, but that would just be the tip of the iceberg and other work would have to be done in preparation for the hearing itself.

The Scottish Legal Aid Board says—I do not know whether this is right—that the original legal aid certificate that was issued when the prisoner got his life sentence could have disappeared or been lost, or that his solicitor could be dead. In such circumstances, the board would not regard that certificate as still being valid. It could be the case, of course, that the person never got legal aid in the first place. The board says that the powers are not wide enough at the moment to give a fresh grant of criminal legal aid for those hearings. I take it as read that it is not intended that those hearings be held without legal representation, so how is that to be provided for?

Mr Wallace: I am aware that the Scottish Legal Aid Board has raised that matter. We did not think that it was necessary to specify that in the bill, but I think that I am right in saying that the financial memorandum indicates that there is an expectation that some form of legal aid would be incurred in the hearings for existing life prisoners. It is certainly our current intention that advice by way of representation would be made available for those hearings. I accept your point that it is not a case of simply parachuting an advocate in on the day of the hearing. Preparatory work would obviously be involved.

Gordon Jackson: People will be looking back at a crime that happened 15 years ago and presenting an argument about the background to it and its seriousness. That will not demand replaying the scene from 15 years ago, but it will require some work in some cases.

Mr Wallace: It is not a retrial.

Gordon Jackson: No. Nevertheless it is not nothing.

Mr Wallace: I accept that there would be more work involved than the hearing itself, for which ABWOR would be available. There must be preparatory work. As I indicated, the financial memorandum acknowledges that we expect there to be some call on the legal aid fund to deal with that.

Gordon Jackson: I do not want to bore for Britain, because this is the SLAB's problem. However, the board seems to be suggesting that it does not have the powers to deal with it properly and that there is no clear method of delivering that worthy expectation. It may be wrong about that, but I would like to know how things stand.

Mr Wallace: There is not consensus between the board and the Executive on this matter.

Gordon Jackson: I urge you to reach consensus, because the board will not grant legal aid unless it is absolutely clear about what it is supposed to do.

Mr Wallace: I take your point. That is something that we will have to discuss further with the board. Our view was that we did not need to include that in the bill but, in the light of your comments, I shall discuss the matter with the board.

Gordon Jackson: I have one more question.

You may already have given us the answer, but I may not have been paying attention. Is there a time scale for finishing the 500 cases?

Mr Wallace: No.

Gordon Jackson: An expectation? A hope?

Mr Wallace: As I indicated to Mr Matheson, a working group has been established and will have to work through those cases. Some people have been sentenced to life imprisonment only in the past two years. Logic would suggest that we should start with the ones whose sentences are further through and where there is a more pressing need. However, no time scale has been set.

The Convener: We will move on to discuss the Parole Board and the regulations for the appointment and removal of members. Will we see draft regulations at some stage prior to further consideration of the bill?

Mr Wallace: It had not necessarily been intended that the committee would see draft regulations, but if the committee so wishes, we would be willing to provide them.

When framing the part of the bill on the appointment and tenure of members of the Parole Board, we tried to reflect the kind of procedures and provisions that were made last year for part-time sheriffs. The bill will therefore parallel what we produced for part-time sheriffs.

The Convener: When the board sits as a tribunal, there are three people on it. Proposed new paragraph 3B under section 5(4) specifies who those people are:

"a Senator of the College of Justice or a sheriff principal",

a "legally qualified" person and "one other person." I think that it is intended that the third person is not legally qualified. If that is the intention, should it not have been stated in the bill?

Mr Wallace: The way that the bill stands leaves it flexible as to whether the person is legally qualified. As I indicated earlier, one of the key issues that the board or tribunal will consider is that of risk. People with expertise would be required. Those people would not necessarily be legally qualified but they would have something to offer.

Are we talking about different things? Are we talking about the tribunal for removal or—

The Convener: Yes.

Mr Wallace: I am sorry. We were at cross-purposes.

The Convener: Sorry. I misled you.

Mr Wallace: Our ideas on removal have again been modelled on what happened with part-time sheriffs and justices. I think that the wording is exactly the same.

The Convener: And the third person is meant to be someone who is not legally qualified?

Mr Wallace: Yes, normally.

The Convener: But you do not think that it would be advisable to say that in the bill?

Mr Wallace: No, because there may be circumstances in which a third lawyer might be useful. It would be odd if a lawyer were statutorily barred. The bill must be flexible, but the expectation would be that the third person would be a lay person.

Michael Matheson: We do not want too many lawyers.

Phil Gallie: I note that it is felt that the bill will have no real cost implications for the Parole Board. The figures that we have received in previous communications suggested that board members should serve 20 days a year. However, according to the Parole Board chairman today, members are currently serving 40 days. As from November, if we take into consideration the transitional period for mandatory life prisoners, the requirement will go up to 65 days. A 25 per cent increase in staff will also be required. Currently, 15 people are involved in the Parole Board, but the chairman estimates that that will go up by five, one of whom will be a judge. What are the cost implications of that?

Mr Wallace: We are discussing whether we ought to appoint further members to the Parole Board. Phil Gallie mentioned 20 days. The chairman of the Parole Board will be statutorily charged with ensuring that every member

"is given the opportunity of participating appropriately . . . on not fewer than 20 days in each successive period of 12 months".

The 20 days is a minimum, so that people can build up experience and expertise in dealing with cases.

As I said, much of the work is already being done. The cases of adult mandatory life prisoners are currently being considered by the Parole Board. We are in discussion with the Parole Board about whether there is a requirement for more members. I do not want to say off the top of my head what the additional costs of that might be, but it will not be excessive and it will be met within our budget.

The Convener: If there are no further questions on part 2, we move to part 3, on legal aid. The committee has discussed the extension of legal aid to deal with tribunals and, in particular, which tribunals might be affected by the provisions. How do you intend to proceed? Will you draw up a list

of potential bodies that would be affected? What stage is consideration at?

Mr Wallace: I could have given the committee a list of all tribunals, but that would have been fairly meaningless.

The Convener: I think that the Law Society has already given us one—it may not be complete.

12:00

Mr Wallace: Such a list would not necessarily assist your inquiries.

This is about ECHR compliance, so we are considering areas where civil rights are involved. We are trying to determine how many of the tribunals should become eligible. The second step is to consider which additional criteria should apply. I have asked my officials to get on with that work and I have undertaken to make that list available to the Parliament in time for stage 3 of the bill.

The Convener: That list will not form part of the legislation.

Mr Wallace: No.

The Convener: What happens if a dispute arises, and someone feels that their case before a tribunal should qualify for legal aid? If the list that you have provided to the Legal Aid Board does not include that tribunal, does the board have discretion, or will the person seeking legal aid have recourse to a court—assuming that they can get legal aid for that?

Mr Wallace: My understanding is that if the tribunal is not on the list of tribunals—which would be designated by regulation—and the person feels that it ought to be, they would raise a so-called human rights issue before the court. Indeed, that was happening with employment tribunals before we took remedial action with the orders that we debated before Christmas.

The Convener: Would such action in itself qualify for legal aid? You can see what I am getting at.

Mr Wallace: I can.

My understanding is that the so-called devolution issues have qualified for legal aid. There would be an action in the Court of Session; it would not necessarily be before the tribunal. We can never guess who is going to challenge or on what grounds, but the list of tribunals will be handled with considerable care, to ensure that it is as inclusive as possible and to identify areas in which civil rights may be an issue.

The Convener: We have had queries about the fixed-payment scheme.

Michael Matheson: In the course of evidence, the way in which exceptional circumstances will operate has been highlighted. Time and line will be available for cases that could be classed as exceptional. My understanding is that you intend to provide for such cases via regulation. In earlier evidence, the Executive mentioned two criteria that would apply; complexity in the law and cases in which there is a considerable number of witnesses. A further criterion that has been suggested is where there may be a need for a considerable number of expert witnesses. When will we see the regulations? Has greater consideration been given to what should come under exceptional cases?

Mr Wallace: The criteria that we have indicated so far should not be deemed to be exhaustive—we have tried to give examples. Another possibility might be the geographical location of witnesses. We will give further consideration to the matter of expert witnesses.

Michael Matheson: Can you advise the committee of the time frame in which you will consider the regulations?

Mr Wallace: We will have a proper consultation with the Scottish Legal Aid Board and the Law Society of Scotland. Much consultation and discussion can take place in parallel with the passage of the bill. We cannot lay the regulations until after the bill has been passed, but we aim to begin the consultation process immediately after royal assent and to introduce the regulations as soon as possible after the bill has been passed.

Michael Matheson: A concern that was highlighted to the committee was about cases in which a solicitor applies for exceptional circumstances to be considered and the board decides that the case will not be considered as exceptional. It has been suggested that the solicitor should have some recourse to a review of such a decision. Would the minister consider that to be appropriate? Such a review system would have to expedite any consideration quickly.

Mr Wallace: The proposed new subsection (3J) under section 7 is:

"The Board shall establish a procedure under which any person—

(a) whose solicitor's application under subsection (3H) above has been 40 refused; or

(b) on whose solicitor's application under that subsection the Board has made a determination which is such that the solicitor will not be paid out of the Fund in accordance with regulations made under subsections (2) and (3) above,

may apply to the Board for review of that refusal or determination."

There will be a statutory right of review.

Michael Matheson: The concern is that that

would mean re-applying to the board.

Mr Wallace: That is what happens at the moment in any application for legal aid. I have no doubt that, like me, Mr Matheson has spoken to constituents who have had applications for legal aid turned down and that he has then asked for a review. Ultimately, there can be a judicial review if the view is taken that the decision is out of line or perverse. The Legal Aid Board is a public body and if it is thought that it has exercised its discretion unreasonably, it will be subject to judicial review. We propose that there will be a procedure devised by the board, which will allow scope for an initial review, as is currently the case with legal aid applications.

Phil Gallie: It has been suggested that the powers of the Scottish Legal Aid Board to employ solicitors directly will be enhanced in future. That could lead to criminal legal assistance being provided inexpertly. Does the minister have any views on that or does he have plans to address such concerns?

Mr Wallace: Given that people who would be so engaged must have a certain professional competence, I do not accept the premise that direct employment by the Scottish Legal Aid Board would lead to cases being conducted inexpertly.

Phil Gallie: Expertise based on long experience would be the choice of most criminals who need solicitors.

Mr Wallace: We are trying to address circumstances in which it has not been possible for the accused person to get a solicitor. That might happen for a variety of reasons; the person might have been turned down by all the solicitors who practise in a given area, or there might be a conflict of interests where there are multiple accused and only a few solicitors in the area. It is not the first port of call.

We are trying to plug a potential gap, where an accused person could argue that their rights under the ECHR were being abrogated because they did not have access to legal representation. That will be a fairly exceptional circumstance, but it is a possibility and the most sensible way of dealing with it is to appoint a solicitor who is employed by the Scottish Legal Aid Board. However, it should not follow from that that the person appointed would be second or third class.

Phil Gallie: May I refer to a previous comment? Let us look back to the transitional period, and the fact that there will be cases to establish the punitive elements of sentences. Will individuals for whom punitive elements are set have the right to appeal, and will there be provision for the Scottish Legal Aid Board to give support to such appeals?

Mr Wallace: Yes, they will have the right to appeal and I assume that, as with any appeal, they will be entitled to legal aid. I think that I am right in saying that the Crown could also appeal. I will check that.

Phil Gallie: Will the minister undertake to talk to the Legal Aid Board to ensure that provision is made for that circumstance?

Mr Wallace: Yes. That is a point that Gordon Jackson raised earlier, and I have already given that undertaking. Obviously, that extends to the question of appeals.

Phil Gallie: Can the minister also confirm—this is nothing to do with legal aid—that the Crown would have the right to appeal against any perceived leniency in the setting of the punishment element.

Mr Wallace: Yes.

Phil Gallie: That is the answer that I wanted.

The Convener: We have no questions on parts 4 and 5, so we will move to part 6. We heard what the minister said earlier, but officials told the committee, in relation to remedial orders that are made in consequence of part 6—it still applies—that

"If there is a strong view that something in the draft of the draft is unacceptable, that would be taken on board." —[*Official Report*, *Justice 1 Committee*, 30 January 2001; c 2067.]

Given that that procedure does not allow remedial orders to be amended by Parliament, will that be acceptable to those who have strong views on the contents of such orders? What I want from you is a commitment that only in extremis will remedial orders, as opposed to primary legislation, be used.

Mr Wallace: I said in my introductory remarks that we would limit the use of that power to urgent cases, and cases in which the changes were of a scale that suited them more to subordinate legislation. Indeed, we will lodge amendments that will require ministers to prove that they have a compelling reason for using the remedial order route. I also added that in the event of a remedial order being required, representatives of the relevant department would be willing to appear before the relevant committee to discuss the proposed remedial order to help members in their scrutiny role. Committees do not usually hold back in conveying their views if widespread protest has built up.

The Convener: You talked about using remedial orders in urgent cases, but section 13 says that Scottish ministers will

"give such public notice of the contents of the proposed draft order as they consider appropriate and invite persons . . . to make observations".

How do the facts that the orders will be used in

urgent cases, yet you will give public notice and have a consultation process, mesh together?

Mr Wallace: The committee will recognise that there is a genuine wish to use remedial orders only if there is a degree of urgency. However, because of that urgency, it will not be possible to have the full-scale consultation process that we would normally have. Nevertheless, in any given circumstance there will be obvious interest groups or bodies that will have something relevant to contribute. The aim is to tap into that, while recognising that there is some urgency. As with all such matters, there is an attempt to strike a proper balance. The provision also mirrors what is set out in the Human Rights Act 1998 for the exercise of a similar function by Westminster ministers.

Michael Matheson: You said that such powers would be exercised only in urgent circumstances. Can you give us an example of an urgent case in the past couple of years in which those powers would have been required?

12:15

Mr Wallace: I have thought about that. It is tempting to say that the question of temporary sheriffs would have been such a case. Oddly, however, I did not need such a power. I merely gave an instruction that temporary sheriffs were not to be used. That did not require legislation and we were able immediately to meet our obligation. If you had asked me prospectively, I might have said that we could have introduced an order to install part-time sheriffs and thereby address the courts' concerns. However, as events transpired, it took us some time to get that right. So I am not sure that the temporary sheriffs question is a good example.

Michael Matheson: I do not think that it is a good example. You may recall that, when it considered the Bail, Judicial Appointments etc. (Scotland) Bill at stage 1, the Justice and Home Affairs Committee had grave concerns about whether it was ECHR compliant and said so in its report.

Mr Wallace: We seem to agree that that is not a good example of an urgent case in which the powers might be needed.

Michael Matheson: Yes, we do, but you have not yet given me an example of when you think you would have required those powers.

Mr Wallace: It is a question that I have asked myself.

The Convener: You said that it took some time to get things right on the question of temporary sheriffs. Does not that illustrate the danger of the procedure? If that procedure is available, the temptation is to act by order rather than by primary legislation. There is then a danger that corners will be cut or that the implications of orders will not be considered as carefully as they ought to be, which will lead to further problems.

Mr Wallace: In some cases, it will be very clear where the default is from the judgment that has been made, and it will be possible to address it. For reasons to which Michael Matheson has alluded, I do not feel that trying to create a whole new regime of part-time sheriffs would have lent itself to using that procedure. However, there could be decisions in which a court rules against a certain section of an act.

One possible example would be a case that was covered by part 4 of the bill and in which there was a decision by the European Court of Human Rights on a specific point, which could have been dealt with straight away by an order.

Michael Matheson: In your opening comments, you said that the Executive intends to lodge an amendment to tighten up part 6 and bring it into line with the remedial orders provisions under the Human Rights Act 1998. I understand that the provisions of the Human Rights Act 1998 can be exercised only when there has been a court decision on a matter, either in England or in the European Court of Human Rights. Is that what the Executive intends?

Mr Wallace: No. It is a similar test—a compelling-reason test—but we are in a different position from Westminster. As you are aware, any incompatibility as far as Scottish law or the actions of Scottish ministers are concerned is immediately struck down. At Westminster, there is a period of grace that we do not have. If we identify a problem, there is no point in waiting for a court decision because we know what will happen, but the test would be whether there was a compelling reason. That is what I or any other minister would have to be satisfied by. Indeed, we would probably also have to satisfy a committee or the Parliament.

Gordon Jackson: I have been chasing officials from committee to committee on this point. I am therefore fairly pleased with what you are suggesting. I was not happy about simply copying section 107 of the Scotland Act 1998. I much prefer the idea of having a compelling-reason test. However, I also accept that because of our different position, there will be times when we must anticipate a court decision. That widens the debate about how that can be done, and brings us back to the idea of a Scottish human rights commission, which would make it easier to identify problem areas. By definition, problem areas can be difficult to identify; otherwise they would not be problems.

I have rather lost track. What is the up-to-date Executive position on that? Identifying problems is

linked to identifying when remedial orders might be needed.

Mr Wallace: The Executive has agreed to issue a consultation document on a human rights commission. That will be a whether-and-if-so-how consultation, as opposed to the police complaints consultation document. We are agreed that there will be an independent element in police complaints and the consultation will be about how that is to be achieved. We have had meetings in the past two weeks about the matter and I hope that we can do the consultation soon, but please do not pin me down to a time—other matters might intervene, which would not allow me to make an announcement.

Gordon Jackson: I do not want to tie you down on the consultation, but do you at least see the logic in having somebody else to identify problems? I do not mean to detract from your department's ability to do that.

Mr Wallace: I see the logic in that. That will no doubt be one of the issues that will emerge during the consultation.

The Convener: I thank the minister and his team for answering the committee's questions.

12:21

Meeting continued in private until 13:27.

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:

Friday 23 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