JUSTICE 1 COMMITTEE

Tuesday 27 February 2001
(*Morning*)

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JUSTICE 1 COMMITTEE
5th Meeting 2001, Session 1

CONVENER

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

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

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

*attended

WITNESSES

Right Rev Dr Andrew McLellan (Moderator of the General Assembly of the Church of Scotland)
Professor Alan Paterson (University of Strathclyde)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Tuesday 27 February 2001

(*Morning*)

[THE CONVENER *opened the meeting at 10:04*]

Prisons

The Convener (Alasdair Morgan): Good morning. I apologise for the late start to today's meeting—it was unavoidable given the various travel problems that people have had.

We move straight to item 1 on the agenda. I welcome the Right Rev Dr Andrew McLellan, who is the Moderator of the General Assembly of the Church of Scotland, and the Rev Graham Blount.

I am sorry, moderator, about the huge gap between us. There are usually members sitting in those chairs and I assure you that their absence means no disrespect to you. I believe that you want to commence by making a short statement to us.

Right Rev Dr Andrew McLellan (Moderator of the General Assembly of the Church of Scotland): Thank you, convener. This feels like a Sunday morning, with everybody sitting at the back.

In the context of my genuine gratitude for the opportunity to attend the Justice 1 Committee this morning, I will explain my own context for being here. It brings together two little initiatives that I have undertaken this year as moderator of the general assembly. The first initiative is my visit to every prison in Scotland; an opportunity for which I asked and was readily granted. I have made those visits and, by tomorrow, I will also have visited every Scottish prison which, of course, is not the same as every prison in Scotland.

I also initiated a visit to the Scottish Parliament that lasted over two days. It was set up by Graham Blount—who is beside me—and for that I am grateful. I thought that, in the context of meeting the Scottish Parliament in different ways, it was important to have the opportunity to meet the committee to talk about my visits to prisons.

I know that the committee has seen my leaflet. I have no new information to add, but I will stress two or three things from the leaflet. I stress how astonished I was at how popular the idea of visiting the prisons was among prisons, the general public and the church. There is a cliché that there are no votes in prisons, but I am not so sure. Over the last few weeks, many people have said to me that they are genuinely interested in and concerned about what is happening in Scottish prisons. They said how little they know about the problems and, for some people, my visits were a new opportunity to reflect on such matters. Everything that I do does not always attract universal approval, so I was pleased to have the kind of encouragement to which that little venture has given rise.

Every time that I speak about prisons, I try to say that we should recognise that there has been a sea change in the atmosphere in Scottish prisons in the past 20 years. Since the riots in the early 1980s, when the atmosphere in Scottish prisons was one of menace and confrontation, prison staff at all levels have made huge efforts to engender a more civilised and decent atmosphere in Scotland's prisons. The evidence for that atmosphere is everywhere. It is obvious that, from time to time, there are difficulties in prisons, but the general perception—which I had before I started my visits—that Scotland's prisons are places of fear, terror and confrontation is simply not true.

There are real issues about the morale of Scottish prison staff. The committee knows much more about such issues than I do, but those issues must be spoken about and addressed, because the considerable progress to which I referred depends on the continuing co-operation of the Scottish Prison Service and on its continuing motivation.

I like to think that the churches—the Church of Scotland in particular—could help in the care and treatment of offenders in prison and on their release from prison. I am particularly concerned about the public perception of sex offenders and the release of those offenders. I hope that there will be opportunities for voices to be heard other than those of people who think that it is appropriate to describe released sex offenders in the most brutal and persecuting terms.

Last, I want to say something that is obvious, but which must be said over and over. The problems of Scotland's prisons are very often the problems of Scotland. By transforming regimes or hoping that lots of money will be put into prisons, it is not likely that we will do away with the circumstances and issues that lead, in a variety of ways, to crimes. Only if Scotland addresses a whole clutch of issues—such as drugs, poverty and employment—will prisons be less needed and less inhabited.

The Convener: Thank you very much.

I want to pick up on the last theme. In "Reflections on visiting the prisons of Scotland",

you say that

"only when Scotland is more just and more compassionate will Scotland's prisons be more empty and less sad".

Do you see any potential conflict between what some people see as just and what other people see as just? In particular, is being just the same as administering justice? I suspect that there is a perception out there that people get justice only if the perpetrators of crimes are put away for a long time. How do you square that view with the need for us to be

"more just and more compassionate"?

Dr McLellan: Justice is a matter of dealing with the person who commits an offence, with the victims of an offence, with the good of society and with the circumstances that lead up to an offence. Justice is not simply a matter of equating a serious crime with a long sentence.

Of course I believe that serious crimes need to be punished heavily—I do not think that justice is served by being soft. However, a society in which opportunity, protection and access to jobs and education are easier for some people than for others is a hard society in which to build real justice.

I want people to think about justice not simply in terms of what happens in the courts, although that is very important. I believe passionately in the independence of judges and would not want to interfere in any sense with what happens in courts. However, I want us to ensure that crimes are not committed because of social injustice. In the document, I make the point that we lock up a disproportionate number of Scotland's poor people. Until we are able to provide just opportunities for access to education, health and housing for Scotland's poor people, that will continue.

The Convener: Is that the main point that you are driving at? In saying that we are less just and less compassionate than we should be, are you talking about social justice?

Dr McLellan: Yes, but I am not saying that I wish judges to treat convicted persons more mildly. In the past two months, I have met people who have committed absolutely vile, horrible, dreadful and offensive crimes. It is right that there should be a severe sentencing policy for those who commit horrible crimes.

Maureen Macmillan (Highlands and Islands) (Lab): Good morning, moderator.

I want to talk about the possibility that even people who have committed serious crimes can change. An argument is made that criminals should be locked up because they are seen as unchanging and a threat for ever. We could perhaps talk about rehabilitation and, going on from that, through-care—which you talked about earlier as something that the churches might get involved in. It is important to have provision for prisoners when they leave prison, particularly if they have been there for a long time. Perhaps you could discuss that and give us your thoughts on that.

Dr McLellan: It seems to me that it is absolutely fundamental that prisons ought to provide at least the opportunities for prisoners to change their life patterns and lifestyles. There has been a change in mood in terms of the way that people talk about rehabilitation. Twenty or 30 years ago, the idea was that rehabilitation was imposed upon people. Today, I notice that the phrase "the correctional system" is creeping into the Scottish Prison Service. I am not quite clear what that phrase means, but I think that the context is that prisons must provide people with the opportunities to make decisions that will heal their lives and get their lives right. There is clear evidence throughout Scotland's prisons that those opportunities are sometimes provided and that those opportunities are sometimes accepted. I could name people whose lives have been changed because of the opportunities that were given to them in prison to address rehabilitation issues.

10:15

Nevertheless, it is not true that the opportunities for rehabilitation that are given to people in prison—in other words, the way that people are treated in prison—are the most important influences on what will happen to them when they come out of prison. Those opportunities are important, but the most important influence on what will happen to people when they come out of prison is what happens when they come out of prison. That is to say that the most important things that will prevent people from reoffending are connected to through-care. Housing issues, family issues, job issues and—clearly—drug issues have as much to do with preventing people from reoffending as does a change of heart.

I like to think that the church can help in those areas. Throughout my prison visits, I was astonished to see how highly valued chaplains are in prisons. I would estimate that chaplains are valued more in prisons by a factor of eight than they are in Scottish society as a whole—both by prisoners and by prison staff. Of course, there are all sorts of opportunities for manipulation by both parties, but there is a real understanding that chaplains can play a role in helping people to address issues inside themselves. In particular, chaplains have expertise in helping people to address the difficult and painful issue of personal guilt.

On the issue of release from prison and through-care, there is a mood within our church that we could take real steps forward. Fifty or 100 years ago we did that in providing care for the elderly. Our church, along with other churches in Scotland, has a good record of being pioneers in the provision of care for the elderly. Clearly, society has overtaken us in some ways, although we still do an important job.

I like to think that we are ready to begin to take more steps in providing through-care. As the committee might know, there is a new scheme in which a through-care chaplain is being appointed in connection with premises in Glasgow. I hope that we might be able to move towards occasional provision of buildings for some kind of hostel accommodation or care accommodation for people who are making the difficult transition from prison—where they are able to address some of their internal issues and make some changes in themselves—to being out of prison and finding themselves vulnerable because so many of the circumstances that led to their original offences might still be present.

Michael Matheson (Central Scotland) (SNP): Good morning, moderator. I want to ask about through-care. You stated that there was a patchwork of services, and that provision was patchy throughout the country. You referred to the fact that some prisons had reasonable through-care services, while others seemed to be lacking. How extensive did you find the lack of through-care services in the prisons that you visited?

Dr McLellan: I am not absolutely clear just what Michael Matheson asked, but if it was whether I found that there was a lack of through-care, I would say, "Yes, probably."

Michael Matheson: You referred to the fact that there was a lack of through-care services and that, to some extent, some services were positive. How extensive did you find the lack of through-care services to be throughout the prison service?

Dr McLellan: In all the prisons to which prisoners were sent close to their release date, every single prison officer said that they were merely scratching the surface of through-care.

In several Scottish prisons, really good things are being done because of the relationships that exist between Apex Trust Scotland, Safeguarding Communities Reducing Offending, the churches and a bunch of different bodies. In the prisons that are at the front edge of that, there is good co-ordination between those different bodies, but there are major issues about resources and facilities. In every prison where we spoke about through-care, prison staff and prison governors told us that the issue was important and that they were only just beginning to address it.

Michael Matheson: Did staff indicate that through-care was improving, or that it was an ongoing problem that never seems to get addressed?

Dr McLellan: Although my remarks are anecdotal, their value is that they come from the perspective of somebody who did not know about prisons and examined them for one month. My answer to a historical problem is, therefore, anecdotal. Nevertheless, I can say that in two prisons, people told me that they were really proud of the through-care initiatives and projects that had taken place over the last two years.

Michael Matheson: Would it be fair to say that there has been a lack of a strategic aftercare policy in the prison service?

Dr McLellan: I cannot say whether there is a lack of strategic policy. What I can say is that, as yet, if there is a policy, it has not produced coherent activity on the ground in all our prisons.

The Convener: You talked about staff morale, and ended by saying that significant management issues must be dealt with. Could you expand on what those management issues are?

Dr McLellan: I said that chaplains are ripe for manipulation. Given that—and presuming that moderators are even more ripe for manipulation—it is striking that, in every institution, prison officers told me that they are proud to work in their institutions, but that they find that they are alienated from working for the whole prison service, for the prison authorities and for the people of Scotland. What I say is entirely anecdotal, but in every prison where I was given the opportunity to meet prison officers, although they had a kind of commitment to their own institution, they also had a real feeling of being unable to make progress. They also sensed that their employers did not recognise or value their work.

I do not know how justified those feelings are, but I have had the opportunity to raise them with the Scottish Prison Service. Its staff have indicated to me—I believe them—that a great deal has been done to address those issues, but real intransigences must also be dealt with. I am not in a position to apportion right, neither am I in a position to say where the gravamen of the complaint lies, but it is certainly true that many prison officers feel disaffected.

The Convener: Is that disaffection because of their employers' lack of recognition of their employees' worth? Prison officers have two employers: the governors and assistant governors—who are their employers within the prison; and their other employers at the SPS's Carlton House headquarters at the Gyle. Are you talking about the far-away tier?

Dr McLellan: Yes, but that feeling is not specific to prisons. You would find, for example, that many teachers would say that they really love their school, but that they find the national environment in which they are asked to teach quite difficult. That might be a feature of management and modern life in general. However, among the prison officers whom I met, the disparity is clear between the commitment to and motivation for the institution in which they work and the lack of that commitment to and motivation for a career in the Scottish Prison Service.

The Convener: Might that be because of the structure? It is very much a bipolar structure. There are all the individual prison units and the headquarters, with nothing much in between. It is almost inevitable that the two are going to fall out on quite a few occasions.

Dr McLellan: That is why I mentioned that—even if it is inevitable, it must still be addressed. The SPS is doing well in trying to address it. I think that it has certain structures between the two levels that you suggested.

One of the striking things for me is exactly the point that the convener made. Before I began the project, I thought that there were Scottish prisons. In fact, there are Barlinnie, Castle Huntly, Peterhead and Dumfries prisons and they are all very different. That is partly to do with the buildings, which are different, and partly to do with their histories, which are also different. It is partly to do with the different constituencies of prisoners and partly to do with the differing styles of governors.

That means that each institution builds up a culture of its own and tends to attract prison officers who feel comfortable with that particular ethos or style. My view is that most prison officers value quite highly the prison in which they work, but still feel disaffected.

The Convener: Without asking you to name names when you talk about low morale, are there any institutions in which you felt that morale was particularly low or particularly high?

Dr McLellan: All the visits were carried out in October and November. At that time, the rumours about the prisons estates review were most rife. The press carried all sorts of speculation about the prisons that were likely to close and there is no doubt that there was anxiety in those prisons.

Since then, the SPS has made what I believe to be helpful statements about redundancies and closures. I am not in a position to know whether those who felt most threatened in some prisons in November have been reassured by the statements that the SPS has made.

Michael Matheson: What was your experience of the morale of the staff whom you met in Barlinnie, who were dealing with prisoners who must continue to slop out? You made some comments about slopping out in your leaflet.

Dr McLellan: I visited Barlinnie in the context of its being one of the prisons that had been named for possible closure. There had been speculation that the future of Barlinnie might be threatened because of the condition of the building and there was general anxiety about that.

As far as internal sanitation is concerned, I am ashamed to say that I had not really thought about its implications for staff. I considered the fact that slopping out is rotten for prisoners, although we do not know how rotten it is until we see it or, more accurately, smell it. I had not addressed how disgraceful it is that, as part of their working conditions, we require people—whom we, as a nation, employ—to supervise slopping out in Barlinnie. I had the opportunity to be present during slopping out. The comments of the members of staff—and, indeed, the governors—who spoke to me about it, were what I expected; that no decent person could possibly find slopping out anything other than disgusting.

Maureen Macmillan: I am very interested in what you had to say about Kilmarnock prison. When I visited prisons and talked to the staff, Kilmarnock prison seemed to worry them and to be part of the uncertainty that they have about their future. Would you elaborate on your thoughts on Kilmarnock? You say in your leaflet that you think that it is a good prison, but that you still have philosophical objections to it. Will you also talk about the morale of the staff in Kilmarnock and whether you think that they are as involved in rehabilitation of prisoners as staff in other prisons are?

10:30

Dr McLellan: My good friend, the Rev Dr Blount, is sitting on my right. His only piece of advice to me this morning was, "If you do not know the answer to the question, say so."

I still do not know what I think about Kilmarnock prison and about private prisons in general. Kilmarnock prison is the only prison that I have asked to go back to see with other people because I want to think more clearly about the issues.

I want to deal with staff morale and the relations of staff with prisoners in general. I thought that staff morale was very high among those whom I met. I was told in every prison that I could go anywhere and meet anybody, but I do not know enough to know whom I did not meet or what I did not see, if you see what I mean. However, the people whom I met felt very up about Kilmarnock

prison.

Staff's involvement in helping prisoners to rebuild their lives is a central issue. That is more difficult in general in Kilmarnock prison because the staff to prisoner ratio is very different from that in a non-private prison that is administered entirely by the SPS.

We were present during some good opportunities for prisoners to address issues—in programmes like those that are run throughout the SPS—such as anger management and cognitive skills courses. Those programmes seem to be functioning quite well in Kilmarnock prison. It has the best chaplaincy arrangement of any prison in Scotland, which matters to me, of course.

It is not—on the basis of one short visit—possible for me to make an assessment of the quality of work that is done in Kilmarnock prison compared with a non-private prison, unless the differences are dramatic and striking, or fabulous or distressing. They are not, so I do not want to make an assessment.

There are still issues that trouble me about the ownership of prisons. I am troubled about whether it is appropriate for the state to deprive people of their liberty and then to hand the management of that deprivation to private concerns. Is it appropriate to make profit out of the imprisonment of people, or that the terms under which prisons are managed are secret and confidential?

I still hope that the debate on such issues is not entirely closed and that MSPs will engage with those issues. If it is true—as people tell me—that the argument against private prisons is lost, it is important that the terms of contracts are carefully examined and understood, to ensure that rehabilitation issues—about which I am glad that the committee is concerned—are clearly at the centre of whatever is expected of our private prisons in future.

Michael Matheson: In your leaflet, "Reflections on visiting the prisons of Scotland", you refer to your visit to Kilmarnock prison and state that beneath the issue of privatised prisons

"there lie a host of related issues about responsibility and profit and vocational commitment".

Would you expand on those three areas? You have mentioned profit and vocational commitment. What are your concerns about responsibility and the use of the privatised model for prisons?

Dr McLellan: People who have worked as prison officers all their lives came into the service largely—although not entirely—because they felt that it was an opportunity to build a better world. I do not want to be sentimental or over-exaggerate that, but I think that there is a vocational element to people's decision to enter the prison service.

Not many people enter the Scottish Prison Service as prison officers because it is one job among others—it is not that attractive. Unless one felt that in some way it was a good thing to do, one would not enter. I am nervous that that element may not be developed to the same extent in a private prison. The opportunities for career and vocational development for prison officers in a private prison may be more limited because of the expense—it may be harder for those elements to be nourished in a private prison. Kilmarnock has not been open long enough for a rational assessment to be made. Nevertheless, it is important that any anxiety should at least be expressed and examined. That was my first point.

Secondly, I mentioned profit. I have a gut feeling that something is wrong. Prisons are always sad places. There is unhappiness around the families, the victims and the criminals. I feel uneasy that that should be a source of competition from which to make more and more money. That may not be a very articulate unease, but I am not the only person in Scotland to feel it. My church shares it.

As I said to Maureen Macmillan, who asked me to repeat it, we ought to face up to our responsibilities as a society. To deprive somebody's father of his liberty—to deprive a person of their liberty—is such a radical and potentially damaging thing to do that we ought to face up to the responsibility and costs of doing it. If we decide that the costs are too high, that might help us to address ways of dealing with offenders other than imprisoning them.

The Convener: As Phil Gallie is not here, let me put the other argument. It is early days for Kilmarnock and one swallow does not make a summer. If it appears that the private model works—in the sense that it delivers some of the goods that we would expect a reasonable prison to deliver—is not there an argument for, if not forgetting, putting to one side whatever moral objections we have? The name of the game is getting a system that works.

Dr McLellan: There are a variety of ifs in what you have just said. The answer is that if everything is good, and the other arguments are bad, you should go with the good rather than with the bad—but none of them is as yet.

The tone of what I wrote is concessionary. I hated Kilmarnock much less than I wanted to. However, it seems important that we recognise that Kilmarnock is our only private prison and that the experience of private prisons in other parts of the world is not universally encouraging. The kind of heated argument that went on before the first private prison was established—and there was heated argument—has not been brought to an end by the evidence from Kilmarnock. Nobody would say that we have seen enough in Kilmarnock in

the past three years for such arguments to have been completely obliterated. As long as Kilmarnock is still in early times, it is important that we—people such as me—do not say that the moral argument is completely lost. We need to keep bringing it up and allowing it to be addressed to help our politicians to recognise that there are still many people in Scotland who feel uneasy about privatised prisons.

The Convener: I have two further questions, one of which is fairly trivial. In your opening remarks, you talked about Scottish prisons and prisons in Scotland, and said that they were not the same thing. It has been suggested that the state hospital at Carstairs is the difference; is it, or is there another difference?

Dr McLellan: I am feeling smug—I am going to Camp Zeist tomorrow. I was hoping that somebody would ask what the difference was. I am going to the state hospital at Carstairs next month, but that is not a prison.

The Convener: No. In some senses it is a prison, but legally it is not.

You talked about how much the atmosphere has improved over the past 20 years. What is your impression of the extent to which that improvement has helped to reduce the likelihood of prisoners reoffending once they leave prison? Obviously, the public are interested in that question.

Dr McLellan: I indicated to Maureen Macmillan that that is only one of the factors that affect recidivism. The circumstances in which people are released and their particular personal histories are mixed in.

Instead of answering your question statistically, I will say that last week I was at the Shotts special unit, which houses some of the most difficult prisoners in Scotland. As people there said to me, if that is the bottom of the Scottish Prison Service, we should be proud of the service. The unit provides an opportunity for the most difficult prisoners in Scotland to engage daily and over a long period of time with issues of reoffending. From the conversations that I had with prisoners there—again, this is anecdotal evidence, which I would not wish to exaggerate, as I am not a professor of criminology—I know that they say that that kind of environment is determinative in changing attitudes. Of course, people say that in prison anyway, but I suspect that one would not have heard that in a prison in Scotland before 1980.

Gordon Jackson (Glasgow Govan) (Lab): I am sorry for arriving late—it seems that I have been on trains for days.

The Parliament will continue to be interested in prisons and how they are run. They are a big issue for the committee and the rest of Parliament. I think that the involvement of the church is useful because it brings to the matter a vision that is different from that of people such as me who have been in the trade all our life. How do you envisage the church's role continuing? You have acted as an individual moderator, but your reign—if that is the right word—will end and I am frightened that the involvement will stop. Do you envisage a continuing, structured role for the viewpoint that you and people like you can bring to the debate, into which we can feed? I realise that that is a very garbled question.

Dr McLellan: It is a good question. It matters. It is one of the many existential questions that I must address about what happens to me after May. I am pleased to say that there is a clear sign in two or three different areas that the momentum that began with this programme will continue. For example, soon after the visits, we provided the opportunity for the people in our churches who are responsible for the voluntary prison chaplaincy, one of whom is in the public gallery today, to meet the Scottish Prison Service to talk about developments in chaplaincy. That was very constructive. The visits have helped to build a new atmosphere of chaplaincy and I feel positive about the way in which chaplaincy is operating. That is partly to do with the work of Stuart Fulton and Brian Gowans, who are the Scottish Prison Service's advisers on chaplaincy, but it is also to do with the new momentum in our church and the new receptiveness in the Scottish Prison Service as a result of the visits.

Secondly, as a result of the visits, the church and nation committee of our church, which addresses social and political issues, is holding a day conference to address issues relating to prisons and criminal justice.

Thirdly—I may have been talking about this before Mr Jackson arrived—developments in through-care are beginning to take shape in our church. We are currently advertising for a new through-care chaplain. I hope that it may be possible for us to be more imaginative and active in providing hostel accommodation.

The most important thing is the remark with which I began, which Mr Jackson certainly missed: I have been astonished by the enthusiasm within the church for this little project. I have received many letters and many people have come to see me about it. They have said that it is an important thing for churches to be involved in. As it happens, my congregation has quite a history of involvement with Edinburgh prison. Several other congregations have spoken to me about how they might become involved. Clearly, there is a geographical limitation, but nevertheless I think

that churches will be more and more anxious to provide placements for people who are on different forms of release programmes. Our church has had a couple of little headlines from our policy of trying to build a more humane attitude to the release of sex offenders and I am fairly confident that that kind of initiative will continue.

10:45

The Convener: As there are no more questions, I thank you for coming today. The committee was appreciative of the initiative that you took and today's session has given us more food for thought.

Dr McLellan: I am grateful for the privilege that you have given me and I wish you well in your work.

The Convener: For the record, I should say that we have apologies from Phil Gallie and Euan Robson.

Legal Aid Inquiry

The Convener: We have with us Professor Alan Paterson, who is a professor of law at the University of Strathclyde law school. Members of the committee have the evidence that he has submitted in relation to our inquiry into legal aid.

Professor Paterson, what are the major problems with the legal aid system in Scotland? That may be an essay in itself, but perhaps you could summarise.

Professor Alan Paterson (University of Strathclyde): I will start with the strengths and go on to the weaknesses, as the strengths are the converse of the weaknesses. The strengths are the breadth and scope of the coverage. Compared with other jurisdictions in the world, levels of expenditure are high and the key advantage of civil legal aid is the protection for those who lose. That does not exist in most European jurisdictions, which would look at the factors that I have mentioned and ask, "What are you worried about?" We should not lose track of the fact that, to outsiders, we have a good system. I would not say that the system does not need remedying—you will hear in a minute that I think that there are many problems with it—but we should remember that it has many strengths, especially when compared with other jurisdictions.

The weaknesses in the system depend on one's standpoint. The Treasury does not like the fact that our system is open-ended and demand led. The drive comes from people asking for help and from what the suppliers are prepared to supply—there is a link between the two elements, in that if suppliers are not supplying something, there does not tend to be demand for it. However, if suppliers are prepared to set up niche practices, demand will grow. We have evidence of that in Scotland.

The Treasury probably does not like the fact that there is limited scope for strategic planning in relation to legal aid in this jurisdiction. It probably dislikes the fact that, for many years, there was an exponential rise in legal aid expenditure. Indeed, the Treasury probably dislikes the fact that it has no quality controls. As the committee will be aware, in most other areas of public expenditure, quality assurance and value for money are thought to be good things, yet we have very limited quality controls on legal aid in Scotland.

People in the profession probably object to what they see as the bureaucracy involved in civil legal aid. However, compared with England and Wales, "they ain't seen nothing yet". I admit that there is bureaucracy, but it is very limited compared with that in England and Wales, where it has probably gone too far. Solicitors also quite rightly object to

the fact that they are the providers of working capital for legal aid—they carry a lot of the costs of legal aid over the period of legal aid cases. In the Netherlands, legal aid lawyers are given staged payments in advance.

There are other ways of running things. The profession feels strongly that the fee levels are low and have been held low. There are responses to that. The Government's response would be to say that although the fee levels are pegged low, the unit cost per case keeps on rising. However, in my opinion, civil legal aid is certainly under-remunerated in Scotland.

From a client's point of view, although the scope of civil legal aid is good, it is still not as good as it should be. It excludes some aspects of fatal accident inquiries and, as members will know, most tribunals, although that is being dealt with in the Convention Rights (Compliance) (Scotland) Bill. There is no provision for legal aid for groups or collective interests and there is no provision for funding public interest litigation. Both those matters have been tackled in England and Wales, but it would be difficult for us to tackle them without amending legislation. There are problems with the urgent case provisions and there is a shortage of specialists in social welfare law, particularly in rural areas.

There is a middle-income trap. The evidence from the research work that I have been doing with Professor Genn in London and from elsewhere begins to suggest the not entirely surprising fact that those on low incomes and the wealthy are able to use legal services rather more than those who are on middle incomes. There is also some evidence that neither the clients nor some of the profession fully understand the statutory clawback in legal aid. Legal aid is of great benefit to someone who loses their case, because at that stage it becomes a grant. However, if a person wins, their misfortune is that legal aid becomes a loan and must be paid back through contributions from the other side or, failing that, from any winnings. That often comes as a shock to members of the public.

The Convener: You said that we spend more on legal aid than most other jurisdictions, yet you also imply that the people who receive legal aid think that they are not receiving enough. Why are we spending more? Are we funding more cases or cases of a different kind than they do in other jurisdictions? Is our jurisdiction more litigious or simply more expensive?

Professor Paterson: Our expenditure is higher per capita. This year, the Legal Services Corporation in America has an allocation of $330 million. We are in touching distance of that in a much smaller jurisdiction. Our allocation is considerably higher than in some other jurisdictions.

In Europe, even though the European convention on human rights applies, expenditure per capita on civil legal aid and criminal legal aid is considerably lower than ours is. That is partly because there is a different way of doing things. In the Netherlands, I was involved in compiling a study with which Professor Stephen is familiar, which shows that the Netherlands spends nine times less per capita on criminal legal aid because the money is spent partly on the judiciary and partly on the different system that exists there.

The other reason why we spend more on legal aid is that our scope is wider. We complain—quite rightly—about the current eligibility level, which has dropped. In 1950, 80 per cent of the population was covered and as late as 1979, that figure stood at 70 per cent—it went down and we pulled it up again. Nevertheless, eligibility is higher in this country than in most other jurisdictions, including in Europe, Australia and the Commonwealth.

The Convener: Are the differences greater in the civil or criminal area, or are they the same in both?

Professor Paterson: They are the same in both. Until fixed fees were introduced, we had a higher expenditure per capita on criminal legal aid than other jurisdictions. We had the highest level of such expenditure in the world, and probably still have. It is interesting to speculate on why that might be. The simple answer that is sometimes given, that lawyers cost more here, is not true. It is partly because of the complexities of the system. Whenever we change the system and introduce new stages, increases in legal aid follow. If legislation is changed frequently, legal aid increases.

I have a theory—which has not been tested—that eligibility for criminal legal aid depends on the interests-of-justice tests. One aspect of those tests is judging the likelihood of imprisonment. Because we have a predominantly common-law criminal law, it is difficult to rule out imprisonment; whereas, in a codified statutory system, which has statutory penalties attached to specific crimes, it would be more clear in which cases there would be the possibility of imprisonment. However, that theory has not been put to the test.

The Convener: Over the past few years, Governments have tried to cut back on expenditure on legal aid. You suggest in your submission that the way in which they have tried to do that has exacerbated or caused some of the problems to which you refer. Is that fair?

Professor Paterson: It is fair to say that successive Governments and Treasuries have worried about the fact that, for a considerable

time, legal aid has been the only demand-led source of public expenditure. They have managed to cap many other areas of public expenditure, but that has been the one area that they have not capped.

Despite what I have said, legal aid is still the cinderella of the social services: the one that has the least money put into it. Nevertheless, for a long time the Treasury has been anxious about it. If I were in the Treasury's position, I would be anxious too. Since 1950, there has been an exponential rise in legal aid expenditure, which has not been tied to an exponential rise in productivity or the number of cases in which people have been helped. As Professor Stephen knows, one school of thought south of the border believes that that has been due, in part, to supplier-induced demand—the fact that lawyers helped to make it happen. However, that explanation is far too simple.

Maureen Macmillan: In paragraph 13 of your submission, you say:

"The prevailing solution amongst contemporary thinkers to these problems of definition and analysis relating to access to justice, unmet need, the nature of legal problems and rationing legal aid is that identified by the Hughes Royal Commission on Legal Services in Scotland, namely, stipulation. As the Hughes Commission recognised, the fact that tackling these problems requires the making of value or policy judgements, does not mean that the judgements cannot be defended on rational grounds."

Is that to be interpreted as suggesting that the level of expenditure on legal aid must be seen as a matter for political decision?

Professor Paterson: Yes.

Maureen Macmillan: So it should be capped?

11:00

Professor Paterson: If you subscribe to the Treasury school of thought, the answer to that would be yes—that is not necessarily my view.

As I tried to say in my paper, the current thinking is that unmet need and questions of what a legal problem is do not involve definitive facts, but value judgments. No amount of fieldwork that we did would demonstrate the extent of the unmet need for legal service in Scotland—that involves a value judgment; it is not something that can be proved. However, it is possible to make rational statements about the level of unmet need, and needs assessment can be undertaken. Someone can state what the priority needs are, and they can try to defend that. Ultimately, it is a question of what the Government is prepared to fund.

Maureen Macmillan: The Government therefore has to have some idea of how much it will spend on legal aid, even if it does not state that £X million or £X billion will be allocated. Is it true to say that there is a global sum, within which the priorities should be considered?

Professor Paterson: In its budgetary and expenditure plans the Government estimates, on the basis of advice from the Scottish Legal Aid Board, the likely costs of legal aid for the next two years. It uses as much science as it can in that process, but it is partly a guesstimate, because it depends on legislation that is being passed and on demand. The demand has to be guessed.

Over the past two years, legal aid expenditure in Scotland has dropped. That is somewhat unusual compared to the past. The question is whether that will continue. That partly depends on whether lawyers' fees increase, on whether new forms of legislation come in that dramatically increase legal aid expenditure, and on all sorts of other factors. It is probable that legal aid expenditure will start to creep up again.

If I were in the Treasury or the Government—or even as an observer—I would say that too much of the expenditure was demand led and reactive, and that not enough of it is being spent on areas in which rational planners would want to put resources. Suppose someone was to identify—as I did in my work for the Legal Aid Board a few years ago—that there was a shortage of social welfare law provision in many rural areas. There was nothing, under the present set-up, that could be done about that. The legislation does not provide for the board to take such strategic action, and it has no legislative powers to do so. The English Legal Services Commission does have such a power. If areas of shortfall in provision were identified and a strategic view could be taken, it would be seen what could be done to provide a service in the area concerned.

I am coming round to the view that the Treasury will eventually cap legal aid, as it has done in England and Wales. If that ever happens, we have to have a system under which we can plan to spend the money as wisely as possible.

Maureen Macmillan: Would you go as far as allocating blocks to various aspects of legal aid?

Professor Paterson: The English and the Australians have been considering for a long time how needs assessment/prioritisation is carried out. Legal aid has been capped in Australia for several years now; English legal aid is now effectively capped. Once legal aid expenditure starts to be capped, prioritisation and rationalisation have to be carefully considered. It would be preferable to avoid that, but we need more strategic planning.

Gordon Jackson: The idea of capping legal aid interests me. I should say formally that I have a financial interest in the provision of legal aid.

I understand your reluctance on capping. I was

at a conference on legal aid 20 years ago, in India of all places. It was pointed out that capping is inevitable because the demand for legal aid is insatiable—that is, it never ever ends—and because resources are never infinite, legal aid always needs to be capped. Is that a fair theory?

Professor Paterson: I fear that that is correct, because, as I argued, there is no absolute level of unmet need. The level could be almost infinite if we began to service all the possible legal needs of the Scottish population. Therefore, what we have at the moment is rationalisation through the suppliers, through what they are prepared to specialise in and through the public information that we make available.

The research that I am doing with Professor Genn makes it quite clear that there are major problems with public legal education. People simply do not understand what their legal rights are or how the legal system operates and many impressions that they form of the system are highly negative. We need public legal education to tackle that.

I agree with Gordon Jackson.

Gordon Jackson: In a sense, that makes capping even more likely. It might be an unfair thing to say, but the more people realise their rights, the more they will want to exercise them, the more the bill goes up, the more eventually we will be in a vicious circle in which we cannot fund legal aid indefinitely.

Professor Paterson: Indeed, except that we have, as I have indicated, a form of rationing that is not talked about. It is based on eligibility. It is based on limiting scope not in a logical way, but just because tribunals came along later and it was easier to give a blanket no. Even when the Lord Chancellor's department was in favour of extending legal aid to tribunals, the Department of Trade and Industry was not.

We have rationing, as you have implied already, but it is not done on a strategic, rational basis. Therefore, if we are going to have some kind of rationing, we need a legal services commission that at least tries to look more rationally at how the money should be spent.

The Convener: Can you suggest a possible scenario for that?

Professor Paterson: We do not have joined-up legal services because the mechanism is not there. Community legal services are partly about joined-up legal services, which we do not have at the moment. We do not have sufficient links between the advice providers, between the advice providers and the private lawyers and between the private lawyers and the salaried lawyers, who all need to work together.

In the most advanced jurisdictions, it is recognised that the way forward in relation to legal aid is some kind of planned mixed model. That is a strategic overview that looks at the use of lay advisers, the private profession and the salaried lawyers in the public sector and asks how we can best rationalise the use of our resources in relation to legal aid. That means having debates such as whether it is good to have competition between the public and private sectors or when it is helpful to use a salaried model and when it is not. Those issues have been looked at in other jurisdictions but are only gradually being looked at here. That is part of what the Public Defence Solicitors' Office experiment is about.

The Convener: I do not think that that would distinguish between types of case, but rather between the mechanisms through which a case is fought.

Professor Paterson: One way to get more value for money is to reduce wastage and duplication and to make sure that the money is being spent as effectively as possible. We want to do local needs assessments to assess where there are gaps. I would rather go down that route, with more quality assurance, before we finally bite the bullet about which areas we are going to pull back from. It is inevitable that we will prioritise some areas more than others. We already de facto do that.

The Hughes royal commission did a good job in many respects, but it said that people should not have legal aid to organise or regulate their affairs. That seems quite rational until we realise that it allows legal aid to people who want to litigate about the contents of their parents' estate, but does not allow legal aid to let the parents draft a simple will, which costs much less. In other words, there is a great need to move to a preventive strategy, which we have not been able to do.

Richard Suskind argues that spending a little money putting a fence at the top of a cliff is a more effective strategy than having lots of ambulances at the bottom. The research that I have been undertaking with Professor Genn shows that there is a cascade effect with legal problems: if they are not treated, they get worse and worse. For example, one starts off with a small financial or debt problem that gets worse and that leads to mortgage arrears and puts strain on the marriage. Then the house is lost and the marriage breaks down. We know of cases involving that sort of cascade effect and early preventive work is the way in which to tackle it.

Gordon Jackson: What is coming across to me—I say this in order to ensure that I have understood you correctly—is that there is an advantage to a capped system. It teaches people to be strategic by forcing them into a much more

rational way of spending available money through a legal services commission or whatever.

Professor Paterson: You could have such a system without capping it—that is called a soft-cap system, in which the board or commission knows what its global expenditure will be two or three years in advance and tries to plan its expenditure on that basis. I am not absolutely convinced that we must have a hard cap, as it is called, or an absolute limit on expenditure, but perhaps we must. Whether we have a hard cap or a soft cap, strategic planning would help us.

Gordon Jackson: I will stay with this subject for a moment. My other difficulty is how precisely a cap can be fixed. I do not know what other countries do—perhaps you could tell us—in relation to demand-led or fixed capping. Let me be slightly flippant. With one week to go in the financial year, 18 murders take place. People must be defended—that is a requirement under the European convention on human rights. How can a cap be fixed if we do not know who is going to kill whom?

Professor Paterson: I take your point absolutely. The problem is very difficult.

Parts of Australia operated a crude cap, which meant that assisted divorces would cease in June until the next financial year. That is how a crude cap works. However, the Australians got into all kinds of problems with criminal cases. There was a celebrated murder case in which a cap on expenditure was imposed—the defence could have two Queen's counsels, but not three, or whatever. The defence argued in the highest court in Australia—the High Court—that the funds that had been allocated to that murder trial were insufficient. One can get into problems by imposing such a crude cap.

The English system tries to tackle those problems by contracting, with rolling contracts that start at different times. In theory, 10 firms would have contracts to deal with divorce cases in a part of the north of England, but those contracts would not all start on 1 January. There would always be two or three firms of practitioners with the capacity to take on divorce cases.

Michael Matheson: When you referred to the practice of crude capping in Australia, I thought that there must have been a knock-on effect for marriage guidance and social services, which will have had to pick up the pieces—that goes back to the issue of prevention.

I will change tack slightly. In paragraph 22 of your submission, you raised some general issues about eligibility criteria, with particular reference to the tapering of eligibility. You refer to the fact that the legal aid eligibility review "lacked the courage" to implement an upper limit on eligibility. Could you expand on that comment?

Professor Paterson: I am sure that it was rather naughty of me to say that.

The "Review of Financial Conditions for Legal Aid: Eligibility for Civil Legal Aid" is an interesting document that considered a number of ways of tackling what I call the middle-income trap. People whose incomes are just outside the legal aid limits seem to be left out in the cold. One of the proposals was a recommendation of the Hughes commission to remove the upper limit for legal aid, which would mean that everybody would be eligible for legal aid. Before you ask how on earth that could be operated, the answer is that there would be a tapering system of contributions in which somebody of a middle income would pay a 100 per cent contribution.

Why should such a system be established? First, the contribution could be spread over a substantial period of time, which not all private lawyers allow. Secondly, it would give a measure of protection as the case proceeded. Thirdly, there would be protection if someone lost, which is, as I said earlier, the real advantage of legal aid if a substantial contribution is required. If someone loses who is legally aided, the court has discretion to vary the person's liability between nil and the size of their original contribution. Even if someone paid a 100 per cent contribution, they would have the possibility of protection if they lost. It would be a kind of insurance policy.

11:15

The Administration considered that option and decided that it would incur a lot of additional administrative expenditure, as so many people would take up legal aid, which it would have to pay for. My response is that the cost could be factored into the contributions system. The Government did not consider that proposal as seriously as I would have liked, but that was its argument. I do not have chapter and verse on it—it is not in the consultation paper—but I recall, from asking the Government what the additional costs of such a scheme would be, that the additional costs would be relatively few millions of pounds and not a huge additional financial burden. The impression that was given by the Conservative Government was that it did not want to sign up to universal eligibility.

I do not have the facts on how much the Government said that the scheme would have cost, and it might have been difficult to get an accurate figure for that. Nevertheless, I would have liked it to be considered more carefully, along with the safety net that they were proposing.

Michael Matheson: The scheme sounds similar to that which is used by the Benefits Agency, in which tapering systems are operated to determine

eligibility for some benefits.

You referred to the fact that the Government was concerned about the administrative costs of operating such a system, which, if it had been implemented, would probably have been a few million pounds. Would that money have increased the number of people who would have been eligible, or would it have been required just to implement the system?

Professor Paterson: I cannot answer that question, as I do not have the information.

Gordon Jackson: Let us move on to something more specific. There may be areas outside the system at the moment. Do you have a view on specific areas that you would like to be brought into its scope? I was interested in what you said about prevention and the narrow way in which we analyse the provision of legal aid. What do you think is missing and how could it be brought into the system?

Professor Paterson: British Columbia has a form of legal aid delivery that is in many ways traditional, but which has an innovative aspect called public legal education, which is renowned. We should try to work in that area of prevention. The research that I have been involved with indicates that there is a considerable gap in the public knowledge of law. That is one area to be included, and I would like public legal education to be established here. The law centres would say that they carry out much of that education, but there are only 11 or 12 law centres, most of which are in the west of Scotland.

I would also like more legal aid to be allocated to areas of social welfare law, especially in rural areas. There is a distinct shortage of legal aid expenditure in the areas of social welfare, debt advice, employment advice, welfare benefit advice and housing advice. There is also an argument for legal aid to be made available in some instances in which there is a strong public interest in the case, as there is a difficulty with legal aid when a lot of people have the same problem. In America it is called a class action, such as when many people have the same problem with a defective product.

A celebrated case from south of the border was the litigation against Opren, a so-called wonder drug for arthritis, which was alleged not to be a wonder drug. Half the pensioners were eligible for legal aid, but the other half were not. They all started off together, but a judge ruled that those who were not eligible for legal aid could no longer be associated with the action. That caused serious problems until a millionaire stepped in and offered to fund the pensioners who were not eligible for legal aid. The system cannot be run on the basis that a millionaire might come out of the woodwork and fund actions. Something must be done about the situation, as it has been done in England.

I agree with the move to extend legal aid to certain tribunals, as is proposed by the Convention Rights (Compliance) (Scotland) Bill.

Maureen Macmillan: You talked earlier about the middle-income trap. In certain civil legal aid cases, the trap is not set at middle income, but just above the poverty line. The fact that repayments can be made over several months is of no consequence to people who cannot afford those repayments. I would appreciate your comments on that.

You also talked about the need for more legal aid in social welfare cases, especially in rural areas, and gave debt advice as an example of the legal aid that is required. Would you favour organisations such as the citizens advice bureaux being funded by legal aid to give advice, or do you feel that such advice will always have to be given by solicitors?

Professor Paterson: Let us deal with the urgent issue of domestic violence cases first. The Scottish Legal Aid Board and the Scottish Executive recognise that there is a problem, and they are trying to find a way around it. The issue requires attention. Lawyers feel that they have to ask for money up front in some cases, as they are not guaranteed the protection of legal aid, especially if a legal aid form has not been filled out. They are also required to undertake an assessment of the individual's means and of whether they are likely to be eligible for legal aid. That issue must be, and will be, dealt with.

Your second question, on whether legal aid funding should be allocated to non-lawyers, is something of a hot potato. That route has been explored south of the border and is part of community legal services there. The argument is that general or specialist advice agencies can provide some services quite well. Research from tribunals shows that the people who are most effective in representation and who produce the best results are not necessarily the lawyers, but the specialists—sometimes they are lawyers, but sometimes they are immigration tribunal specialists who are non-lawyers. It is not entirely unsurprising that it is the specialist who does best in representation.

The research that I and a large team have undertaken for the English Legal Services Commission compares the work that is done by the not-for-profit sector under contracts to the English Legal Aid Board with the work that is done by solicitors under contract in the area of social welfare law. What we found is not entirely surprising. In some areas, the not-for-profit sector was more effective than solicitors, partly because

it was more specialist in certain debt and housing work. Sometimes the two sectors produced differing results.

Similar research has not been conducted north of the border, but we found that, in debt work, lawyers south of the border tended to challenge individual debts through the courts, whereas the advice agencies tended to take a more holistic approach and consider all the debts, proposing a debt rearrangement system rather than challenging individual debts. I am not saying that one approach was better; I am simply saying that one was more holistic and the other focused on individual debt.

Curiously, when it came to welfare benefits the behaviour was completely reversed. The solicitors conducted a generic advice benefit check, whereas the not-for-profit sector tended to carry out much more tribunal representation and challenging of the lack of award. It is interesting to note how they changed their tactics.

The Convener: I presume that such organisations would need to become more like lawyers, in the sense that they would become accountable for bad advice.

Professor Paterson: Absolutely. They are subject to the quality kitemark of the English Legal Services Commission. However, as members probably know, the English Legal Aid Board and now the Legal Services Commission have pursued quality assurance and kitemarks—first for solicitors and then for the not-for-profit sector—for 10 years now. I have been quite heavily involved in that research. However, north of the border, research has not developed much, and I think that it needs to. Quality assurance mechanisms have to be applied to both the not-for-profit sector and solicitors.

The Convener: Might it not have to go further than that? Does the Law Society for Scotland not have some kind of guarantee fund?

Professor Paterson: It does, but the guarantee fund is where the client's money is held. In most litigation, substantial amounts of client's money will not be held. In a legal aid litigation, payments are supposed to go straight to the board and not be held in the fund.

Gordon Jackson: I understand that the guarantee fund tends to pay out where the till has been dipped into and money has been taken. However, another point to make is that the Law Society for Scotland has a block insurance policy that will cover bad advice. That would not have come into play if the advice were given out by other people.

Professor Paterson: Yes. The CABx all have insurance policies in relation to advice, as do the law centres. I would expect any agency that took part in community legal services not only to meet quality assurance standards but to be properly insured.

The Convener: Should small businesses be eligible for legal aid in certain circumstances?

Professor Paterson: That is a very interesting question. In the past, I would not have been sure, but now I think that there probably is an argument for that. In my paper, I refer to a piece of research south of the border that has been funded by the Nuffield Foundation, of which I am on the advisory committee. The researcher has found some really horrendous stories of the devastation of a small business that can occur when it runs into difficulty and there is a debate over whether the supplier has been at fault or whether something has gone wrong in the way that the small business has operated. That kind of situation can cause the small business to go bankrupt and can threaten the loss of all the personal and private belongings of the small businessperson. The researcher has unearthed some very sad stories. There must be a question mark over whether the English have been right to try and remove from legal aid eligibility individuals who are small businesspersons.

The Convener: The final area that we want to explore is that of a legal services commission. You mention such a commission several times in your document. How broad would its functions be?

Professor Paterson: That will partly depend on the view that is eventually taken by the stakeholders, the Scottish Executive and the Scottish Parliament on how broad community legal services should be. However, the functions should certainly cover all public legal funding. The question would then arise, in a joined-up legal service, of how a commission would relate to advice agencies that are funded in other ways or to lawyers doing pro bono work or speculative fee actions. In a joined-up legal service, there would be some link, but I doubt whether everything would come under a legal services commission. A legal services commission should have, as its primary focus, public legal funding.

11:30

The Convener: Do you envisage a commission being given a hard-capped budget?

Professor Paterson: That would depend on the Treasury.

The Convener: What would a commission need to fulfil the role that you think it might have?

Professor Paterson: If we had a legal services commission now, it could start to consider needs assessment, gaps where there is a lack of supply,

and possibly the use of contracting. In England and Wales, franchising was originally partly driven by the notion that if there was a deficiency of social welfare provision in certain parts of the country, and if the private sector felt that it could not make a living by doing that kind of work, we should see whether we could get salaried lawyers to do the work and whether we could give them an exclusive contract for the area. That kind of planning could be done by a commission, as could planning for public legal education. A commission could also liaise with Scottish courts. At the moment, there is not enough ability to liaise with the legislature and with Scottish courts about changes. For example, small claims limits are going to change and that will have a knock-on effect on legal aid eligibility.

When Scottish courts introduced full costs recovery—the notion, to which I and many others were fiercely opposed, that litigants should pay for the great bulk of court costs and possibly even the costs of the judges—legal aid had to pay the court fees of those who received it. That did not seem a joined-up way of thinking. We should have tried to avoid a transfer from one pocket of Government to another.

We will not get innovative forms of delivery through the internet if we leave things as they are at the moment. The Scottish Legal Aid Board has limited strategic powers and limited ability to set up innovative forms of delivery. A legal services commission could do that, and could also do preventive work. There are many things that a legal services commission could do were it given the legislative power. However, I am not yet convinced that it would require a hard-capped budget.

The Convener: Is it implicit in what you are saying that the advice that the minister would give to a commission would be fairly broad?

Professor Paterson: Yes. If the Government wishes to state its priorities, and if it is necessary to ration, those decisions have to come from the Government rather than from any legal services commission, although there is a school of thought that says that such decisions should be pushed down to the local level. This is not necessarily what will happen in Scotland because the decisions have not yet been made, but in England and Wales part of the theory of community legal services is to have local partnerships and providers—some funded through public legal services, some funded through local authorities and some funded through charities—that will work together with user bodies to consider the geographic area, do a needs assessments to ascertain priority needs, and then decide where they should spend resources. Under such a model, where resources were spent might vary from area to area.

The Convener: There will always be restraints on budgets and the Government will eventually have to make hard choices. There would therefore be pressure on the minister to make his advice more and more specific, to constrain a commission to get the results that he wanted.

Professor Paterson: Yes, I can understand that there would be that pressure. I have indicated that we already have a kind of rationing. That might have to become even clearer if we move towards a legal services commission model.

I may sound as if I am reluctant to bite the bullet on rationing, but I think that more overt rationing may be inevitable, in which case we will need to have a body that is able to think hard about how to do that rationing. Those decisions will come either from the Government or from a legal services commission. At the moment, in England and Wales it comes from the Government. The Government has said that its priorities are social welfare law and public interest cases.

The Convener: Will the Government not still say that sort of thing, even if sets up a legal services commission?

Professor Paterson: Possibly. I think that they are likely to take the view that there ought to be more clear priorities. Since that is a political choice, the Government may well say what it thinks its priorities are. Obviously, one would prefer more flexibility if that were possible.

The Convener: As there are no further questions, I thank Professor Paterson for giving evidence, which has been very helpful.

Professor Paterson: Thank you for giving me the opportunity.

Petitions

The Convener: We have four petitions before us today. The first, PE102, by James Ward, on sequestration, is one that we have already dealt with. Members have copies of the relevant papers and latest correspondence with the Minister for Justice on that petition. You will remember that we suggested that the minister should consider whether a petition for recall of a sequestration should be available in the sheriff court, rather than only in the Court of Session. To paraphrase the minister's response, he has agreed to look at that point.

Do members wish to suspend the committee's consideration of the petition pending the minister's consideration of that suggestion, or should we dispose of the petition and write to the minister saying that we strongly believe that petitions for recall should be available in the sheriff court?

Gordon Jackson: I am prepared to wait and see what view the Executive reaches on the matter. Ministers may decide that that is the right thing to do, and we would all agree with that, but they may also decide that it is not. We could examine their reasons for not going down that path and the committee might disagree with them. However, it would be slightly intemperate of us to take a position before the Executive has at least considered the suggestion.

The Convener: I shall write to the minister and ask him whether he has a time scale for coming to a conclusion on the matter.

I take it that we are agreed on the other matter that Mr Ward raised, about the ability to appeal. I think that we agreed that if the petition for recall is to be made available in the sheriff court, that is not something that we want to pursue any further.

Gordon Jackson: We heard evidence that appeal was not as good a method because both sides have to be taken into account. I was convinced by the argument that recall was the better option.

The Convener: The second petition, PE205, by Mr and Mrs Collie, has been referred to us by the Public Petitions Committee for information only, and we are therefore not obliged to do anything with it. Nevertheless, I suggest that we take it into consideration to a certain extent when we are looking at the Convention Rights (Compliance) (Scotland) Bill later today. Phil Gallie has suggested that we write to Mr Collie congratulating him on his efforts to highlight the situation and on his determination to pursue family interests within the civil law. I have to say that I feel that that is beyond the scope of what we should be doing in response to a petition that has been passed to us for information.

Gordon Jackson: I agree, but I think that the issues raised in the petition are pretty similar to those that we will be dealing with when we go into private session. I wonder whether we should tell the Public Petitions Committee that we are dealing with the issues in petition PE205 in our report on the Convention Rights (Compliance) (Scotland) Bill. We should perhaps write to that committee saying that, although it has sent us that petition, pretty much all the issues it raises are dealt with in our stage 1 report. The Public Petitions Committee could then pass that information on to the petitioners.

The Convener: We can certainly bring that to the attention of the Public Petitions Committee.

The final petitions are PE299 and PE331, by Mrs Tricia Donegan. We have already considered a previous petition by that lady. We agreed to suspend consideration of the previous petition pending an investigation by the Department of the Environment, Transport and the Regions. We are still awaiting that report, which is due to be published in the next couple of months. I suggest that we also defer consideration of the two new petitions from Mrs Donegan until that evidence is available. Are members agreed?

Members *indicated agreement.*

11:40

Meeting adjourned until 11:45 and continued in private thereafter until 12:32.

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