JUSTICE 1 COMMITTEE

Wednesday 25 April 2001
(*Morning*)

Session 1

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JUSTICE 1 COMMITTEE
†10th 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)
*Mr Jamie Stone (Caithness, Sutherland and Easter Ross (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Iain Gray (Deputy Minister for Justice)

WITNESSES

Gerard Brown (Law Society of Scotland)
Michael Clancy (Law Society of Scotland)
Ian Smart (Law Society of Scotland)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

The Chamber

† 9th Meeting 2001, Session 1—joint meeting with Justice 2 Committee.

Scottish Parliament

Justice 1 Committee

Wednesday 25 April 2001

(*Morning*)

[THE CONVENER *opened the meeting at 09:22*]

The Convener (Alasdair Morgan): The first item on the agenda deals with the declaration of interests by our new member, but Jamie Stone is not present yet.

Convention Rights (Compliance) (Scotland) Bill

The Convener: The next item deals with motion S1M-1845.

I move,

That the Justice 1 Committee considers the Convention Rights (Compliance) (Scotland) Bill at Stage 2 in the following order: parts 2 to 7, part 1 and the schedule.

Motion agreed to.

Legal Aid Inquiry

The Convener: I welcome our witnesses, who are no strangers to us. From the Law Society of Scotland, we have Gerard Brown, the convener, Ian Smart, the vice-convener, and Michael Clancy, the director.

Thank you for your evidence and for your further submission. I want to ask you about the criteria that you laid out in paragraph 22 of your submission on the subject of the minimum basis for a just and effective system, which includes the statement that

"Justice cannot be easily priced".

Do you think that our criminal legal aid system stands up to those five criteria? Have there been any recent changes that might fail to meet the criteria?

Gerard Brown (Law Society of Scotland): The only recent major change concerning criminal legal aid has been the introduction of fixed fees. In response to consultation, our submission is concerned with trying to remove the roundabouts from the swings-and-roundabouts analogy and with the cover for exceptional cases. In those discussions, we anticipated that there might be a minimum of perhaps 500 exceptional cases.

We are happy to note that, after nearly two years of the fixed fees regime, the Convention Rights (Compliance) (Scotland) Bill includes provision for exceptional cases to be dealt with on application to the board. The question is, what would the criteria for those exceptional cases be? We hope to discuss that in more detail with the Scottish Executive and with the Scottish Legal Aid Board through the tripartite group.

We have instructed a respected academic, Professor Brian Main from the University of Edinburgh, to examine the impact of fixed fees. We also want to see what issues arise from the Convention Rights (Compliance) (Scotland) Bill and the effect that it will have in general terms on the summary criminal legal aid system.

As with other elements of criminal legal aid, the matter of solemn procedures also relates to the question of fees. We hope that a submission on the subject will be sent to the tripartite group within the next few weeks.

The Convener: Leaving aside the matter of fixed fees, would you say that the current system meets the minimum criteria that you lay out in your submission?

Gerard Brown: Yes. We are content that those who require legal aid are getting access to legal aid in the criminal sphere.

The Convener: Other members might want to

explore that issue further.

Some people have expressed concern that the current level of fees places the viability of certain practices in serious jeopardy. Do you have a view on that?

Gerard Brown: We think that, economically, firms have to address various issues. However, we take the view that the fact that there has been no effective increase in criminal legal aid fees since 1992 should be addressed urgently. Also, since it has been two years since the introduction of fixed fees, there should be a framework for the review of the level of fixed fees on an annual or biannual basis. That debate should develop quickly, because we have been invited to produce a paper that will be presented to the Scottish Legal Aid Board and the Scottish Executive.

09:30

The Convener: As part of the same argument, it has been suggested that criminal legal work is no longer attractive to entrants to the profession. Have you any evidence that supply is beginning to diminish because the price is falling or not rising?

Gerard Brown: We three witnesses have nearly 100 years of experience—perhaps more in Mr Clancy's case.

The Convener: Consecutive sentences.

Gerard Brown: There is no remission for good behaviour.

The anecdotal evidence is that a change is taking place. Members of the profession who tutor people for diplomas or in universities note that all young entrants are disinclined to become involved in legal aid work. We are conducting some research into that, which we hope to be in a position to consider before the committee's inquiry ends.

In my experience of appearing in courts throughout Scotland and entering various common rooms, I have noted that the average age of practitioners is not as low as it used to be. Partners are appearing regularly in courts, because firms are not employing trainees or young assistants. My firm has lost three young assistants in the past two years to firms that are involved in commercial work such as commercial litigation and intellectual property, because they offer a more attractive career structure and higher income.

The Convener: You say that a more attractive career structure is available. Are people influenced by considerations other than income?

Gerard Brown: Yes. The long-term prospects are different. Other firms may have a structure that allows them to expand their business into aspects that do not involve legal aid.

Phil Gallie (South of Scotland) (Con): I am slightly surprised at your comment on young solicitors. Several people have advised me that, after attending university, young solicitors sometimes find it difficult to obtain placements in law firms. How does that equate with your comment about the loss of young solicitors to firms that work on commercial operations?

Gerard Brown: Some young graduates who have finished their diplomas are having problems obtaining traineeships, because many firms—especially those involved in legal aid work—are unprepared to take on the overhead of employing a trainee.

Phil Gallie: That is an interesting point.

You said that fixed fees have been the only recent major change in criminal legal aid. Were not public defenders introduced? If so, how have they affected you? Do you not consider their introduction a significant change?

Gerard Brown: We are represented on the research group that is examining the Public Defence Solicitors' Office. The scheme applies only in Edinburgh. The impact there will be considered in due course, when the study reports. The PDSO's effectiveness, cost, quality of service and how it presents itself will have to be assessed by the research group.

Phil Gallie: It would be unfair if I pressed you on that.

Gerard Brown: Thank you. I do not mind being pressed, but not on that subject.

Phil Gallie: I will move on. I understand that solicitors have said recently that the fixed fees system does not cover their costs sufficiently for progress with cases. That raised questions about the European convention on human rights and representation. Will you comment on that?

Gerard Brown: There have been several cases on the issues involved. The judicial committee of the Privy Council is to consider one such case from Fort William on Thursday or Friday this week. We hope that the exceptional cases proposal in the Convention Rights (Compliance) (Scotland) Bill will produce agreed criteria that will allow exceptional cases on summary complaint to cover all summary criminal procedure. If someone approaches a solicitor with a difficult, complex and potentially lengthy summary criminal case—which is unusual—that solicitor should be able to apply to the Legal Aid Board on the criteria. The Legal Aid Board should grant that the case is exceptional and will be paid on time and line, rather than with a fixed fee.

Phil Gallie: Should those exceptional

circumstances be recorded precisely in that bill, or are they best dealt with later by statutory instrument?

Michael Clancy (Law Society of Scotland): As you will have seen from some of the briefings that you have received on that bill, we suggest that the bill's record-keeping obligation should be modified. Record-keeping requirements should increase when the case is determined to be an exceptional case. You may recollect that, after the Crime and Punishment (Scotland) Act 1997 was introduced, a criminal legal assistance register was set up and the Scottish Legal Aid Board established a code of practice. They have operated since October 1998 and have worked well.

The Scottish Legal Aid Board has not suggested that major compliance issues exist or that solicitors have failed to comply with the code of practice or the time-recording or record-keeping requirements of the board. Therefore, it would undermine the compliance structure to require solicitors to keep records from day one on a case to the level of detail that would be required for an exceptional case, in anticipation of that case becoming an exceptional case.

When someone enters a solicitor's office with a complaint, it may not be immediately identifiable that the case is exceptional. I do not want to rehearse the arguments for an amendment that I understand has been lodged and that the committee may discuss later this morning. However, it struck us that the bill proposed an almost impossible task for the solicitor to meet, because they would have to identify on day one the fact that the case would later become an exceptional case to which the relevant regulations would apply. That is why we produced an amendment that would remove the retrospective element in the section involved. Does that answer your question?

The Convener: We will move on, because we are not discussing the bill at this stage.

Phil Gallie: It is always great when people take an opportunity, as Michael Clancy just did.

I will return to the script and move on to civil legal aid. The Law Society of Scotland's submission refers to

"a crisis in eligibility levels which has a significant bearing on the ability of a large section of the Scottish population to secure access to justice."

You also say that financial eligibility criteria are inadequate. Will you expand on that?

Ian Smart (Law Society of Scotland): For the record, I should say that Gerry Brown and I are the convener and vice-convener not of the Law Society, but merely of its legal aid committee.

We tried to set out the information in some detail in the figures that we provided, particularly those on the working families tax credit. It is possible to take the total income produced by the working families tax credit and, without worrying about how that figure is arrived at, simply consider what it represents in terms of a net weekly income, and then consider whether it is reasonable that the relatively small amount of money involved should make people financially ineligible for legal aid. That will be for the committee to consider.

As members will see from the Scottish Legal Aid Board's annual report—and from the comments made by Mrs Couper in the preliminary memorandum, which was at some pains to say this, in fairness to the board—the board does not have a statutory obligation to advise the Government on eligibility. However, Mrs Couper felt it incumbent on her to comment that there is clearly a significant decline in the number of people applying for legal aid. There is also, clearly, a significant increase in the number of people who, having been offered legal aid, are declining to take it up because they are not prepared to pay the contribution. We suggest that, in many cases, they are not financially able to pay the contribution.

That is a serious problem that solicitors face daily. Going to law is expensive. Despite everyone's efforts to minimise the cost—and the Scottish system is considerably cheaper than the system south of the border—it is nonetheless beyond the resources of a person on average earnings to finance a complex legal case. The legal aid scheme is not providing the means to allow access to the system. We would defend the principle of contributions; but we feel that the contributions are too high. In any event, the eligibility cuts off too early.

Phil Gallie: Your answer has covered a number of questions that I had intended to ask. When you consider civil legal aid and make an award, how often does that work fairly for the other person involved in the case, who may not have been awarded legal aid? How often does that person just put their hands up and say, "Right, I am giving up"?

Ian Smart: That is a real problem. It is partly an eligibility problem: someone of very low means will be eligible for legal aid but someone of modest means either will not be eligible or will be eligible only with a substantial contribution. Anecdotally, the most common situation that solicitors come across is of the feckless father, who is unemployed and who qualifies for legal aid, bringing proceedings to secure contact with a child, and of the mother, who is working part-time and who is on working families tax credit, being faced, under the current legal aid system, with

having to find £1,000 or £1,500 to defend those proceedings. Similarly, it is very common in matrimonial violence cases to find that the woman is working hard to provide for the children and is stuck with having to pay the costs of bringing proceedings against a violent partner, whereas the feckless and unemployed violent partner will get free legal aid to defend those proceedings.

We do not seek to justify that. I think that I could go so far as to say that, if the Law Society of Scotland thought that there was one thing that could come out of this committee's inquiry, it would be for you to bring pressure to bear on the Executive on financial eligibility for civil legal aid. That is the biggest problem in the legal aid system in Scotland.

We know that the Executive is always faced with demands on its limited resources, but the cost of the civil legal aid scheme in Scotland is minimal. We pay VAT and court fees back to the Government, so £10 million of the £30 million spent is recovered in expenses or contributions. The amount spent here is a small fraction of the amount spent in England and Wales per head of population. I do not know the exact figure, but it is something like 20 per cent. The difference is that big.

Phil Gallie: If we accept what you say, can you give us some idea of the percentage uplift that you are looking for, and of the minimum level of contribution? How much do things cost overall?

Ian Smart: In our submission, we give an example on advice and assistance. The cut-off for advice and assistance is based on net income. The maximum figure is £163 a week. We suggest that that figure might go up to somewhere in the region of £250 a week. We do not think that that is unreasonable. Obviously, there has to be a cut-off point, but we do not think that someone who is earning £250 a week net is necessarily a rich person. I am afraid that we do not have access to the modelling to allow us to say what the overall cost would be. You would have to ask the Executive or possibly—although it is not obliged to give the information—the Scottish Legal Aid Board may be able to assist you.

Phil Gallie: You are proposing a 50 per cent increase—in fact, it is just over 50 per cent—on the current figure. That would have a significant impact on the overall budget. No doubt, many more cases would come forward.

09:45

Ian Smart: Not necessarily. We give the example that the average cost of an advice and assistance account is only £129. If the client's contribution to legal aid is more than that, patently the client will opt to have the matter dealt with privately, if you follow the logic. The difficulty with advice and assistance cases is that, although the average cost per case is only £129, there are exceptional cases. Everyone is anxious to promote mediation in matrimonial matters. Funding is available for that under legal advice and assistance. However, mediation is not cheap. A session may cost £70 or £80. Often, a bill of £1,000 or more can be built up. That is a lot of money to ask someone to find when they may be earning only £165 a week and therefore not be eligible for legal advice and assistance as things stand at the moment. Such larger cases may be a factor if eligibility is extended, but I am certain that an increase of approximately 50 per cent in eligibility would not lead to anything like a 50 per cent increase in expenditure. I am sorry that that was such a complicated explanation, but these things are difficult to explain.

Phil Gallie: Is there any scope to allow small solely operated businesses access to civil legal aid?

Ian Smart: That is a complicated question. The answer depends on the business medium. If we are talking about small business in the sense of a single sole trader, it is easy to calculate the financial side of things. In principle, I can see no reason that aid should not be extended in such cases. However, I will come back to quite a big caveat to that comment. With a limited company—even a small one—it is much more difficult to calculate eligibility. It is also difficult with a partnership. If someone applies for legal aid, all their assets are taken into account. If they were in a partnership, all the assets of all the partners would have to be taken into account too. It gets complicated.

Generally speaking, businesses are expected to insure against risks. Employers liability insurance is compulsory. Any good business practice involves obtaining occupiers liability insurance. Businesses can insure against most legal risks for a relatively modest sum that is tax-deductible. That puts them in a different position from members of the general public.

Michael Matheson (Central Scotland) (SNP): In his opening remarks, Ian Smart said that SLAB does not have a statutory responsibility to make recommendations on the financial eligibility criteria. Should someone have that statutory obligation? If so, should it be SLAB or another agency?

Ian Smart: If you had asked me that question two years ago, I would have said that it should be SLAB. However, now I think that it should be the Parliament. That is one reason that we have a Parliament—to give advice on such matters. That is why you are having an inquiry. If the Government sets up a quango, it will just appoint

the people who will make the recommendations that it wants. How will that move things forward? It is your role to make recommendations.

Michael Matheson: I understand what you say; but if this is to be a continuing process, carried out annually, it might be difficult, from the Parliament's point of view, to get one committee to go through all the processes. That is why I wondered whether there should be another body with a statutory remit to consider this issue.

Gerard Brown: We did not burden the Justice 1 Committee with the issue of civil and criminal legal aid fees because we decided that the starting point for that would be the tripartite group that includes representatives from the Scottish Legal Aid Board and the Scottish Executive. I agree with Ian Smart that the framework of that group may be a vehicle whereby members of the Justice 1 Committee or another committee can monitor legal aid fees. We would welcome a regular yearly or biannual appraisal in a framework that is acceptable to all. We do not want to have to ask for an increase in legal aid fees each year.

Michael Clancy: It is already a feature of the landscape that regulations to uprate eligibility come before one of the Parliament's two justice committees more than once a year. Indeed, a couple of eligibility issues have come before the justice committees in the past 18 months. The committee would not, therefore, find it unduly burdensome to deal with the legislative element of legal aid fees.

However, the greater burden would be for the committee to deal with the investigative aspect to ascertain how far the eligibility uprating should go. That need not take place every year, as the process could be spread out over two or perhaps three years. As part of my homework for this morning's session, I found myself reflecting on the fact that the big event in eligibility happened in 1993, when the previous Government changed the eligibility criteria quite substantially. In that year, I recollect clearly being at a meeting of the Scottish Affairs Committee at Westminster, of which Phil Gallie was a member. Eligibility criteria were then a new issue for Parliament and the issue came before that committee without having been considered substantively before. As your legal aid inquiry is only the second occasion on which the issue has been considered from 1993 to 2001 there has been a long lapse indeed and there is clearly room for more regular parliamentary scrutiny of the issue.

Michael Matheson: We have had regulations before us on previous occasions. The Law Society made submissions about those regulations at the time. However, we need to consider whether the process is adequate. I suggest that, if problems arise before regulations are set, we start then to consider the issue along with the parties that have an interest in the matter.

That would resolve the issue of having to take evidence from organisations to ascertain whether the regulations work every time regulations come before us. If the interested parties can reach agreement, the committee may not need to consider the regulations. We need to build in a strategy that is not overly burdensome and bureaucratic, but which works so that problems are flagged up at an early stage.

Ian Smart: The central problem with eligibility is that, in 1992-93, the Government made a conscious decision to cut back on eligibility, so that index linking was with prices rather than wages. The problem has built up over 10 years. It is similar to the situation that led to the shambles of the 75p pension increase. It is not for us to comment on the political sphere, but what has happened since that time is—to put it bluntly—more cock-up than conspiracy. The gap between price and wage inflation has led to a steady decline in eligibility. The problem has been compounded by the working families tax credit, the Government's conscious decision about the structure of the tax burden and what that has meant to the interaction with the legal aid scheme.

I am sure that members understand the point that it is absurd that the working families tax credit is a passported benefit for free legal advice purposes but counts as income for legal aid purposes. I do not believe that anyone intended that the cost of legal aid should go up for those on working families tax credit who have a second child. The additional working families tax credit that such families receive is more than the additional legal aid allowance that they are given. As I said, one does not have to be either a supporter or an opponent of the Government to think that that is a cock-up rather than a conspiracy.

The Convener: You mentioned the importance of the working families tax credit and, I think, also the disability living allowance. Are there other benefits that create the same problems?

Ian Smart: The working families tax credit is the primary problem area. The DLA produces exactly the opposite problem in that it is discounted for full legal aid but counts as income for legal advice and assistance. Although I hesitate to say that they do well out of the system, people who have had catastrophic accidents often receive a significant layer of benefits. They receive incapacity benefit, industrial injuries disablement benefit and disability living allowance at higher rates for both the mobility and the care component. Those people are in the absurd situation of not being eligible for the legal advice and assistance that would allow them to pursue compensation because their

benefits stack up to the point that they are taken out of the scheme. However, they would be entitled to full legal aid because a number of the benefits that receive, such as the DLA in particular, are discounted for legal aid purposes.

We do not believe that all benefits should be passported. Income support and the working families tax credit are means-tested benefits, whereas other benefits including incapacity benefit, DLA and industrial injuries disablement benefit are contribution-based benefits. In certain circumstances, people are entitled to those benefits even if they have £1 million capital in the bank.

Maureen Macmillan (Highlands and Islands) (Lab): I declare an interest. My husband is a solicitor who does legal aid work, both criminal and civil.

What other barriers are there to access to legal aid? We heard evidence from Scottish Women's Aid and from the Glasgow Bar Association that those seeking legal aid for interdicts under the Matrimonial Homes Act 1983 were turned down by the Scottish Legal Aid Board. SLAB said that the matter was one for the police and that the applicant should not be given legal aid to go before a civil court. Have your members complained about that?

Ian Smart: Yes. The Scottish Legal Aid Board has shown considerable inconsistency in its decision making. Members have access to the board's annual report. Rather than hold up today's proceedings while I check the figure, I suggest that members find in the report a number of cases where the board comes to a different decision on review from that which was made in the first instance. SLAB asks whether a matter has been reported to the police and, if the answer is yes, it says that there is no need for an interim interdict but, if the answer is no, it asks why legal aid should be granted to bring civil proceedings. People get into a completely circular argument with SLAB and that is one of the things that they get most annoyed about, particularly given the bureaucracy that surrounds regulation 18 of the Civil Legal Aid (Scotland) Act Regulations 1996. That emergency provision means that, in certain circumstances, where the board has decided that someone will not get full legal aid, lawyers are not paid for the work that they have done on a bona fide basis for a party who is otherwise financially eligible for legal aid from the earlier stages of their proceedings.

Maureen Macmillan: Is there any way of resolving that? It seems to be a problem that really irritates.

Ian Smart: To be fair to SLAB, it realises that there are problems with its decision-making processes. It has promised us that every decision—I think by the end of this year—will be considered by a solicitor, rather than just by an unqualified member of staff on the board. We hope that the decision making will be better as a result. We still have our differences with the Legal Aid Board, but it would be only right for us to acknowledge that, in general, its decision making is getting better.

Michael Clancy: The board will also conduct research on regulation 18 of the 1996 regulations, and I understand that focus groups will soon be working on the issue. That work will also deal with aspects of contributions and eligibility. A lot of work is going on in that area.

10:00

Gerard Brown: Regulations develop over the years. If we had started with a clean sheet, we would perhaps not have produced some of the regulations that are now in place, particularly in view of the mass introduction of information technology, which we welcome. SLAB has invited us to work with it in making progress with IT throughout the legal profession. The board has recently received funding for that, and is actively involving us in that.

There are two elements to the use of IT. One is to lessen the complexity of some of the form filling that has to be done. Some members will be aware that the volume of forms that need to be filled in for civil legal aid is enormous. The complexity must be lessened because of IT considerations.

Secondly, perhaps we should consider the regulations afresh and spring-clean them to make them more user friendly for everyone, including the committee. We want to push forward with that, although it would have major resource implications for us, for the Legal Aid Board and, possibly, for the Executive. All the regulations would need to be examined, and I am sure that we would all welcome any assistance that might be provided in doing that.

Maureen Macmillan: SLAB promised us a while ago that we would be able to look at legal aid forms. Not all of us have seen them, so it would be a good idea to ensure that we did that.

Ian Smart: I refer in particular to the financial forms that have to be filled in for civil legal aid. I am unable to find the reference now, but I can say that there are 146 questions on the standard financial questionnaire. That is not all; two other forms need to be filled in.

Maureen Macmillan: That leads me to my next question, which is on the decline in the number of applications for civil legal aid. You have mentioned the problem of ineligibility. If people are not

financially eligible, they will not apply. Are there other barriers, such as the complexity of filling in the forms? People may take one look at their form and say, "Oh, stuff this."

Ian Smart: We hope that that is not the case. That is a very subjective question. It depends to an extent on the solicitor's availability to assist with filling in forms or to press the client to pursue the matter. Sometimes a client who is given the form may not have come back to the solicitor 10 days later. If the solicitor is busy, the case just goes by the board. If the solicitor is not busy, they will remember and will drop the client a line saying, "Look, if you're having a problem with the form, bring it in, and we'll do what we can to assist." Perhaps that is not how the system should operate.

What Gerry Brown said about IT is important in this context. Solicitors are frustrated all the time by the part G, which is how the financial questionnaire form is known. Those forms come back to the solicitor time and again—the clients fill in the part G themselves. The whole legal aid application is often bounced because one of the 146 questions has not been answered. There are some absurd situations: for example, somebody who has been on income support for two or three years, which is disclosed in the form, may not have ticked a box to say that they are not a company director. The Legal Aid Board will send the whole thing back. What is the likelihood of somebody in those circumstances being a company director?

The IT changes will mean that, if a form is not filled in properly, it simply will not go through, and we will not have the frustration of it being sent back time and again.

Gerard Brown: With IT and ready access, the problem could be addressed almost immediately through the person dealing with the application sending an e-mail to the solicitor's office and asking why a certain box was not ticked. An immediate response could be given, rather than having the delays that currently take place. We think that such procedures are a realistic prospect in the shorter term.

Maureen Macmillan: In other evidence, it has been put to us that the legal profession is not equipped to deal with most aspects of welfare law, as its members have no experience in it. Do you accept that view?

Michael Clancy: We do not accept such a bald statement as an accurate reflection. There are great wells of experience in many areas in the social welfare arena. That includes housing cases, debt cases and so on. When one considers the basic statistics that Citizens Advice Scotland has released on such matters, it becomes clear that the idea that solicitors do not do such work has come about because someone else is doing it, and because the marketplace is already being very well supplied by citizens advice bureaux.

If, say, 90 per cent of inquires about some aspect of benefit law are dealt with by citizens advice bureaux, and 10 per cent by solicitors' offices, it is quite obvious that solicitors will not get the opportunity to develop expertise in that area. Any analysis of the incentives and disincentives to operate in the system is complex, but I could not claim that solicitors have a vast expertise in every range of law. However, in the range of complaints that we receive about inadequate professional services, aspects of social welfare law do not feature terribly highly.

Therefore, one could deduce that there is a high level of satisfaction among clients who receive advice from solicitors on such matters. The fact that other bodies are providing the advice means that we can only speculate that clients are being satisfied there also.

Maureen Macmillan: Would you be happy for welfare law to be taken over more by advice agencies, and perhaps to have legal aid follow it? Citizens advice bureaux could be used for tribunals and so on.

Michael Clancy: We have to consider what kind of system we want and where the strategy for providing advice and for deciding who should provide the advice is to be formulated. The Law Society would like to reflect on that question a wee bit more, because it is a complex issue. I would not want to peril and prejudice the views of the committee on the matter. If you want, we will come back to you in writing on that issue.

Gerard Brown: I welcome the opportunity to write to the committee about that. Social welfare law is a broad term, which includes such things as housing and benefits issues. If a solicitor is instructed in relation to a social welfare issue, he must identify that there is a legal issue. If the person is eligible for advice and assistance, he places that application with the board, which is then obliged to identify that it is a legal issue that requires advice and assistance.

That is very important, because it is not always clear from some of the statistics we see that issues that are identified as legal issues actually are legal issues. There may be some other problem that is not necessarily a social welfare issue. The indicator for that is that it is an experienced professional who has undergone a period of qualification or training who identifies the issue. It is then submitted to the board, which also confirms that that is the position. I have yet to be totally convinced by all the statistics we see from some other agencies that all those issues are

specifically legal issues.

Ian Smart: I am in the fortunate position of having the local citizens advice bureau literally next door to my day-to-day practice. I sing the praises of that citizens advice bureau. There is a constant interaction, with people going backwards and forwards between our two offices. The local CAB is good at identifying when someone needs to see a solicitor and referring them to my practice or to one of the other firms in the town.

We also refer business to the CAB. For example, somebody who is facing eviction may come to see us, and we may discover that it is because housing benefit payments have not been processed that they are facing eviction. Sometimes it is the client's fault; they may not have filled in the right forms. In such cases, what is really needed is just a lot of chasing about, getting on to the people who know, sorting things out with the council and fixing the problem. To put it bluntly, someone does not need a solicitor for that. We commonly tell such clients that there are people at the CAB who can assist them. However, we practise in the North Lanarkshire Council area, and members will appreciate that that council is not always a model of administrative efficiency.

Gordon Jackson (Glasgow Govan) (Lab): Never!

The Convener: Let us draw a veil over that.

Ian Smart: Sometimes it is the case that the client has filled in the right forms, but the council has not processed them or some mistake has been made in its system. If that is the case, it becomes a legal focus, because it is not that the eviction is being properly but wrongly carried out, but that there is a legal issue about stopping it. It is a question of identifying which it is.

It is horses for courses. We do not say that the advice given by Citizens Advice Scotland and the many other voluntary agencies that fall into the same category is not worth while. What we ask is whether it is necessarily legal advice and whether, if it needs funding, that funding should come out of the legal aid budget rather than other available budgets.

Maureen Macmillan: It would be interesting to know what proportion of social welfare problems are legal and how solicitors get expertise in dealing with them. I presume that, if you can identify a social welfare problem as a legal problem, the people involved are eligible for legal aid, and that, if it is not a legal problem, they are not eligible. There is still a contention that the legal profession does not know about social welfare law, but you obviously dispute that.

Ian Smart: It is absurd to say that the legal profession does not know about social welfare law. Not everybody in the legal profession knows about it, but then not every lawyer knows about all aspects of the law. I am sure that if you asked the three of us about agricultural tenancies, for example, we would have to put our hands up and say, "Sorry. We're not that kind of lawyer."

Lawyers who practise in areas of deprivation, and who commonly deal with matrimonial violence cases, criminal cases and issues to do with damp or inadequate housing, inevitably pick up knowledge and expertise on welfare law, including benefits law, along the way. However, that does not necessarily make them more expert than the welfare rights officer employed by the local authority. We have an excellent welfare rights officer locally, who undoubtedly knows more about those areas of law than I do. I advise people every day to go and see him rather than speak to me.

Phil Gallie: Maureen Macmillan mentioned the possible involvement of solicitors in tribunal areas. My understanding is that, for the very reasons that have just been given, other people who are already operating in civil areas in which they have specific expertise should be used in tribunals. Is not it the case that, if one starts using solicitors, one should just go straight to court rather than having tribunals?

10:15

Ian Smart: There are different problems in rural Scotland and in urban Scotland. I operate in a relatively small town in the west of Scotland, but we have a welfare rights officer, a citizens advice bureau and an unemployed workers centre, all of which give excellent advice on tribunals. If I were a local family solicitor in a rural part of Scotland, I might be the only port of call and I might not have all those other agencies. That is why I do not think that a one-size-fits-all solution is the way forward. I would hesitate to say that solicitors should be kept out of the system altogether.

Gerard Brown: I do not think that anyone is suggesting that solicitors should open doors to every tribunal and hearing that might be dealt with in Scotland. For benefits tribunals, for example, there may be as many as 50,000 or 60,000 summary trials; I do not know the exact statistics. There may be situations where, given certain criteria, legal advice is essential. For example, there may be a complex legal issue, or the individual may have difficulty dealing with complex issues of fact, or language or understanding problems. Legal advice should be provided only in cases where such criteria apply. I do not think that anyone is suggesting that there should be an open door to all those tribunal areas.

There is obviously a problem in view of the European convention on human rights, article 6.1

of which states that people must have a fair hearing and representation. I agree with Ian Smart. In my firm, we have excellent relations with two welfare rights officers, who take up benefits issues on behalf of clients. Whether that access is readily available in rural areas is another matter. As we discussed before we came to this meeting, there are many benefits of living in a rural area other than having access to a welfare rights officer, such as lovely views, scenery and clean air.

Phil Gallie: All MSPs are constantly contacted about incapacity benefit. What could a solicitor offer in that area? It really comes down to medical interpretation of an individual's specific situation.

Ian Smart: The medical evidence is clearly important. One of the pieces of advice that people often do not know is that they are entitled to obtain their own medical evidence and are not necessarily obliged to accept the examining medical officer's assessment. That is a big piece of information in itself. As in any other area, people have to have the articulacy—yes, that is the right word; I thought it might be a McLeishism—to be their own advocate, and that is not always the case.

Phil Gallie will probably know about this better than anyone else, because he has had the advantage of being a Westminster MP as well. Quite often, when one is tied up in an interminable argument with the Benefits Agency, a phone call from the member of Parliament or the member of Parliament's office suddenly gets a result that was not achievable by the person on their own.

Sometimes it is the authority of the position and sometimes it is just the ability to marshal the facts, speak to the person at the right level and make the point succinctly so that it is picked up. We see that in any situation in which evidence is being given—even with us this morning. You struggle to make a point as narrowly and precisely as you can. I do not necessarily mean legal representation, but experienced representation. People who are not panicked by the system can get more quickly to the right result for everybody.

Unfortunately, even if they have their independent medical report, not everyone knows that, instead of just waving it at the tribunal, they should focus on saying, for example, "My doctor says that X was missed by the examining medical officer" or, "They have not picked up on the fact that I have a depressive illness as well as a back problem."

The Convener: Perhaps we can move on, as our witnesses' time is limited. Are you happy to leave it there, Maureen?

Maureen Macmillan: I just had a sweeping up question. Are there any other areas that it would be beneficial to bring into the scope of civil legal aid?

Michael Clancy: The Legal Aid (Scotland) Act 1986 is extensive. Schedule 2 says that civil legal aid is available for proceedings in the judicial committee of the Privy Council, the House of Lords, the Court of Session, the lands valuation appeal court, the Scottish Land Court and the sheriff court. That is very broad—it is applicable in every court in Scotland. It is available also in relation to the Lands Tribunal and the employment appeal tribunal. There are few excepted proceedings in part II of schedule 2, including defamation actions and—of interest to elected members, although I know that it will never be an issue for you—election petitions under the Representation of the People Act 1983. The excepted proceedings also include simplified divorce applications, small claims processes and petitions for sequestration. There is a narrow range of excepted proceedings and it is difficult to imagine how civil legal aid could be much wider than it is at present.

Paul Martin (Glasgow Springburn) (Lab): The witnesses will be aware that Professor Paterson described the neglected topic of quality assurance in the legal aid system. There is no equivalent of a code of practice for legal aid providers to adhere to. Would the witnesses welcome the introduction of a code of practice for providers under the civil legal aid system?

Gerard Brown: Michael Clancy has already referred to compliance in criminal legal aid. A solicitor spends four years doing an honours degree and two years as a trainee. There is now cross-fertilisation, with a new diploma system that links the university year with presentation and office learning skills.

However, the Law Society also has practice rules and codes of conduct, which apply to how solicitors deal with matters. There is continued professional development and IPS—inadequate professional services—which is when solicitors fail to provide a proper service. In civil work, there is invariably an adversary and if the case goes to court there is an arbiter—a sheriff or a judge. There is also a record of proceedings and appeals procedures. Finally, there is the marketplace. If the individual is not happy about the service they are being provided with, they can consider changing solicitors.

We take the view that there is not a major quality issue. All those safeguards satisfy the public about the service that we provide. However, we are not closing the door to considering the matter further. There is no evidence of a quality problem, but it has appeared in our discussions with the Scottish Legal Aid Board. We are happy to revisit that with the board. As we have said before, what we are

against is increasing administrative burdens on solicitors—which are a disincentive to doing the work—and over-regulation.

Paul Martin: Would practices withdraw from the legal aid system as a result of the compliance costs that you have described?

Gerard Brown: There is potential for that to happen. We would not want to discourage people from entering this area of work, but all the safeguards that we have mentioned—there are probably more, but I have forgotten about them—are intended to ensure the quality of the service that is provided.

The final point goes back to what we were saying earlier. Our perceived view—which I accept is anecdotal at this stage—is that younger practitioners are not going into civil legal aid work, which means that more experienced practitioners are doing the work. I can vouch for the fact that they know what they are doing.

Paul Martin: Is it possible to reinvent some form of code of practice, to crystallise it in some way?

Gerard Brown: One solution might be some sort of random peer review in which, for example, my files are sent randomly to Ian Smart to read, and to ask whether I am doing a decent job. It would have to be another jurisdiction—someone who is not connected in any way. We are not closing that door and we are happy to consider the matter.

Paul Martin: What role should the Law Society and the Scottish Legal Aid Board play in ensuring a level of quality of service?

Gerard Brown: The Law Society regards itself as a body that should safeguard the service that is being provided to the public. It does that across the board. I would argue that its complaints procedure is one of the best—certainly in comparison to some other complaints procedures. We will work—as we worked with compliance in criminal legal aid—with SLAB and any others in safeguarding a quality service. If some body or organisation is concerned about that we will try to allay those concerns with a constructive response.

Paul Martin: In the absence of a code of practice, is it possible to publish league tables, setting out the actions carried out by each firm, as a way to assess a solicitor's experience? Would you welcome that?

Gerard Brown: League tables mislead the public. The fact that a firm has a turnover of a certain level does not necessarily mean that it is doing a good or a bad job—it is not an indicator.

Michael Clancy: When you say league table, what precisely do you mean?

Paul Martin: The number of actions—

Michael Clancy: The number of divorces and consumer debt cases and so on?

Paul Martin: Yes.

Michael Clancy: It is difficult for that information to be gathered in a comprehensive way. We can gather the statistics that are available on legal aid matters but that might be only a proportion of the cases that the firms are undertaking. There might be practical difficulties in gathering that information but, as Gerry Brown says, just because a firm has a high turnover in a certain area does not necessarily dictate that it is the best in that area. High turnover, for example, might relate to the number of offices rather than to the service that is provided, and could be a crude way of analysing the quality of the service.

10:30

We are concerned about quality issues. We want to engage with those issues—we can see difficulties but we can also see areas in which one could identify some quality standards in relation to client satisfaction. For example, the Scottish Consumer Council surveyed clients and found that 87 per cent were either satisfied or very satisfied with their solicitor, which suggests that those clients received a quality service. It might be that those surveys should be done more frequently and that solicitors should be encouraged to take information from their clients by asking, "What do you think of the service that you received?" I could envisage a lot of work being done in that area to get feedback from clients. Thereafter, we could assess the size of the problem—if there is a problem.

Maureen Macmillan: An idea has just popped into my head. Am I right to say that solicitors can call themselves experts in this or that area simply by giving themselves a label, without any evaluation?

Michael Clancy: We have a system of accredited experts.

Maureen Macmillan: How does that system work?

Michael Clancy: The society established an accreditation panel, which is a peer review group. If someone has an expertise in a particular area, they can apply for recognition as an accredited expert.

The system operates in discrete areas of law, such as agricultural, employment or mental health law.

Maureen Macmillan: Is the system capable of being expanded?

Michael Clancy: Yes. Proposals are frequently received from some of the committees that I deal

with, which ask the accreditation panel to consider specific issues. For example, I think that there is a committee on intellectual property. Let us say that that committee said, "Patent law is an area in which we want accredited expertise." We would put a proposal to the accreditation panel to see whether it would establish such an accredited expertise.

The Convener: Are the witnesses constrained by time today?

Ian Smart: The council of the Law Society is sitting at the moment, so we are missing that meeting, but that is probably an incentive for us to carry on here.

The Convener: Given our agenda, the committee has some time constraints, but we could ask some of our questions on the community legal service—we could at least ask the salient questions.

Michael Matheson: I should begin by saying that I am conscious of the statement in your memorandum that you do not think that you can comment on community legal services as you are party to the working group. You may have noticed from the evidence that the committee has received that some of the other parties on that working group have given their views. Are you happy to make your views known today?

Gerard Brown: We are not hesitant about making our views known, but we are part of the working group on community legal services and the Executive made it quite clear to us that an issue of confidentiality is involved. The past president of the Law Society, Michael Scanlon, is a member of that working group and we would want him to be present.

Michael Matheson: Do you want to continue with your statement, as it may lead on to some of the issues that I was going to cover?

Gerard Brown: To be blunt, we are not sure that a problem exists, but if a problem does exist, and if there is to be a solution to that problem, we would like that solution to be a Scottish solution.

Michael Matheson: Could you take that statement a little further?

Gerard Brown: We think that the Scottish community should be considered. Any solution—if there is a problem—should be adapted to the specific situations in Scotland that we are dealing with, such as the rural aspect of Scotland, or the central belt, which is an area with a large population. The solution must be a service that deals with legal issues, rather than something that is totally holistic.

The discussions are pretty complex and are still at an early stage. We would like to reserve our position until the person who is dealing with the working group is present and we have the Executive's agreement that we can discuss the work of the working group in more detail.

Michael Matheson: Given the time constraints, we should perhaps leave matters at that.

The Convener: Yes. This is a suitable time to end our discussion on this agenda item. We have other questions that we would like to ask the witnesses, but we will ask those questions in writing. Depending on the response, we will decide whether we should pursue the matter in a further oral evidence session.

I thank the witnesses for attending. We will let them get back to their other meeting.

Regulation of the Legal Profession Inquiry

The Convener: We move on to item 4, which is, appropriately enough, our inquiry into the regulation of the legal profession.

Members have before them paper J1/01/10/3, which is on the appointment of an adviser. I ask members to consider the terms of reference for the adviser, which are set out in that paper, to make comments, if required, and to agree—I hope—those terms of reference. Do members have any comments on the paper?

Phil Gallie: The paper seems to cover most of the issues that we would have raised.

The Convener: If members are happy with the paper, we would hope to consider a list of potential advisers at our meeting on 2 May.

Do members agree that the terms of reference are suitable?

Phil Gallie: How do the clerks intend to establish who should be approached?

The Convener: The Scottish Parliament information centre will generate and submit a list, using the criteria in the paper as guidance on the sort of person we are looking for.

Are members happy to proceed on that basis?

Members *indicated agreement*.

Declaration of Interests

The Convener: It might be helpful if we were return to item 1 of the agenda at this stage.

I welcome Jamie Stone to his first meeting of the Justice 1 Committee. I see that he is dressed appropriately for summer, which has not descended on Edinburgh yet. I ask him to declare any relevant interests that he may have.

Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD): I thank you, convener, for your kind words. I got it wrong about the weather—it was very sunny when I left Inverness.

I have no relevant interests to declare.

Convention Rights (Compliance) (Scotland) Bill: Stage 2

The Convener: We now move on to the Convention Rights (Compliance) (Scotland) Bill, which we are considering at stage 2 for the first time. We will consider the bill in the order determined by the motion that members agreed to earlier.

I take it that members are familiar with the Parliament's method of dealing with stage 2. It is sufficient for me to say that amendments have been grouped to facilitate debate, but the order in which amendments are called and moved formally is dictated by the marshalled list. Members will need in front of them the groupings and the marshalled list. There will be one debate only on each group of amendments.

We will have a short pause while the minister and his team assemble.

Good morning, minister. I welcome you and your substantial team, which should certainly be able to answer any questions members have.

Section 5—Appointment and removal of Parole Board members

The Convener: Amendment 56 is in a group on its own. I ask the minister to speak to and move amendment 56.

The Deputy Minister for Justice (Iain Gray): In the past, the Parole Board for Scotland has had occasional problems when witnesses have failed to respond to invitations to attend hearings. That hampers the tribunal's task of assessing risk.

Section 20(4) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 confers powers on Scottish ministers to make rules on the Parole Board's proceedings. Amendment 56 would extend that power and allow the Scottish ministers to use the rules to make it an offence for a witness who has been required to attend a hearing of the Parole Board to give evidence to refuse to attend or wilfully to neglect to attend, or for a person who is required to produce a book or document or who is liable to be required to produce the same wilfully to alter, suppress, conceal, destroy or refuse to produce any such book or document.

The maximum penalty for such an offence would be a fine at level 2 on the standard scale.

I move amendment 56.

Phil Gallie: I have a marginal point. Can the minister define the types of person he envisages would attend the board? For example, the committee discussed whether victims might attend the Parole Board. Could the Parole Board insist that someone who has been a victim of a crime some years ago should attend to give evidence?

The Convener: Before the minister answers that, we will take other questions. No, the member who indicated that he had a question has changed his mind. If members have no other points to raise, the minister may sum up.

Iain Gray: It would be for the Parole Board to say who, or what documents, it needs to see. It would depend on the circumstances. Social workers, psychologists and people who give professional advice to the board are the kind of people who are likely to be covered, if the committee agrees to amendment 56.

Phil Gallie: Given the minister's reasoning, I accept that that point is important, but the amendment's scope seems rather wide. Will the minister consider whether the provisions of amendment 56 are marginally wide and whether he could be more specific at stage 3, given the fact that I go along with the examples that he has suggested?

Iain Gray: I am happy to consider Phil Gallie's point and I will try to make some response at stage 3. What amendment 56 is attempting should be read alongside our work on the development of the victims strategy. In the strategy, we are considering, in close consultation with victim support organisations, victims' rights and requirements.

Amendment 56 agreed to.

The Convener: Amendment 4 is also in a group of its own. I ask the minister to speak to and move the amendment.

Iain Gray: Amendment 4 is designed to address one of the recommendations of the committee's stage 1 report. Section 5 provides for the appointment and removal of Parole Board members. Section 5(3) contains nine new paragraphs to be inserted into paragraph 2 of schedule 2 to the Prisoners and Criminal Proceedings (Scotland) Act 1993. Proposed new paragraph 2E provides that a person may be reappointed as a member of the Parole Board only if at least six years have elapsed since they ceased to be a member and they have not already been reappointed under the new provisions. The committee's stage 1 report on the bill stated that

"there would be merit in reducing the period from 6 to 3 years."

The rationale for the six-year gap was that it would avoid any appearance that a Parole Board member might show bias towards the Executive to secure reappointment. However, we are satisfied that a three-year gap is sufficient to remove any legitimate doubt about the independence and impartiality of members. We indicated at stage 1 that we would lodge such an amendment to reflect

the points that the committee made.

I move amendment 4.

Amendment 4 agreed to.

10:45

The Convener: Amendment 60, in the name of Phil Gallie, is grouped with amendments 62 and 63.

Phil Gallie: Amendment 60 seeks to delete the phrase,

"carried out at the request of the Scottish Ministers".

The bill is concerned with removing the powers of Scottish ministers and allowing tribunals to stand in their own right. On that basis, I query why we do not leave the tribunals to investigate on their own initiative.

I move amendment 60.

The Convener: Does Phil Gallie want to speak to the other amendments in the group?

Phil Gallie: Amendments 62 and 63 follow along the same lines. They both refer to the involvement of Scottish ministers.

Iain Gray: I differ from Mr Gallie on the purpose of the bill. The bill's purpose is not to remove powers from Scottish ministers, but to ensure compliance with the European convention on human rights and to set up processes that are effective, efficient and fair. Amendments 60, 62 and 63 would not be necessary to achieve ECHR compliance and would, I fear, fail to set up such processes. The amendments' effect would be to ensure that a tribunal rather than ministers would initiate an investigation into whether a member of the Parole Board was unfit for office. They would also allow a tribunal to determine its own procedure—including the duration of the suspension from office of a member who was under investigation and what effect that would have. We do not believe that that is necessary to achieve compliance with ECHR.

In light of the Starrs decision, we acknowledge that the current system of appointment, reappointment and removal of board members may not comply with article 6 of the ECHR. However, by setting up the tribunal we believe that compliance will be achieved. The bill mirrors the arrangements that were provided in the Bail, Judicial Appointments etc. (Scotland) Act 2000, in which we addressed a similar issue in respect of part-time sheriffs.

It is also worth saying that we have in mind an ad hoc tribunal, not a standing tribunal, so it is difficult to see how it could determine its own procedures. In order to set down those procedures, the bill requires that regulations be placed before the Parliament. Those regulations would be subject to the affirmative procedure, so they would be subject to the scrutiny of the Parliament. That seems to be desirable to us, but it would be lost if amendments 60, 62 and 63 were agreed to. I therefore ask Mr Gallie to withdraw amendment 60 and not to move amendments 62 and 63.

Phil Gallie: Before I do so, I would like the minister to describe for the record how precisely that tribunal would be set up.

Iain Gray: The tribunal would be set up if there were a case for it to consider. Appointments to the tribunal would be the responsibility of the Lord President of the Court of Session. It would not be a standing committee; it would deal with particular instances as they arose.

Amendment 60, by agreement, withdrawn.

The Convener: Amendment 5, in the name of the minister, is grouped with amendments 61 and 23.

Iain Gray: Executive amendment 5 is designed to address one of the recommendations that was made by the committee in its stage 1 report. Section 5 of the bill makes provision for the appointment and removal of parole board members. Section 5(4) would replace the original paragraph 3 of schedule 2 to the Prisoners and Criminal Proceedings (Scotland) Act 1993 with new paragraphs 3, 3A, 3B, 3C and 3D, which detail the conditions under which a Parole Board member may be removed from office, by providing for a tribunal that may order a member's removal if, after investigation,

"it finds that the member is unfit for office by reason of inability, neglect of duty or misbehaviour."

New paragraph 3B would fix the membership of the tribunal and, as we have just discussed, it would provide that the Lord President of the Court of Session appointed them. The three members must be:

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

(b) a person who is, and has been for at least 10 years, legally qualified;

(c) and one other person."

The committee's stage 1 report stated that the committee saw no good reason why it should not be stated specifically that the "one other person" should not be legally qualified. Since it had always been the intention that the other person would be a layperson, we are happy to amend the bill to reflect that.

Mr Gallie's amendment 61 goes further and would place unnecessary restrictions on the power of the Lord President to appoint appropriate

members of the tribunal. We consider that there is nothing to be gained by excluding those who have law enforcement or social welfare experience, provided that such persons are not legally qualified. I hope that Mr Gallie will not move his amendment.

Mr Matheson's amendment 23 seeks to expand the definition of someone who is qualified as a lawyer to include one who is registered under the European Communities (Lawyer's Practice) (Scotland) Regulations 2000 (SSI 2000/121). Those regulations allow lawyers from other European countries to register with the Law Society of Scotland or the Faculty of Advocates and to carry out certain professional activities in Scotland under their home professional title.

For two reasons, we do not believe that such lawyers should be eligible to sit as the legally qualified member of the removal tribunal. The purpose of requiring the second member of the tribunal to be an advocate or a solicitor who has been legally qualified for at least 10 years is to ensure that the member is familiar with Scots law and with the process of judicial decision-making in Scotland. That would not necessarily be the case with a registered European lawyer. We believe also that registered European lawyers are not disbarred by section 5 of the bill, because they may apply to enter the professions of solicitor or advocate without undertaking any further qualifications, provided that they have been registered for at least three years and have effectively and regularly pursued professional activities in Scotland. It is therefore possible that a registered European lawyer could become a member of the tribunal. On that basis, I hope that Michael Matheson will consider not moving his amendment.

I move amendment 5.

Phil Gallie: I am delighted that the minister has lodged an amendment to clarify the point that the third member of the tribunal will not be a legally qualified person. The thinking behind my amendment was that many individuals who have had professional involvement in either law enforcement or social welfare matters will have firm and fixed views. I believe that a degree of flexibility could be lost by their inclusion on the tribunal.

The minister used the term "layperson". That layperson should not have been involved in any way with the process.

Michael Matheson: Amendment 23 was intended as a probing amendment. I listened to what the minister said and I am reassured that European lawyers who choose to become solicitors or advocates will not be disbarred from the tribunal, should they want to become involved. I am satisfied with what the minister has said.

Maureen Macmillan: I want to ask for clarification of the definition of "legally qualified". Does that include only people who have a practising certificate or does it include people who gained a law degree in the past?

Iain Gray: The relevant qualification would be a practising certificate.

Mr Gallie said that individuals who have had professional involvement in either law enforcement or social welfare matters might have firm and fixed views. The reverse of that would be that, equally, they might have profound experience and understanding that would be valuable in the work of the tribunal. The decision about who would be an appropriate and effective member of the tribunal would lie with the Lord President of the Court of Session. The existing requirements probably circumscribe his choice enough without it needing to be reduced any further. That is why we oppose Mr Gallie's amendment.

Phil Gallie: In that case, on the basis that amendment 5 might rule out my amendment, I will not vote for it.

The Convener: The question is, that amendment 5 be agreed to. Are we all agreed?

Phil Gallie: No.

The Convener: There will be a division.

FOR

Alasdair Morgan (Galloway and Upper Nithsdale) (SNP)
Gordon Jackson (Glasgow Govan) (Lab)
Maureen Macmillan (Highlands and Islands) (Lab)
Paul Martin (Glasgow Springburn) (Lab)
Michael Matheson (Central Scotland) (SNP)
Mr Jamie Stone (Caithness, Sutherland and Easter Ross (LD)

ABSTENTIONS

Phil Gallie (South of Scotland) (Con)

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

Amendment 5 agreed to.

Amendments 61 and 23 not moved.

The Convener: Amendment 24, in the name of Michael Matheson, is grouped with amendment 26.

Michael Matheson: The intention of amendment 24 is to ensure that Scottish ministers will consult interested parties before making regulations that specify the procedures that are to be followed by the tribunal. The tribunal will perform an extremely important function in determining whether members should be removed from the Parole Board. That procedure has to be workable, transparent and clear. It is on that basis that it is essential that we have a commitment from

the Executive that there will be a proper consultation of interested parties before regulations are made. That will ensure that those who will be affected by the procedures have had an input in the process.

I move amendment 24.

Iain Gray: The amendments seek to ensure that Scottish ministers may not make regulations regarding the powers of the tribunal and the procedure to be followed by and before the tribunal, until they have undertaken consultation. The Executive would not demur from the principle that underlies the amendment, but we contend that it is neither necessary nor appropriate for the point to be included in the bill. Amendment 26 would insert into section 5(4) the requirement to undertake consultation. That section sets up the tribunal that would consider the removal of Parole Board members from office, and section 7 of the bill provides for Scottish ministers to prescribe in regulations the specific circumstances in which a case may be exempted from the fixed-payment scheme. In both cases, however, there is an obligation to consult.

We have already undertaken to provide, prior to stage 3, a draft of the relevant Parole Board regulations. That will give members the opportunity to comment. I can confirm that it is our intention to invite other interested parties—including the Parole Board, the Lord President, and sheriffs principal—to comment on the regulations, which will be laid later this year.

On fixed payment regulations, the Deputy First Minister has already made it clear that we recognise the importance of consultation. We will proceed with drafting regulations as soon as the bill has been passed. We will consult interested parties on those draft regulations, prior to laying them before Parliament.

Legal aid issues are also discussed regularly with the tripartite group that includes the Scottish Legal Aid Board, the Executive and the Law Society of Scotland. We also consult regularly on statutory instruments under the Legal Aid (Scotland) Act 1986. There appears to be no justification for singling out the new subordinate legislation power on legal aid as the only one in the bill on which something is said in statute about consultation. We fear that amendment 26, by insisting on consultation but not specifying who should be involved in that consultation, would also lay us open to the danger of a lack of clarity as to how wide consultation would be.

It is unnecessary to make express statements about consultation in the bill, given the general commitment to and practice of consultation in preparing and making regulations. I hope that members feel able to accept my guarantees that consultation will take place. On that basis, Mr Matheson might consider withdrawing amendment 24 and not moving amendment 26.

11:00

Michael Matheson: Can the minister clarify that the regulations for the tribunal process that are to be published before stage 3 will be draft regulations?

Iain Gray: They will be an advance copy of a draft of the regulations.

Michael Matheson: Will there be an opportunity before stage 3 to discuss the regulations in greater depth, if there are points that need to be considered?

Iain Gray: Yes, there will be.

Amendment 24, by agreement, withdrawn.

Amendment 63 not moved.

Section 5, as amended, agreed to.

Section 6—Extension of advice and assistance and civil legal aid under Legal Aid (Scotland) Act 1986

The Convener: I call Phil Gallie to speak to and move amendment 64, which is grouped with amendments 65, 6, 7, 66, 67, 68, 69, 70 and 71.

Phil Gallie: Amendment 64 refers to the

"Extension of advice and assistance and civil legal aid",

which, if the section were passed as introduced, would allow legal aid to be granted for tribunals in Scotland.

The tribunal system has benefited from the fact that the people who are involved in it tend not to be legally qualified—solicitors have been kept away from the tribunal system to an extent. When I say that those who are involved are not legally qualified, I do not mean the chairmen of tribunal panels, who are legally qualified. Tribunals tend to be more of a negotiating or arbitration arrangement that is not adversarial, as the courts tend to be. If we include solicitors and, perhaps, other legally qualified people in the tribunal service, we will lose that underlying aspect of the service. That gives me some concern.

It is for that reason that I lodged amendments 64 to 71. I am grateful to the clerks for putting me right on the amendments to ensure that I covered everything in the section. I have some concerns and I will listen to what the minister has to say about them.

I move amendment 64.

Iain Gray: As members are aware, Scottish ministers, in fulfilment of their obligations under

article 6 of the ECHR, consider that they should make civil legal aid available where a court, a tribunal or any other proceeding is determining civil rights and obligations in certain clearly defined circumstances. Those circumstances are: where the applicant cannot fund or find representation; where the case is arguable; and where the case is too complex to be presented to a minimum standard of effectiveness by the applicant. It is not the intention of section 6 to lose the non-adversarial characteristics of certain tribunals, which have been advantageous.

We feel unable to support amendments 64 to 71 on two counts. First, they are somewhat inconsistent. They attempt to remove all references to tribunals from section 6 of the bill, but many other references to tribunals in the Legal Aid (Scotland) Act 1986 would still remain. In fact, some of the changes that are proposed by amendments 64 to 71 are to interpretation provisions of that act. They would therefore leave doubt as to how references elsewhere in the act were to be read.

More importantly, we believe that amendments 64 to 71 would be contrary to our policy objective for section 6, which is to allow Scottish ministers to make legal aid available for any proceedings, including those before tribunals, where there is or may be an ECHR requirement to do so.

I will speak briefly to Executive amendments 6 and 7 in the grouping. Section 13(5) of the 1986 act prevents ministers from extending civil legal aid under schedule 3 to proceedings in a court and tribunal

"before which persons have no right to be and are not normally represented by counsel or a solicitor".

That is an unnecessary restriction, as we cannot be sure that there will not be bodies in that category for which we may need to make legal aid available in future. Amendments 6 and 7 would therefore delete section 13(5) of the Legal Aid (Scotland) Act 1986.

I therefore ask Mr Gallie to consider withdrawing amendment 64 and not pressing his other amendments in the group.

The Convener: Agreement to amendment 7 will pre-empt amendment 66.

Phil Gallie: Has the minister attempted to determine the extent of the extension of civil legal aid? How much further will it be extended? To how many tribunals will it be extended?

Has the minister given any consideration to costs? It is important to consider costs when debating a bill. Costs have an effect on other activities in the civil law scene in Scotland. It is my understanding that there is a ceiling on the civil law budget and the measures in the bill will have a direct effect on that budget.

The extension is substantial. As tribunals are not defined in the bill, can the minister give a list of the tribunals that might fall within the remit of the measures?

Iain Gray: Mr Gallie raised two separate but related points: cost, and the extent of the effect of the bill.

We have, of course, considered the potential cost. We believe that the legal aid cost increases will not be substantial and significant. I point out that that was one of the factors that had to be considered in the preparation of the financial resolution, which was passed by the Parliament at stage 1 of the bill. In a sense, the Parliament has considered and accepted the costs.

The extent of the tribunals to which the extension will apply has been discussed at some length in committee and plenary debates at stage 1. We have given an undertaking to construct an initial list and to consult interested bodies as to which tribunals should be on that list.

I have a letter that has been sent out. It would indicate to the committee which bodies we have approached. That at least, would give some indication of the size of the net that we are casting. I would be happy to provide members of the committee with copies of that letter at the end today's proceedings, if that would be helpful.

Phil Gallie: Does the minister feel that it would be appropriate, at the end of the consultation to which he referred, to include that list as a schedule to the bill, perhaps at stage 3?

Iain Gray: The answer is that that is not appropriate, partly because we are not attempting to produce an exhaustive list for all time. We believe that that would not be helpful in future, and we would not want to have to return to the matter constantly if we wanted to extend the provisions of the legislation to cover other tribunals. That has always been the basis of the discussions over the list that has been compiled, with the commitment that we will do that before stage 3.

Phil Gallie: I am still concerned about the matter. We are opening up a minefield and creating problems that could produce less clarity in the future and bring about a lot of argument, concerning who is entitled to civil legal aid. The minister's comment that there is no need for a list because he does not want to be constrained is not consistent with other arguments that he has used for the introduction of statutory instruments to cover such matters in future. The bill grants ministers the right to use their initiative to introduce such instruments. If that base list were included in the bill at an early date, there would be nothing to stop the minister adding to it in future.

The Convener: The question is, that amendment 64 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Gallie, Phil (South of Scotland) (Con)

AGAINST

Jackson, Gordon (Glasgow Govan) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Morgan, Alasdair (Galloway and Upper Nithsdale) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

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

Amendment 64 disagreed to.

Amendment 65 not moved.

Amendments 6 and 7 moved—[Iain Gray]—and agreed to.

The Convener: Amendment 66 is pre-empted.

Amendments 67 to 71 not moved.

Section 6, as amended, agreed to.

Section 7—Fixed payments for criminal legal assistance: exceptional cases

The Convener: Amendment 72, in the name of Phil Gallie, is grouped with amendments 73, 25, 74, 75, 27 and 28. If amendment 74 is agreed to, amendments 75, 27 and 28 are pre-empted. I call Phil Gallie to speak to and move amendment 72 and to speak to the other amendments in the group.

Phil Gallie: The other amendments in the group are consequential to amendment 72, which suggests something similar to what was suggested in earlier comments. We are currently taking ministers out of making judgments on criminal defence and interest matters, as they are effectively the prosecutors. By allowing ministers to judge whether additional funding is required for the defence, are we not cutting across that objective? In giving the board the right to determine whether additional funding is required, we would satisfy the principles of the European convention on human rights. As section 33(3C) of the 1986 act is currently worded, it creates non-compliance.

I move amendment 72.

The Convener: I call Michael Matheson to speak to amendment 25 and the other amendments in the group.

Michael Matheson: Amendment 25 seeks to clarify the reason for providing time-and-line payments in exceptional cases and the adequacy of the fixed payment. There is a need for some clarification of that, as the evidence that the committee has received during its legal aid inquiry has not concerned the amount of aid so much as its adequacy for proper legal representation. As drafted, the bill fails to address that and seems more concerned with the amount than with the adequacy of it. Amendment 25 seeks to provide that clarification.

Amendment 27 is a probing amendment, which seeks clarification of the conditions that are listed under section 33(3C)(b) of the 1986 act. I would welcome the minister's comments on that issue.

Amendment 28 addresses the issue of solicitors being obliged to keep time-and-line records for professional services that they have provided up until the point at which a case may be considered exceptional, after which time-and-line payments replace a fixed payment. The bill would require solicitors to keep records up until the point at which they find out whether the payment will be time-and-line. Although the case may be taken on for a fixed payment, the solicitors will have to keep records throughout its process, as the payments for the case may then move to a time-and-line basis, for which they will be required to keep records.

Amendment 28 tries to remove some of the burden on solicitors who are uncertain whether they will receive time-and-line payments. A fixed payment is a one-off payment for that function, and they accept that. However, at present, the bill would force them to keep accurate records on a time-and-line basis up until the point at which a decision is made whether to classify the case as exceptional.

11:15

Gordon Jackson: Michael Matheson's point is a wee bit pedantic. One can hardly imagine a person not getting a fair trial because his lawyer has been paid too much. The issue obviously concerns the lack of payment rather than excessive payments.

Michael Matheson: The issue is the adequacy of payments. I could say—

The Convener: Hang on. We are not having a question-and-answer session across the chamber.

Gordon Jackson: I do not know what the minister's view is, but I cannot help but think that the adequacy of payments is superfluous to the matter.

Michael Matheson: As drafted, the bill concentrates on the amount of legal aid, which might not be adequate to serve the purpose. Amendment 28 is intended to provide clarification

that it is not simply the amount that should be considered, but whether that amount is adequate.

Iain Gray: I will not argue with Gordon Jackson on the issue of the adequacy of payments to the legal fraternity.

We feel that amendment 28 is unnecessary. By having regard to the amount of the fixed payment, the board will inevitably consider the sufficiency of that payment in the circumstances that are set out in the regulations. Those are likely to include not only preparation costs, but the complexity of the case, the number of prosecution witnesses and the geographic location of witnesses. We feel that the point that Mr Matheson makes is covered in the bill and that amendment 28 is unnecessary.

We feel that the drafting of the paragraph that amendment 27 addresses is clear enough. New section 33(3H) provides the Parliament with a more detailed list of the conditions that can be included in the regulations under section 33(3C) of the 1986 act. We envisage that those will be the sort of conditions that would normally be included in such regulations. The current wording—

"The conditions that may be prescribed … include"—

makes it clear that it is not an absolute requirement that those that are listed need always appear.

New section 33(3H) sets out three conditions that are included. One of those conditions is that solicitors should keep proper records of all professional services, provided that an outlay is incurred, whether they are provided before or after the board determines that the case should be removed from the fixed payment scheme. Amendment 28 seeks to amend that subsection. I understand why members might feel that that requirement is unnecessarily bureaucratic; however, it is essential that the board is provided with proper records before payment is made from the fund.

The essence of the new system that is being introduced is that payment on a time-and-line basis can be made only where there are proper records to justify such payment. Accordingly, a solicitor who believes that a new case may justify an application for exemption from the fixed fee regime will be under an obligation to keep full records from the outset. If, at a later point in the case, the solicitor reaches the conclusion that the fixed fee will suffice, they can abandon detailed record keeping in that case. However, it seems to us that it would not be acceptable for a solicitor to make application at a very late stage in proceedings and then expect to be paid on a time-and-line basis in respect of prior work for which no proper records had been kept. Clearly, ministers have a responsibility to ensure that the funds available for legal aid are used fairly and properly.

In relation to amendments 72, 73, 74 and 75, I should point out to Mr Gallie once again that the central purpose of the bill is not to remove powers from ministers, but to ensure compliance. As he explained, the amendments would leave the Scottish Legal Aid Board with the responsibility of determining what constituted an "exceptional case". I believe that it is more appropriate for the Scottish Legal Aid Board to administer the legal aid budget within clearly set parameters. That seems only right and fair to the board. The most transparent way to provide such parameters is to make regulations. That leaves the power with ministers, but also ensures that the regulations will have the scrutiny and agreement of the Parliament. The amendments would seem to remove any review of the board's decisions; that seems quite draconian and would be considered unfair by the legal profession.

I invite Mr Gallie and Mr Matheson to consider not pressing their amendments.

Phil Gallie: I am delighted to hear the minister's comments on the responsibilities of the Scottish ministers, which are aligned with my own. No doubt we will return to that point when we debate part 1 of the bill.

Amendment 72, by agreement, withdrawn.

Amendments 73, 25, 26, 74, 75 and 27 not moved.

Michael Matheson: I want to return to the subject of amendment 28 at stage 3. I am not entirely satisfied by the minister's comments on the issue. An undue burden might be placed on solicitors who may consider applying for cases in exceptional circumstances, and the provision could act as a deterrent to such applications.

Amendment 28 not moved.

Section 7 agreed to.

Sections 8 and 9 agreed to.

Section 10—Repeal of section 13(2)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995

The Convener: Amendment 76, in the name of Phil Gallie, is grouped with amendment 90.

Phil Gallie: Amendment 76 removes section 10, which refers to group homosexual practices. I must accept, as the committee accepted when it expressed great sympathy with some of the representations that were made to us at stage 1, that, whether we like it or not, there must be equality. If we accept the status quo, part 4 of the bill is necessary. However, my argument is that the Executive and the Parliament have a responsibility to the health of the nation. That is represented in many ways—through the food

agencies and by ensuring that unhealthy practices are not encouraged and condoned. Group sexual practice of any kind is not something that is wanted in our society today. It puts our society at risk and is unhealthy.

On that basis, I ask the minister to give an undertaking to reconsider the matter and perhaps come back with a new part 4 to change the law in Scotland. Instead of being concerned with equalising homosexuality, the new part should create an offence of practising group sex of any nature—heterosexual or whatever—as that is not something that should be practised in our nation.

I move amendment 76.

Iain Gray: I was pleased to note that the Justice 1 Committee and the Equal Opportunities Committee stage 1 reports strongly recognised the need for section 10, which repeals section 13(2)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995.

In the case of A D T v the United Kingdom, the European Court of Human Rights ruled that the English equivalent of the section breached article 8 of the European convention on human rights—the right to respect for private and family life. In light of that judgment, there is no doubt that the repeal of the equivalent Scottish legislation is necessary to ensure compatibility with article 8. Indeed, in speaking to his amendment, Mr Gallie acknowledged that fact.

In our view, there is no option but to repeal section 13(2)(a) of the 1995 act. I cannot give Mr Gallie the undertaking that he has requested—not just because of the substance of the case that he put. What he proposes, which would be a more general review of legislation relating to sexual offences, is not the purpose of our committee meeting this morning—this is not the place to consider the Scottish Parliament's views on such matters. Our purpose today is to ensure that our law is compliant with the ECHR, and in order to do that, we must repeal section 13(2)(a) of the 1995 act. On that basis, I urge Mr Gallie to withdraw amendment 76 and not to move amendment 90, which follows from that.

Phil Gallie: I am disappointed by the minister's reply. He has simply re-emphasised the comments about justifying the requirements for part 4, which I had already acknowledged. I am suggesting that the Convention Rights (Compliance) (Scotland) Bill gives us an opportunity to re-examine the situation. I disagree with the minister's observation that we have no option; there is an option to include an alternative section, which would not need too much work and which would say that group sex of any kind is not condoned under the rule of law in Scotland. That is an opportunity that the minister could have taken to improve the health and aspirations of society in Scotland. The minister is missing an opportunity.

I will not press amendment 76, because I might want to propose an alternative part 4 at stage 3. I ask the minister to give the matter some consideration. It does not require a full review of the law on sexual activities; it requires a review of one area. That should not be beyond the minister's expertise, particularly given the support that the civil service provides.

Amendment 76, by agreement, withdrawn.

Section 10 agreed to.

Section 11—Appointment of procurator fiscal of the Lyon Court

11:30

The Convener: Amendment 8, in the name of Jim Wallace, is grouped with amendment 9.

Iain Gray: Amendment 8 concerns the central issue in the bill, and I know that the committee has been waiting for it.

Amendments 8 and 9 address one of the committee's recommendations in its stage 1 report. Section 11 amends the Lyon King of Arms Act 1867 to allow for the appointment of the procurator fiscal to the Lyon Court to be made by Scottish ministers, who are independent of the Lyon Court.

The committee's stage 1 report recommended that the bill should state expressly that the procurator fiscal should be legally qualified. That was always the intention, and I am happy to bring forward the amendments.

I move amendment 8.

Amendment 8 agreed to.

Amendment 9 moved—[Iain Gray]—and agreed to.

Section 11, as amended, agreed to.

Section 12—Remedial orders

The Convener: Amendment 10 is in the name of Jim Wallace and is grouped with amendments 29, 30, 11 and 31.

Iain Gray: Executive amendments 10 and 11 fulfil the commitment that was made by the Deputy First Minister and Minister for Justice at stage 1. The minister said that the introduction of a new general remedial power by part 6 of the bill would be subject to Scottish ministers having compelling reasons to use the remedial order route.

The general remedial power will extend the circumstances under which Scottish ministers can use subordinate legislation to remedy established

or perceived incompatibilities with the ECHR. At stage 1, the Justice 1 Committee and the Subordinate Legislation Committee expressed concerns about the proposed scope of the power. The amendments are intended to address those concerns by applying a test similar to that in section 10(2) of the Human Rights Act 1998.

In addition to the Deputy First Minister and Minister for Justice's agreement to bring forward the amendments, he made it absolutely clear at stage 1 that the power was not intended to be a substitute for primary legislation. He also concurred with the committee's recommendation that the power should be used only in urgent cases and where subordinate legislation might be more appropriate.

There is no intention to override parliamentary scrutiny. The bill makes specific provision for the Parliament's role in scrutinising remedial orders. A procedure is set down that is similar to that laid out in the Human Rights Act 1998. In all except the most urgent cases, ministers will be obliged to lay a copy of any proposed order and a statement of their reasons for wishing to make the order before the Parliament, inviting comments. Ministers will be obliged to have regard to comments made before formally laying the final draft order for parliamentary approval. On laying the draft order, ministers must also lay a statement summarising the comments that have been made and specifying the reasons for any changes that have been made.

I hope that the introduction of amendments 10 and 11 reassures committee members that the powers will be used only in appropriate circumstances.

Amendments 29 and 30 in the name of Michael Matheson would remove the word "expedient" from section 12(1) and (2), which confer the power to make supplementary and transitional provisions. We must remain conscious of the different way in which the ECHR has been incorporated in Scotland relative to the functions of Scottish ministers. That is important as the amendments seem to have the effect of reflecting the wording that appears in section 10(2) of the Human Rights Act 1998.

Scottish ministers cannot act in a way that is incompatible with the convention, even where primary legislation appears to require or authorise them to do so. Ministers in the UK Government can. Against that background, we must have a reasonably wide-ranging set of powers to be able to rectify quickly legislation that, in the opinion of Scottish ministers, may not be entirely compatible with the convention.

In view of the proposed Executive amendments and the different constitutional position, we do not believe the amendments to be appropriate.

Amendment 30 in the name of Michael Matheson would remove the words "or may be" from section 12, page 12, line 30 of the bill and would, in effect, restrict ministers to using the remedial order route where a court had made a declaration of incompatibility.

We consider the amendment to be undesirable. It is essential that ministers are able to take action in circumstances where a court has not yet made a declaration of incompatibility. That may be necessary where litigation is pending before a court, for example, and the view is taken that the arguments are so strongly in favour of incompatibility that we require to act in advance of the court's decision, or where a court in England has ruled that legislation is incompatible but there is no such ruling in relation to the corresponding Scottish legislation.

It is important to remember that, unlike our counterparts at Westminster, Scottish ministers cannot simply continue to act on the basis that they are authorised to do so by primary legislation. They do not have the benefit of the defence that is provided by section 6(2) of the Human Rights Act. If every change in the law in Scotland to ensure ECHR compatibility has to await a specific court decision, Scottish ministers may be found to have acted unlawfully in the interim and be potentially liable for damages. I can think of many better ways to spend public funds.

I ask Michael Matheson not to move amendments 29, 30 and 31.

I move amendment 10.

Michael Matheson: Amendment 29 would allow Scottish ministers to use remedial orders as they currently stand but only when that is necessary to rectify an incompatibility with the ECHR, and not simply when it is expedient to use them.

The minister referred to the Human Rights Act 1998. I think that the Law Society's evidence to the committee highlighted that most of the bill reflects provisions within the Human Rights Act. Section 10(2) of that act states:

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

At no point in the Human Rights Act is reference made to expediency alone.

Amendment 29 seeks to ensure that the provision within the bill is a mirror reflection of what is in the Human Rights Act.

I take on board what the minister said about the need to be able to act urgently. It emerged in the evidence that a quick process can be used with

the remedial order system and that there are provisions to act quickly if that is required. Amendment 30 ensures that the remedial order system will be used only when there is an incompatibility with the ECHR and not on the basis that there may be. There could always be a difference of opinion.

That takes me back to my earlier comments. I can understand that difficulties could be presented if ministers had always to wait for a court judgment, and the remedial order system is a mechanism whereby ministers can move urgently. A super fast-track system is available if required. The amendment does not aim to box in ministers. There are provisions if need be, but the amendments ensure that there is a greater reflection in the bill of sections in the Human Rights Act. Ministers should not be provided with powers on the basis that there may be an incompatibility or that it may be expedient to use those powers for whatever purpose.

Gordon Jackson: I welcome the minister's amendments. It is obvious that some of us did not like the provision as it stood, as we felt that it lacked specification. I very much appreciate the fact that the Minister for Justice and Iain Gray are willing to change it.

Against that background, I will address Michael Matheson's amendments. I do not have much sympathy with amendment 30, which deletes the words "or may be". Such a deletion does not seem appropriate as the ministerial amendments mean that ministers will need to justify the necessity for making a remedial order. Indeed, the minister's argument about situations in which there has been no court determination justifies leaving in the words "or may be". Although it is still possible to argue that those words should not be used, I have no problem with leaving them in.

The minister will not be surprised to learn that I have some sympathy for amendment 29, which deletes the words "or expedient". However, I do not have enough sympathy for it to vote against the minister if it is thought appropriate to leave them in. My sympathy lies not so much with the principle, but with the array of advisers who draft these things. As far as drafting is concerned, the inclusion of the words "or expedient" is simply not my cup of tea; it is the kind of catch-all for which Governments and those who draft bills have a great liking as it allows them to bring in everything that might ever happen.

It is difficult to imagine a situation where it would be expedient but not necessary to make a remedial order, especially in the context of amendment 11, which proposes that ministers will make such an order only where they can show that "there are compelling reasons". If a Government is able to advance "compelling reasons" for making an order, that by definition would come under the category of necessity. It is not entirely clear where the words "or expedient" have relevance or meaning, and my legalistic view is that extra words in legislation are by and large not a good thing.

Without being over-technical, I should point out that I have much more sympathy for the second use of "or expedient", which amendment 31 would delete. In section 12(2)(c), we are past the decision to make a remedial order, and are now discussing what should be included in that order. There might be occasions when, if regulations are being amended anyway, it might be "expedient" to include things that are not strictly necessary. I invite the minister to think about those points. The word "expedient" does not fit equally well the two times that it is used in section 12. However, although I do not see the need for the word the first time, I will not go to the barricades over the matter.

Phil Gallie: I will ride to the minister's support. As section 12 is required in the bill for the reasons that the minister has fully explained, the last thing we want is to incur any delays that might bring our justice system into disrepute. In some recent situations, the effects of the incorporation of the ECHR has put us on the back foot. Although the bill is intent on overcoming that situation and indeed identifies a few areas where difficulties might arise, I have a great feeling that some problems might emerge that the minister has not yet identified. On that basis, section 12, whether modified or not, gives the minister the right to ensure that we meet the law's requirements.

As for the amendments in this grouping, perhaps some more surface amendments will bring onside one or two people who have made complaints—such as Gordon Jackson. I agree with Gordon's comments on amendment 29 about the use of the word "expedient"; its inclusion is not necessary in section 12(1), as the word "necessary" covers everything. Nevertheless, I will listen to what the minister has to say and give him 100 per cent backing. Whatever he decides on this issue will be good enough for me.

11:45

Gordon Jackson: With friends like that, minister, you are not going to need a lot of enemies.

Iain Gray: I am speechless, convener.

In the course of his remarks, Michael Matheson referred to "expedient" actions for whatever purpose. That is not the case; any "expedient" action would have to address any incompatibility with the convention. Only a foolish Executive would not ensure that it could demonstrate strong

reasons for incompatibility on that basis, because otherwise amendments to the legislation would be open to being struck down. The word "necessary" seems to set a very stringent test. However, I acknowledge the remarks that have been made. Although I hope that Mr Matheson is willing not to move amendment 29, I will go away and consider the use of "necessary" and "expedient" and at the very least provide some fuller explanation and argument at stage 3 for the use of "expedient".

As for amendment 30's deletion of the phrase "or may be", it is very clear that, in any situation where legislation is found to be incompatible with convention rights, the implication is that we will be waiting for a court decision, which will leave us open to the possibility of a period where we would be unable to operate in certain areas. That might give rise to difficult or unsatisfactory consequences. Mr Matheson said that, in such cases, we could use the "super fast-track route"; however, that is designed only for the most urgent and extreme cases and, most important of all, completely bypasses parliamentary scrutiny. In the same way that I was puzzled at defending ministerial powers against Mr Gallie's attempts to strip us of them this morning, I would be surprised if Mr Matheson thought it correct to use a process that would reduce the opportunity for parliamentary scrutiny. On that basis, I hope that he will consider not moving his amendments.

Amendment 10 agreed to.

Michael Matheson: I take on board the minister's comments. Although my gut instinct is to move amendment 29, I am willing to take the minister at his word and will wait to hear what he has to say at stage 3. I hope that he will be open-minded. If he feels that he cannot use the word "expedient" in section 12(1), which amendment 29 amends, and in section 12(2)(c), which amendment 31 amends, he will be prepared to lodge an amendment to address that lack of justification.

As for amendment 30, I again take on board the minister's remarks. However, I continue to have serious concerns about the range of powers that remedial orders give to ministers, and will likely return to the issue at stage 3.

Amendments 29 and 30 not moved.

Amendment 11 moved—[Iain Gray]—and agreed to.

Amendment 31 not moved.

The Convener: Amendment 32, in the name of Michael Matheson, is grouped with amendment 33.

Michael Matheson: The primary purpose of amendment 32 is to get clarification about the types of instruments and documents that may be modified by remedial order. As the bill is drafted, the Scottish ministers will have a wide-ranging power to modify by remedial order an enactment, prerogative instrument or any other instrument or document. The types of instruments and documents that are affected by these powers should be more clearly specified as those relating to the responsibilities of Scottish ministers.

Amendment 33 intends to ensure that no criminal offence, regardless of punishment, shall be created by remedial order. As the bill stands, a criminal offence could be created by remedial order. The creation of a criminal offence is a matter for Parliament to consider. Amendment 33 seeks to ensure that the creation of a criminal offence is brought before Parliament and is not done by remedial order.

I welcome the minister's comments on those issues.

I move amendment 32.

Iain Gray: Amendment 32 would amend section 12(2)(d) so that modification by remedial order of any instrument or document that was not an enactment or prerogative instrument could be done only if the instrument or document related to the exercise of functions by ministers. Michael Matheson has asked for clarification on what kinds of instruments or documents we might have in mind. I admit that we have no particular documents or instruments in mind that would fit into the category of not being enactments or prerogative instruments. Nevertheless, it is difficult to predict exactly what amendments may need to be made to our law in future as ECHR case law before the domestic courts develops. It would be a pity if some instrument or document could not be appropriately altered in an emergency due to the deletion of the relevant power in the bill.

I note that under section 113(5) of the Scotland Act 1998 the general remedial powers that are available to the UK Government under section 107 of the act extend to amending relevant instruments and documents, so the bill is consistent with that. Members will wish to note that, if we ever sought to amend instruments or documents by way of remedial order, the consultation requirements that are outlined in sections 13 and 14 of the bill would operate, so those with a central interest in the instrument or document would have the opportunity to comment.

Leaving the power as it stands is advisable and of no great concern. On that basis, I invite Mr Matheson to withdraw his amendment. However, if members feel particularly strongly about this matter, I will take it away for consideration and return at stage 3 with further explanation or, if appropriate, an Executive amendment.

Mr Matheson's other proposal, amendment 33,

would mean that a remedial order could not create any criminal offence. We do not support the amendment. Just as we do not envisage the remedial order power being used regularly, the instances on which that power would be used to create new criminal offences are likely to be very rare. Of course, criminal law is generally subject to particularly close ECHR scrutiny. I do not think that we want to go so far as to say that the remedial power could never be used to create a new offence.

Perhaps it would be more worrying if it were found necessary to make adjustments to the law on the onus of proof relative to certain elements of an offence or on the assumptions that it is valid for a court to make in criminal proceedings. That could lead us to a situation where it was argued in court that a brand-new offence had been created. We would, accidentally, have abolished the offence in trying to amend the legislation to make it compatible.

Given the safeguards in section 12(3) concerning the level of penalties, we do not feel that it would be wise to go so far as to prohibit entirely the creation of a new offence by remedial order. I hope that Mr Matheson will consider withdrawing amendment 33.

Michael Matheson: I take on board what the minister has said in relation to amendment 33, although I continue to have concerns about using a remedial order—subordinate legislation—to create a criminal offence. There are real issues about scrutiny, by the committee and the Parliament. I take on board the hypothetical circumstances in which the minister has suggested there could be difficulties. It would be interesting to know whether there have been difficulties since the incorporation of the ECHR to date.

Iain Gray: I do not have an example of those difficulties coming to pass and having to be dealt with in the way that we discussed. I am conscious that by giving a hypothetical example, I laid myself open to requests for a more realistic one. Under the Civic Government (Scotland) Act 1982, someone who has a previous criminal record and is found in a public place with certain tools, such as a jemmy, can be assumed to be there for nefarious purposes. That has been questioned under the ECHR. If we felt that it was necessary and expedient to address that point and did so, there would be a danger that it could be argued that by changing the legislation around the existing criminal offence, we had created a new criminal offence. We could strike down the criminal offence without meaning to.

On scrutiny, I fall back on the fact that the orders are subject to scrutiny, as we have discussed. I take Mr Matheson's point about whether subordinate legislation is an appropriate medium by which to create or introduce a criminal offence, but there are existing safeguards concerning scrutiny and the level of penalties. I hope that Mr Matheson will feel that those safeguards are enough to avoid unfortunate side effects.

Michael Matheson: I hear what the minister has said and he has given an example of where questions have been raised. I can presume only that when the bill is enacted one of the first remedial orders to be introduced will address that incompatibility. I continue to have concerns about making provisions that allow us to create a criminal offence under subordinate legislation. I will seek to return to the matter at stage 3.

Amendment 32, by agreement, withdrawn.

Amendment 33 not moved.

Section 12, as amended, agreed to.

Section 13 agreed to.

Section 14—Procedure for remedial orders: urgent cases

Iain Gray: Amendment 20 is a technical drafting amendment to improve the clarity of section 14(5). It inserts text to clarify that modifications to a remedial order include not just amendments to the order but its repeal.

I move amendment 20.

Amendment 20 agreed to.

Section 14, as amended, agreed to.

Section 15—Short title and commencement

Phil Gallie: Amendment 77 is a probing amendment, which deletes reference to part 2 of the bill from section 15(2). How can the Parole Board measures that the minister has so eloquently outlined today as being necessary to compliance under the ECHR be delayed any more than is necessary? Why should different parts of the bill come into force at different times? I cannot quite fathom that out, and I seek guidance from the minister as to why he is determined to do that.

I move amendment 77.

12:00

Iain Gray: As Mr Gallie says, the effect of amendment 77 would be that part 2 would commence the day after royal assent, rather than by commencement order. I cannot disagree with him, except to say that it is desirable to commence those provisions as quickly as possible, particularly as they relate to ECHR compliance.

There are benefits in having a short period—we have in mind a couple of months and no more—

prior to commencement. Part 1 of the bill requires changes to be made to the Parole Board rules to provide for the board to sit as a tribunal when considering the release of mandatory life prisoners. Furthermore, amendment 56, which was passed by the committee today, allows rules to be made requiring persons to attend hearings of the Parole Board.

We would like to bring the new Parole Board rules into force at the same time as the changes that are made to the constitution of the board under part 2 of the bill. That will ensure that all the board members take on their new functions and begin to operate on the new constitutional basis at the same date. That means, however, that a short period of time is likely to be needed after the passing of the bill, to consult on the new Parole Board rules. It is also desirable to have some time to prepare and consult on the regulations that will prescribe the appointment procedure for new members and the procedure that is to be followed by the removal tribunal, before part 2 of the bill is brought into force.

The purpose of section 15(2) is not delay. It is rather to ensure that things start in a proper and orderly way. There is some work to be done that can only really be done after the bill is passed. On that basis, I invite Mr Gallie to consider withdrawing amendment 77.

Phil Gallie: I emphasise that I made no objection to part 1 being included as it stands under part 7, simply because I think that it has already been acknowledged that part 1 is not essential to ECHR compliance. Having said that, part 2 is essential to ECHR compliance, and it gives me some concern that we are going to all this trouble to push the bill through while effectively saying that, even after the bill is enacted, we will be in breach of the ECHR.

I have listened to what the minister has said. I shall read his comments closely in the *Official Report* and I shall then determine what to do on a future occasion. For the moment, however, I shall seek leave to withdraw amendment 77.

Amendment 77, by agreement, withdrawn.

Section 15 agreed to.

The Convener: That completes consideration of stage 2 for today.

Meeting closed at 12:03.

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