JUSTICE 1 COMMITTEE

Tuesday 29 October 2002
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE

† 36th Meeting 2002, Session 1

CONVENER

*Christine Grahame (South of Scotland) (SNP)

DEPUTY CONVENER

*Maureen Macmillan (Highlands and Islands) (Lab)

COMMITTEE MEMBERS

Ms Wendy Alexander (Paisley North) (Lab)
*Lord James Douglas-Hamilton (Lothians) (Con)
*Donald Gorrie (Central Scotland) (LD)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Kate Maclean (Dundee West) (Lab)
Mrs Margaret Smith (Edinburgh West) (LD)
Kay Ullrich (West of Scotland) (SNP)

*attended

WITNESSES

Professor John Blackie (University of Strathclyde)
Clare Connelly (University of Glasgow)

CLERK TO THE COMMITTEE

Alison Taylor

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 3

† 35th Meeting 2002, Session 1—joint meeting with Justice 2 Committee.

Scottish Parliament

Justice 1 Committee

Tuesday 29 October 2002

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:33*]

Item in Private

The Convener (Christine Grahame): I remind members to turn off mobile phones and pagers. We have received apologies from Wendy Alexander.

I invite the committee to agree to consider item 2, which is consideration of lines of questioning for the witnesses, in private. The witnesses will give evidence on the Mental Health (Scotland) Bill. Are members agreed?

Members *indicated agreement*.

14:34

Meeting continued in private.

14:41

Meeting continued in public.

Convener's Report

The Convener: We proceed to item 3. Members will be delighted to know that my report is very brief.

I refer members to two pieces of correspondence, copies of which will be found in papers J1/02/36/3 and J1/02/36/15. The first is the minister's response to my letter of 6 September and to correspondence from the STOP: closure of Peterhead prison officers partners committee regarding the Coleman penitentiary in Florida. I suggest that we send a copy of the letter in the first instance to Christine Wood—the campaign group's assistant secretary—for comment. Are members content that we do so?

Members *indicated agreement*.

The Convener: The second is a response from the minister about his visit to Craiginches prison. I suggest that in the first instance we send the response to Richard Lochhead for comment. Are members content that we do so?

Members *indicated agreement*.

Subordinate Legislation

Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2002 (SSI 2002/440)

Criminal Legal Aid (Scotland) Amendment Regulations 2002 (SSI 2002/441)

Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No 2) Regulations 2002 (SSI 2002/442)

The Convener: The instruments that we are to consider today are subject to the negative procedure. If there are no comments on the regulations, do members wish to note the instruments?

Members *indicated agreement*.

Mental Health (Scotland) Bill: Stage 1

The Convener: We move to item 5, which is consideration of the Mental Health (Scotland) Bill. We are the secondary committee to the Health and Community Care Committee, which means that we can consider only certain aspects of the bill. Today, we will take evidence on the general principles of the bill from Professor John Blackie, of University of Strathclyde law school, and Clare Connelly, of the University of Glasgow school of law.

I welcome the witnesses to the committee. I ask whoever would like to start to give us an outline of your background and the areas of the bill in which you have a particular interest. I also ask you to be mindful of our role; we are concerned with the regulation aspects of the bill.

Professor John Blackie (University of Strathclyde): This is in strict alphabetical order.

I am professor of law at the University of Strathclyde, where I have been for some 10 years. My interest in mental health law has grown out of an interest in medical law more generally, but my background is fundamentally as a civil rather than a criminal lawyer. It might be relevant to mention that I have also been a user of mental health services, although I have never been compulsorily detained. Therefore, I have experience from the other side, as it were—the non-lawyer's side. I deal with some criminal evidence law in the course of my teaching, which also links to the subject.

14:45

Clare Connelly (University of Glasgow): I am a senior lecturer in law at the University of Glasgow. Previously, I practised as a solicitor for a short time.

I am particularly interested in mentally disordered offenders. I have conducted two empirical studies evaluating the new provisions of disposal and of examination of the facts, which were introduced by the Criminal Procedure (Scotland) Act 1995 and which dealt with offenders found insane and unfit to plead or offenders pleading insanity. Perhaps it is more relevant to the committee that I evaluated the new extended interim hospital orders and the hospital directions that were introduced by the Crime and Punishment (Scotland) Act 1997, which form part of the bill that we are considering. I have also evaluated legislation and literature dealing with serious violent and sexual offenders and have reported to the McLean committee. I have an active interest in criminal law and procedure and I research widely in that area, but my work on mentally disordered offenders will be of most interest to the committee. I am best equipped to comment on that part of the bill.

The Convener: So we have a balance of civil and criminal practice experience, which is interesting.

Professor Blackie: That is roughly right.

Maureen Macmillan (Highlands and Islands) (Lab): I want to ask about pre-sentence orders in part 8, chapter 1 of the bill. Section 92 introduces two new orders—the assessment order and the treatment order—that can be made prior to sentencing an offender or prior to any finding of guilt or innocence. They replace existing powers that are available under section 52 of the Criminal Procedure (Scotland) Act 1995. Are the new orders an improvement on the old powers? Do you wish to raise any concerns about them?

Clare Connelly: The provisions are sensible, but my only concern about the orders is: who will be empowered to apply for an assessment order? The bill states that Scottish ministers and prosecutors are empowered to do so, but the role of Scottish ministers is not wholly clear to me. In practice, I cannot see how a Scottish minister would become aware that an assessment order would be appropriate.

It is interesting that the bill does not give the opportunity for a defence solicitor or counsel to bring it to the court's attention that their client should be assessed so that the most appropriate treatment and disposal can be made by the court. The defence solicitor or counsel has most contact with an offender. I urge the committee to consider either replacing the Scottish ministers' powers with those of the defence agent or defence counsel or adding those powers to those of the defence agent or defence counsel.

Maureen Macmillan: That is interesting. Is there any reason why defence solicitors, for example, have been omitted? Is it an oversight or is it policy?

Clare Connelly: Defence agents sometimes find themselves in difficult positions in respect of whether they should encourage the court to have their client assessed. We should think of a parallel. If somebody is insane and unfit to plead, there is an obligation on all parties that are involved in the criminal justice process—whether they be prosecutors, sheriffs or defence agents—to bring it to the court's attention that they believe that the offender or accused has difficulties and that there is evidence of mental disorder that should be investigated. That should be paralleled in the bill. I cannot see how a Scottish minister could be empowered and how they would know that an offender or accused in Glasgow sheriff court was suitable for such assessment.

Maureen Macmillan: If a defence solicitor were able to ask for an assessment order or a treatment order, might that be misused to delay proceedings, for example?

Clare Connelly: There is no evidence to indicate that. The empirical study that I conducted on accused who were insane and unfit to plead produced no evidence of defence agents abusing that power. Such a suspicion has been held in the past. The consequences for someone of being found to be mentally disordered can be far more draconian than the consequences of that person proceeding through court as a non-mentally disordered offender. Defence solicitors and, to a greater extent, the accused themselves are reluctant to go down such a path. We certainly found no evidence of abuse in the two-year study that we carried out.

Maureen Macmillan: Assessment and treatment orders are not an easy option—a way of ducking responsibility.

Clare Connelly: No, they are far from that. The consequences can be far more draconian than they would be if the normal criminal procedure were followed.

The Convener: Under whose instructions does the defence agent make such an application? If they are acting under the instructions of the accused and they feel that the accused does not have the capacity, how can they make an application?

Clare Connelly: That is an on-going problem in cases in which the accused is mentally disordered. That is why the examination of the facts was introduced in cases in which someone was found to be insane and unfit to plead. In such circumstances, it is perceived that people with mental disorders should still have legal representation. The legislation acknowledges that the process of being able to take instructions from a client who is mentally disordered to that extent is problematic.

Lord James Douglas-Hamilton (Lothians) (Con): Are you arguing for the bill to be amended?

Clare Connelly: I have been asked about concerns that I would raise, and I have such a concern in relation to the protection of an accused person. If the provision in question is to be included, it should be made as effective as possible.

Michael Matheson (Central Scotland) (SNP): I want to be clear about your view. Should the defence solicitor or advocate be able to indicate the need for an assessment order or a treatment order?

Clare Connelly: The defence solicitor or advocate should be empowered to have an assessment carried out. At the point of sentencing, the solicitor or advocate might well regard themselves to be acting in their client's best interest by asking for such an assessment, to avoid their client having to go to a mainstream prison. As the people who have the greatest contact with the client, defence agents might have some insight into the difficulties that their client is suffering. If their client had to go into the normal prison service, it would take much longer for the client's difficulties to be picked up. It could be problematic if some such person were in the vulnerable position of being imprisoned.

Professor Blackie: There is already the example of a situation in which the defence agent makes an insanity plea in bar of trial, which indicates that the person is so mentally disordered that they cannot stand trial. That is a more extreme example of a situation in which the issue of taking instruction arises. There are examples of cases in which such action has not been taken. The legislation also provides for the prosecutor to have a duty in the relevant circumstances. It would be perfectly consistent with that provision in law, which must remain, for the defence to have some role.

The Convener: Is that a statutory provision?

Professor Blackie: It is.

Clare Connelly: It is a provision under the Criminal Procedure (Scotland) Act 1995.

The Convener: I asked that for the benefit of the record, so that we can refer to the provision when we do our report.

Maureen Macmillan: I want to ask a similar question about interim compulsion orders, which are intended to be used prior to sentencing in cases in which it is thought that the offender might present a high risk to the public. The interim compulsion order will replace the interim hospital order, which is available under section 53 of the 1995 act. What are your views on the new order? Do you have any concerns about it?

Clare Connelly: The interim compulsion orders largely mirror the interim hospital orders that have been available so far, but the category of prisoner to whom they are to be made available is reduced. My slight concern is about whether there will be adequate psychiatric diversion schemes for individuals who are accused of more minor offences. Previously, interim orders were available for a larger group of offenders; now, the orders will be available only for people who commit more serious offences. What will happen to people at the minor end of the scale? Are other mechanisms in place to ensure diversion from prosecution at an earlier stage? That would be less problematic.

The Convener: So the bill is taking away something that was previously useful.

Clare Connelly: Yes. The category as it now stands under the 1995 act excludes accused who are

"charged on complaint in the sheriff court if the sheriff is satisfied that he did the act or made the omission charged but does not convict him"

and people who are

"remitted to the sheriff court from the district court under section 58(10) of"

the 1995 act. Those are very minor cases. Under the bill, the compulsion order—the replacement of the old hospital order—would not be available to cover such minor offences. It could be said that that is broadly consistent with the fact that only those who may be made subject to a compulsion order may be subject to an interim compulsion order. However, that means that people who have committed more minor offences are removed from the whole process. It is not particularly clear what will happen to those people.

Maureen Macmillan: So it is not the interim compulsion order that is wrong; the problem is that there is a gap, through which some people appear to have dropped—there is no provision for them.

Clare Connelly: Exactly. There appears to be a gap.

Professor Blackie: There is an argument for the difference. The policy behind it is, I understand, to avoid people who have committed very minor offences having mental treatment by compulsion through the criminal law and criminal procedure. In other words, the policy is that, as far as criminal procedure is concerned, the courts should not be involved in sending such people for any form of compulsory treatment when they have been in the community or in hospital. In other words, they should be dealt with through the normal procedures that are available to every member of the public.

I suggest that there is quite a difficult question about where the line should be drawn, between using the law of criminal procedure—under which the bill will effectively come—for how people are made to have treatment for mental health problems and the alternative of using the civil law. I am inclined to think that it sends out the right signal if very minor offenders are not required to have treatment for their mental health problem through a criminal procedure. I suppose that we disagree about that.

The Convener: That is interesting.

Maureen Macmillan: Should there be some provision for such people, however?

Professor Blackie: Yes. Clare Connelly discussed the whole question of diversion from prosecution. It is important to note how well developed and well funded diversion from prosecution arrangements are. It might be argued that there are situations in which even very minor offences should be prosecuted. The fact that an offence is minor does not in itself mean that it should be diverted from prosecution. The public interest might indicate that.

Diversion from prosecution might not deal with all the minor offences committed by people who have a mental disorder. I incline to the view, however, that one can rely upon the general mental health services—the health services and social services and so on—to pick up those people.

Michael Matheson: Could you help me by putting this matter into the real world? A gap is going to be left in respect of people who have committed a minor offence but to whom the new order will not apply. Could you illustrate the types of those minor offences? Could you also give me an example of someone who might commit some kind of minor offence who should have some type of compulsory treatment order placed on them?

15:00

Clare Connelly: There are a couple of questions to be addressed, so you might have to bear with me. To clarify, I do not think that there is a problem. I agree with Professor Blackie that the correct signal is being sent. My concern is that people at the bottom end, who have committed the most minor offences, will be left without a safety net. There is no caveat for them. The proposal would not be suitable in all circumstances, but it could be.

Our study on mentally disordered offenders revealed that psychiatric diversion schemes were not being actively used in Glasgow. In fact, some prosecutors whom we interviewed had never heard of them. We had individuals who had committed minor offences. One individual who had not paid for a train ticket, and who did not have English as their first language, was prosecuted through the sheriff court because the procurator fiscal took the view that that was the only way in which that person could get assistance from the mental health services. The prosecution was abandoned when the psychiatrists became involved. That sort of situation is clearly intolerable. I am not suggesting that we should have compulsion orders for such individuals—clearly, that is not needed.

I agree with Professor Blackie that if the civil services are geared up and if we have a dynamic psychiatric diversion process where appropriate—it is not appropriate in all cases—people will not fall through the net. Professor Blackie highlighted

the important point that the issue is whether, to some extent, one thinks that the criminal justice process should have a safety-net function. Should we ensure that people who appear before the courts and who suffer from minor mental disorder, and who have perhaps only committed a breach of the peace because of their mental disorder, are treated like all other offenders? Or should we have something else in place so that either that person does not go through the court process because they are diverted, or if they do, the court is empowered to provide them with some assistance at that point to help them to address the difficulties from which they are suffering?

Michael Matheson: That is helpful.

The Convener: You have raised interesting points about the balance for the committee to ponder. I wish to move on, because we are only doing a stage 1 report, but these are extremely interesting counterbalance arguments.

Donald Gorrie (Central Scotland) (LD): I wish to ask about full compulsion orders, rather than interim orders. Section 95, which I have been grappling with and which goes on at great length, introduces compulsion orders which, I am told, replace hospital orders under section 58 of the Criminal Procedure (Scotland) Act 1995—I have not found out whether that is the case, but that is my fault. What are your views on the new compulsion orders, especially on matters such as the criteria that govern them, the range of measures that could be introduced and the procedures for reviewing such orders?

Professor Blackie: The existing hospital order is generally accepted to be unsatisfactory. Its criteria are crude and it is not well nuanced when it comes to review. Nobody who knows anything about the field would suggest that we want to maintain the existing arrangements, so the new order is indubitably a step forward. In the past, there were problems with orders and how they related to the giving of treatment in hospital. Those were problems to do with the drafting of the old legislation. The bill is a huge improvement. There might be some details that we want to explore.

Clare Connelly: I agree. The criteria are acceptable and the range of measures appears to be appropriate. The processes for monitoring, varying, renewing and revoking the orders are definitely welcome. It is more appropriate that orders will be much more closely monitored.

However, there may be an error in section 95, which seeks to insert a new section 57A into the 1995 act. Proposed new section 57A contains a definition of a restriction order, which refers to "this Act". That may contradict the definition of a restriction order that is contained in section 228, which refers to "the 1995 Act".

Donald Gorrie: It is encouraging that we seem to have got most of that right. It makes a nice change.

The Convener: It is my understanding that the key difference between a compulsion order and a hospital order is that, with the new order, the court can authorise treatment in the community. As I understand it, the Millan committee was not opposed to community-based treatment for offenders but took the view that where a community-based disposal was being contemplated, the matter should be referred to the mental health tribunal, which would then report back to the court. The bill does not provide for that referral. Do you have any views on which approach is preferable?

Clare Connelly: I would certainly follow the Millan committee report, partly because we would then safeguard against the possibility of community treatment being recommended simply because hospital resources are limited.

The Convener: That issue has been raised with me. Pharmacists have also raised concerns and said that they might be unhappy at being in the front line of responsibility. Perhaps you could expand on that.

Professor Blackie: That is absolutely right, and there is another reason. As the new tribunal develops over time, it will gain expertise in deciding on the best mix of measures for people. As you know, the divide between hospital orders and community treatment orders will not be absolute.

The measures that will be put in place for community treatment orders are quite severe; they include, for example, notification of change of address and monitoring of the person at their address. The decision on whether treatment will be given in hospital or in the community has nothing to do with criminal law and criminal procedure. As I read the bill, that decision must be based on the most appropriate therapy for, and the well-being of, the patient. From that, it follows logically that the new tribunal is the right place to consider the treatment.

The Convener: If no one else has a question, I am content with that answer.

Lord James Douglas-Hamilton: Section 1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 introduced the public safety test, the effect of which is that a restricted patient cannot be discharged if detention in hospital is necessary to protect the public from serious harm. The Millan committee recommended that the public safety test should be abolished. However, section 133(2) retains that test for restricted patients. Which approach of the two do you prefer?

Professor Blackie: I find this a very difficult question to answer; I have thought about it a great deal.

There is clearly public concern—sometimes unjustified, but perhaps justified in some cases—that there are people who appear to have a track record of a higher tendency to injure or threaten the safety of the public, perhaps in an extreme way. That concern lay behind the act to which Lord James has just referred and the Parliament considered it at that time. Whatever I think, one has to be aware that there is public concern. The ideal solution would be to allay public concern and achieve the right approach in the light of general principles of criminal law, mental health law and human rights law. As you will know, the courts have held that existing legislation is in accordance with human rights provisions, specifically article 6 of the European convention on human rights.

Having said that, my feeling is that there might be a difference according to the level of risk to public safety. That might not be captured properly in the present wording, so there might not be an all-or-nothing decision on that. My preferred solution would be that it is not the job of mental health services to deal with the problem. As the Millan committee suggested, other bodies that might be put in place could concern themselves with the matter. I find it difficult to answer the question.

The Convener: To which other bodies are you referring?

Professor Blackie: The difficulty is that risk-management bodies would have to be created.

Clare Connelly: I had concerns about the public safety test when the 1999 act was passed, because at that time—the situation has now changed—if an offender was given a sentence, they were deemed to be able to be released at a certain time, even if they were still deemed to be dangerous at that time. If the sentence was determinate, they could be released and we could not stop that. The situation has now changed.

The mentally disordered offenders who were given a hospital disposal were given it because they were deemed to require treatment. At the end of that treatment, the legislation allowed them to continue to be detained on the basis of dangerousness. At that point, there was an inconsistency and a prejudicial position for people who were mentally disordered. In effect, a form of indeterminate sentencing had been introduced, but only for mentally disordered offenders and not for non-mentally disordered offenders. That was the position when the bill was passed.

I agree with the Millan committee. The public safety test should be scrapped. However, I appreciate that there are real concerns that people who have offended might still be dangerous. The MacLean committee addressed that in respect of not only mentally disordered offenders but other offenders, by attaching orders for lifelong restriction.

The orders are important for two reasons. The order is made at the point of sentencing and it follows a formal risk assessment. A lot of the literature on risk assessment is up front and honest and says that conducting risk assessments of offenders is extremely difficult. Risk assessment is easiest to do and most effective at the time when the person has offended. It is extremely difficult to conduct a risk assessment 10 years on, when the offender has been in an institutionalised environment. That person has been in an artificially controlled environment for a long time and at that point reference is often made to their offending behaviour in the past.

Many people have argued, and this seems appropriate, that formal risk assessments should be made at the time of offending, when decisions on disposal are being made. That would give the court the ability, regardless of whether the person is a mentally disordered offender, to make an order for lifelong restriction. That would be much more appropriate than having legislation that merely suggests that the assessment be made at a time when it is not most appropriate and in circumstances that would not be tolerated for non-mentally disordered offenders. That is overtly prejudicial. I urge the committee strongly to take the opportunity to correct that, because the suggestion would not have to put the public at risk.

Lord James Douglas-Hamilton: I want to pursue this theme. Could we not take the protection of the public, which is enshrined in section 133, as a safeguard for more dangerous offenders who might be a great peril to the community unless they take the necessary medication?

Clare Connelly: You do not have to release someone who is under an order for lifelong restriction, which means that the public will be protected. The difficulty is that the provision in the bill would exist only for mentally disordered offenders and, as a result, would not be tolerated.

15:15

Lord James Douglas-Hamilton: Can someone be mentally disordered, but not mentally ill? For example, someone could be a psychopath and have no feelings about what was right or wrong; in other words, they might actually kill someone and be a danger to the community but might not, technically, be mentally ill.

Clare Connelly: That is a difficult question, as it relates to an issue where, as lawyers, our

expertise ends. Perhaps the question should be addressed to a psychiatrist. However, I understand that psychiatrists regard psychopathy as mental illness.

Professor Blackie: I should point out that the phrase "personality disorder" is expressly mentioned in section 227, which defines mental disorder for the purposes of the bill. It would not be a good idea to have different definitions of mental disorder for different parts of the bill. That has been a problem with certain areas of mental health law in the past; for example, there were rather odd cases of people being required to pay council tax because of different definitions. If you are going to accept that definition, you also have to accept not only what psychiatrists sometimes say but that what they say falls, by law, under the term "mental illness".

Lord James Douglas-Hamilton: If a person has a mental disorder that is not regarded as a mental illness, cannot we consider the protection of the public as a legitimate interest?

Clare Connelly: Are you asking whether someone who is no longer treatable should be detained solely on the grounds of public safety?

Lord James Douglas-Hamilton: Yes. Is it legitimate to take into account the protection of the public in relation to someone who has a mental disorder and is no longer treatable?

Clare Connelly: I think that that is totally legitimate. However, the bill does not provide for that at all well. Indeed, the bill is prejudicial towards people who have a mental illness and will result in an assessment of dangerousness being made at the point when treatment ends, instead of at the time of the offence. A lot of research in this area has suggested that the appropriate time for such an assessment is when the person has offended. Moreover, the Millan committee has recommended that the public safety test should be replaced by formal risk assessments at the point of disposal and that an order for lifelong restriction, which allows for detention after treatment has ended, should be made when someone is deemed to fall into exactly the category of person that a public safety test seeks to address. However, the bill is going about the matter in a prejudicial way.

Maureen Macmillan: In other words, the bill discriminates against people who have a mental illness.

Clare Connelly: Exactly.

The Convener: Aside from the point about discrimination—which you obviously accept—you also feel that risk assessments are more substantial. I take it that such assessments would be carried out during the period that someone is under a restriction of liberty order.

Clare Connelly: Yes.

The Convener: In that case, I think that Lord James Douglas-Hamilton wanted to know how such a situation can be monitored. For example, problems might flare up again for someone who has been released after being institutionalised for a long time. Are you telling us that this other methodology would be able to monitor, contain and manage the situation in the interests of the public?

Clare Connelly: Yes. I understand that formal risk assessment and the order for lifelong restriction would be more robust, because the danger assessment would be on-going. There are two issues: when the risk assessment is done and whether it is only mentally disordered offenders who are subject to the proposed orders.

Professor Blackie: That is basically the right way to go, but I would like to make two points. The question might arise of what happens if the danger becomes apparent only further down the line. If the risk assessment has been done at the beginning, there is no problem, as that is simply fed into the decision about how the restriction order is to be applied and what is to happen to the person. I do not think that that is a difficulty.

I have a slight bother about lifelong restriction orders in cases where people get completely better. If that were to happen, I would want a review mechanism to be built in. Complete recovery can occur in very rare cases, but who knows what may happen? Medicine may develop and more may be discovered about personality disorder. I am concerned that what is proposed could be too robust.

The Convener: There is nothing in the bill that deals with that, is there?

Professor Blackie: No.

Lord James Douglas-Hamilton: If somebody was found to have a severe mental illness and was put under lifelong restriction, but 20 years later was found to have recovered completely under medication, do you feel that there should be an appeal system or review mechanism?

Professor Blackie: I prefer to call it a review mechanism.

Lord James Douglas-Hamilton: Yes, you are right. It would be a review mechanism, rather than an appeal system, because such people are patients.

On the other hand, if somebody has a mental disorder, is not their physical or mental condition less likely to change?

Professor Blackie: I do not know. I would have to be a psychiatrist to answer that.

The Convener: That is really a question for other experts.

You have raised an interesting point. I understand that lifelong restriction orders would be imposed under the Criminal Justice (Scotland) Bill.

Professor Blackie: That is correct.

The Convener: The problem for the committee is that—

Professor Blackie: I can see the problem for the committee.

The Convener: This committee is not dealing with the Criminal Justice (Scotland) Bill. Perhaps we will address that problem in our report on the Mental Health (Scotland) Bill. Obviously we cannot call it a lifelong restriction order if it is to have a review procedure.

Donald Gorrie: The Millan committee suggested that the responsibility for authorising discharges of restricted patients should be with the reconstituted Parole Board for Scotland. The bill suggests that such decisions should be taken by the mental health tribunal. Do you have any preference as to which route is better?

Professor Blackie: That raises again a question about the criminal justice dimension and the mental health treatment dimension. Coming at it from my end, I prefer the mental health tribunal, which would have expertise and awareness. I am not sure how many such cases would come to the Parole Board for Scotland. Clare Connelly might have some idea about what proportion there might be and whether it would be a large number.

Clare Connelly: I agree with Professor Blackie that the mental health tribunal is a place of expertise. I am slightly concerned that, given the extended responsibilities under the bill, the tribunal will have to be appropriately resourced to deal with the broad spectrum of responsibilities that will come under its wing. In principle, that is the correct body.

From the research that we undertook, I am not aware of the number of cases that would be dealt with, but as Scottish ministers in the past authorised the release of restricted patients, such information should be quite easily available to the committee. One of members' colleagues or former colleagues—the Secretary of State for Scotland and then the First Minister—would take care of that.

Donald Gorrie: I have a fairly obvious question. Are the new proposals better for ministers, because they keep them out of things?

Clare Connelly: Yes.

Professor Blackie: Yes. Dealing with such matters is a big problem for ministers, as I think many ministers feel. The trend throughout the western world is to have such matters dealt with in an adjusted forum, rather than by a minister, however well informed and advised that minister is.

The Convener: Is that because ministers would be involved too much and too directly, as you said? If such matters were not at arm's length, there would be ECHR implications.

Professor Blackie: When we mentioned ministers earlier, I was going to say something that I did not say. At times, the Executive should take the initiative. If someone is in custody, ministers have responsibilities to that person, apart from anything else. I do not suggest that no such situations exist. Scottish ministers have obligations in many situations in the bill. Obligations exist, but what we are discussing is not one of them.

Lord James Douglas-Hamilton: Is it not part of your argument that ministers should not be involved because a tribunal would have greater openness and accountability to the people?

Professor Blackie: Yes.

Lord James Douglas-Hamilton: I will ask a further question about the Millan committee. It recommended that the risk management authority should undertake responsibility for authorising a restricted patient's temporary release from detention, transfers of patients between hospitals with the same level of security and urgent recalls from conditional discharge. Instead, the bill retains the Scottish ministers' role in relation to those matters. Which approach do you prefer and why? You may have answered that question by implication.

Professor Blackie: I probably have, but questions remain about how such responsibility relates to the risk management authority's general work. That is an additional reason that is separate from any that I have mentioned.

Clare Connelly: For the reasons that have been discussed, I think that removing such matters from a minister's responsibility would be a good idea. I support the incorporation of the Millan committee's recommendations.

Lord James Douglas-Hamilton: Would your recommendation be greatly to ministers' relief?

Clare Connelly: I think so.

The Convener: Shall we put that in our report?

Paul Martin (Glasgow Springburn) (Lab): We touched on hospital directions. The Millan committee's report said that since their introduction, hospital directions had been used only

"in a handful of cases".

Do you have views on the reasons for that limited number?

Clare Connelly: Along with some colleagues, I undertook a two-year empirical study of the new legislation that provided for hospital directions. The committee may be interested to know that we wrote a report of approximately 100 pages which, after having funded the research, the Executive's central research unit chose not to publish. The report gives details of the two hospital directions that were made and a direction that was pending in those two years.

The first reason that we uncovered during that study—unfortunately, the reasons were not put in the public domain—as to why directions were rarely used was that sentencers, who are sheriffs and judges, and solicitors lacked familiarity with the new provisions. When we interviewed a wide range of professionals from the legal system, they were unaware of the new legislation.

The professional body that was most up to date on the provision was psychiatrists. They were consistently much more familiar with the disposal than any of the legal representatives whom we interviewed. Psychiatrists identified two reasons why hospital directions are not used. First, guidance from the Scottish Executive prohibited psychiatrists from recommending the disposal. A direction from the Executive overtly stated that, when psychiatrists were giving evidence, they were not entitled to bring to the attention of the sheriff or judge the new hospital directions that were now available.

Secondly, in addition to that guidance from the Executive, there were also ethical problems for psychiatrists, which is perhaps why—this is a bit of a loop—the Executive issued the guidance. Psychiatrists felt that there were ethical issues to do with their recommending a disposal to the court that involved imprisonment. Unlike hospital orders, which had only a therapeutic dimension, the hospital direction is clearly stated to have a therapeutic dimension and, thereafter on recovery, a punitive dimension involving imprisonment.

In the process of conducting our research we became aware of the fact that psychiatrists' hands were tied. In subsequent interviews with sheriffs and judges, it became clear that sheriffs and judges would have found it useful if psychiatrists had been more proactive when giving evidence by saying that the type of offender in question was ideally suited to a hospital direction. Following our interviews, a number said that they would change their procedures by asking more direct questions of psychiatrists who gave evidence.

Among those who knew about the new disposal, we did not find anyone who thought that it was unfavourable. The disposal was not used because of the lack of information about it and, in the case of those people who knew most about it, because their hands were tied in the court process.

15:30

Paul Martin: Can that research be shared with the committee as part of your evidence?

Clare Connelly: I can provide the committee with only a brief paper of four or five pages covering the main findings. Unfortunately, the contract from the central research unit prohibits me from sharing the full report with anyone because it has not been published. Obviously, that is of some concern, as the report also monitored interim hospital orders and transfers of patients out of prison to hospital for treatment.

The Convener: Why was the report not published?

Clare Connelly: I was told that, in the end, it would not be published because there had been only two hospital directions.

The Convener: But your report would have explained why there had been only two.

Clare Connelly: Yes. Let us say that a lot of work was involved.

The Convener: I think that we can read the runes.

We would like the four-page summary if that is appropriate within the terms of your contract with the central research unit.

Clare Connelly: I can leave a copy of that with the committee today.

The Convener: We will make that one of our written submissions, which can go in the public domain. Perhaps that will cure a little problem.

Paul Martin: The Executive proposes to introduce an amendment to the bill to alter the criteria for the making of hospital directions, so that such directions would be appropriate where, in addition to the person's having a mental disorder that meets the criteria for admission to hospital, no close association exists between the mental disorder and the offence or, alternatively, treatment would be unlikely to reduce the risk that the offender would present to the public. Are the witnesses happy with those criteria?

Professor Blackie: I would have a bit of trouble with that, actually—

The Convener: This is getting terribly interesting. I did not think that the bill would be so interesting when we first approached it. It is good that you have trouble with that.

Professor Blackie: I have some trouble with the proposal because there are two factors: the

relationship of the disorder to the offence and the public safety factor, which we have talked about.

Perhaps this shows my of lack experience in the criminal courts, but I find it difficult to see how a court could open up during evidence the link between the disorder and the offence committed other than in situations for which there are mental health defences, such as diminished responsibility in homicide. I find it rather difficult to see how the court could explore that properly. There must be a factual basis. We do not have the amendment, so I do not know how its phrasing might deal with the matter.

Paul Martin: Would the proposed amendments cause an increase in the number of hospital directions?

Professor Blackie: I would not be surprised if that were the case.

Clare Connelly: I do not think that that would be the case because we did not uncover any evidence that hospital directions were not being used because of the definition of offenders who were suitable for receiving such directions. Therefore, I do not think that a change in the definition would operate in the way that Paul Martin suggested.

On the changed criteria for making hospital directions, I do not understand the motivation for the change in the second criterion—commonly referred to as section B of the criteria—which is when treatment will probably not reduce the risk that an offender presents to the public. It was difficult to work out the reason for that change. If someone were treated in hospital and then remitted to prison, normal rules about the length of their sentence would apply, if the sentence were a determinate one. Their treatment for mental disorder would not affect their release date. The use of the word "risk" in section B suggests that that part of the criteria is trying to address the issue of risk, but I do not think that it is.

Lord James Douglas-Hamilton: The Millan committee envisaged that the bill would contain a right for a prisoner to appeal against a transfer for treatment direction. The Millan committee also recommended that there should be a right for a prisoner to appeal against a refusal to make such a direction. Those rights do not appear in the bill. What are your views on that omission?

Professor Blackie: I find it difficult to understand the motivation for the omission. A person in custody might feel that his or her mental health was fragile and that they would be a danger to themselves if they were not transferred to hospital. Therefore, I think that they would have a clear interest in appealing against the refusal of a transfer for treatment. I suppose that the Executive's motive for omitting that right from the bill is to prevent prisoners from endlessly trying to get from prison custody to hospital. However, that seems to leave a gap in the bill on an issue of care.

Lord James Douglas-Hamilton: Would it be fair to say that a general theme underlying all your comments today is your concern about a mentally ill person who gets better?

Professor Blackie: That is one of the themes, but I am also addressing the opposite example of a person who deteriorates.

The Convener: For example, women in Cornton Vale who are very fragile.

Professor Blackie: Exactly.

Lord James Douglas-Hamilton: Your concern is with both situations.

Professor Blackie: Yes.

Clare Connelly: Omitting the right of appeal caused me concern. I wondered whether it was done because giving the right of appeal to prisoners whom the authorities wished to treat would perhaps delay necessary treatment. However, having no right of appeal means that if a prisoner seeks treatment but their request is refused, they will get no treatment. Therefore, having the right to appeal against such a decision would bring treatment to them sooner than the status quo would.

My only caveat about giving a right of appeal concerns the situation of someone who needs immediate treatment but who refuses to have it. However, there are probably other provisions in the bill that could deal with such a situation.

The Convener: That is what I was going to ask you. Are there other provisions in the bill to allow the state to ride roughshod over the individual's rights in an emergency, as it can in other circumstances under mental health legislation?

Clare Connelly: Nothing in the bill would exclude the civil provisions from applying to a prisoner.

Professor Blackie: The civil provisions would be used, as far as I can see, in an emergency.

Lord James Douglas-Hamilton: Let us move on to the next question. The bill provides new criteria for determining when admission to the high-security state hospital at Carstairs is appropriate. That would be the case when a patient suffered from a mental disorder of such a nature or degree that he or she required treatment under conditions of special security or when he or she could not be suitably cared for in a hospital other than the state hospital. Are you satisfied with those criteria? Was the Executive right to depart from the Millan committee recommendation that

there should be a specific criterion relating to admission on the basis of self-harm?

Clare Connelly: I am happy with the proposed new criteria. I have read the Millan committee's report. Its position is that, as people have already been transferred to Carstairs because of fears over self-harm, until alternative provisions can be put in place to care for those people, the state hospital should retain that remit. I support the Millan committee's position. If the bill is to depart from that, it should be on the basis that alternative provisions are now in place, so that such use of the state hospital is no longer appropriate.

Lord James Douglas-Hamilton: Are you familiar with the mental hospital at Carstairs?

Clare Connelly: Yes. I have visited the hospital.

Lord James Douglas-Hamilton: Do you agree that the conditions and facilities there are a great improvement on what was there before?

Clare Connelly: Absolutely. They are very impressive.

Professor Blackie: I agree entirely.

Paul Martin: The Millan committee recommended that patients who are held in high-security or medium-secure units should have the right to appeal to a medical health tribunal to be transferred to a lower-security establishment if their condition improves. The Executive has not included that provision in the bill. Do you have any views on that omission?

Clare Connelly: It is problematic for two reasons. First, it impacts on the patients' right to initiate a review of their detention and of where they are being detained. Secondly, patients at Carstairs move progressively through wards until they are in a ward that allows them some semblance of independent living, where they receive food that they cook themselves. When I visited the hospital, the staff said that the difficulty is that, after people have been in that environment and have been allowed out to supermarkets occasionally and that sort of thing, they go on to a locked ward in a local hospital where the provisions are not in place to help someone on a rehabilitation programme to get back to living independently in the community. The right of appeal must be available, so that the patient can have some control over where they are detained and can, if the authorities fail in their duty, initiate a review that could allow them to move towards lower levels of security and, hopefully, back into the community when appropriate.

Professor Blackie: Let us contrast the situation with a situation in which a patient is detained under civil provisions, under which there are appeal rights. Some of the material that is relevant to an appeal is of exactly that type: there are locked wards, graded things and other questions. I cannot see the reason for leaving the right of appeal out of the bill.

We talked about appeal on transfer. Questions were raised about that, such as that it might have the disadvantage of delaying treatment. They do not seem to arise for patients who are held in high-security or medium-security units.

It is probably coming across that I am always in favour of appeals, as long as they are not frivolous and as long as there are checks and time limits and appeals are not made too often.

The Convener: If you are suggesting that we allow appeals, we would need some provision about the number of times that an appeal could be made. Otherwise, someone could appeal every week.

Professor Blackie: Such provision is built into much of the bill in other areas. It is important.

15:45

The Convener: Would the provision be in the primary legislation or in the guidance?

Professor Blackie: It would probably be in the primary legislation.

Lord James Douglas-Hamilton: Is it not the case that, over the years, Parliaments have tended to favour the inclusion of provision for appeals in acts?

Professor Blackie: Yes. That has been the case.

Lord James Douglas-Hamilton: The Millan committee and the Scottish Executive both considered whether the sexual offences that are found in the general criminal law could sufficiently protect those suffering from a mental disorder but concluded that specific statutory offences were necessary. Were they correct in that view?

Professor Blackie: My knowledge of criminal law and sexual offences is not sufficient for me to give an expert opinion on that. I have my own views, but that is all.

Clare Connelly: I believe that the Millan committee and the Scottish Executive were correct. I favour the specific offences in the bill. They avoid the more difficult issues that would occur if the common-law offences, such as consent, were to be relied on. I welcome the provisions in the bill. They will afford greater protection to those who suffer from mental illness.

Maureen Macmillan: The bill replaces existing statutory sex offences under the Mental Health (Scotland) Act 1984 and the Criminal Law (Consolidation) (Scotland) Act 1995 with two new offences of sexual abuse of a mentally disordered

person and sexual abuse by staff and formal carers. Will you outline the problems that existed in relation to the old offences? Have those been adequately addressed by the creation of the new offences?

Clare Connelly: Unfortunately, I cannot answer those questions. I am sorry. I have done no research on the use of the old offences and how effective they were. I can give only my impression from my knowledge of the common-law offences. My specialism is criminal law. The issues of consent and the operation of the criminal justice process in prosecuting any offence in which consent can operate as a defence—namely rape and indecent assault—are always problematic. I imagine that those problems would only be exacerbated. I could not give any specific examples. However, I welcome the bill's provisions because having statutory provisions will go some way to addressing the particular, more detailed issues that arise for those who suffer from mental disorder.

Professor Blackie: Although I do not know enough about the general criminal law, I know about the old statutory offences because I considered them when I wrote a book with Hilary Patrick many years ago. A number of difficulties were built into those offences. The greatest difficulty was how much knowledge the person whom we would now loosely call the abuser needs to have. Secondly, the offences did not fit with the general developing view that the person who has a mental health problem or a learning disability must—appropriately—have some sexual freedom.

The offences were bad in two respects. They were desirable neither for those of whom we are speaking as victims, nor in working out exactly what was required for the offence. There was some case law on the cognate parts of the law, but it was confused. The offences were unsatisfactory.

Maureen Macmillan: Obviously, the problem lies with consent and how someone with a learning difficulty might be manipulated. Achieving a balance on that is difficult. Are you content with the balance in the bill?

Professor Blackie: As I said, the old statutory offences are inappropriate because they do not focus on that difficulty but raise other difficulties. I do not really know enough about the general law of indecent assault, but I favour the view that, as the people who are involved are fundamentally vulnerable, special statutory offences are required.

Maureen Macmillan: Are the new penalties that will be imposed appropriate? The maximum penalty for sexually abusing people with mental disorders will be life imprisonment.

Professor Blackie: That is a question of general sentencing policy. I am always worried when what appears to be a streamed decision is taken, without wider consideration of sentencing policy for criminal offences. It is extremely unlikely, except in the most unusual cases, that a life sentence will be handed down, however bad the crime is.

The Convener: I am looking for the definitions section in the bill because I am interested in what you say about sexual offences. A recent case in the Borders involved a woman with learning difficulties. The system did not protect that woman and there were difficulties because more than one of the people involved had a learning disorder. To an extent, such difficulties arise from community care. You raised the issue of diversion. At some point, we will come back to the resources that are required to deal with and monitor such matters. That point is interesting.

Donald Gorrie: Sections 217 and 218 create two new offences: the ill treatment and wilful neglect of mentally disordered persons and obstruction by someone other than the mentally disordered person. Are those sections sensible and well written and are the penalties satisfactory?

Clare Connelly: The creation of those offences is appropriate. I cannot comment on how the system will operate in practice because that falls outwith my field of expertise and experience. I am rather concerned that the maximum period of imprisonment of two years on indictment does not seem to be particularly punitive, given the types of offence that could be committed against vulnerable people. I am probably thinking of a worst-case scenario, but a maximum of two years seems rather limited.

The Convener: Is that an absolute limit? That seems extraordinary.

Professor Blackie: I presume that the two-year limit is to bring the matter within the sheriff's jurisdiction. Part of the reason for that is probably that it is assumed that such cases will not be heard in the High Court.

Clare Connelly: The appropriate section is 217(3)(b).

Donald Gorrie: Will the witnesses speculate on who the obstructor referred to in section 218 might be and why they might obstruct access? Would it be a jailer-type person? Perhaps it might be a carer who has misbehaved under section 217 and who is obstructing the investigation.

Professor Blackie: It might be someone who has control of a person and who is obsessively opposed to any form of medical intervention or who hates social workers. Such problems arise occasionally.

Donald Gorrie: Hatred of social workers is quite widespread, unfortunately.

Professor Blackie: I meant more than that.

Donald Gorrie: A lot of people think that social work is a malign service that will take their children away and cause trouble. We are talking about a public education problem.

The Convener: Let me take you back to section 217. I understand what you are saying, but the person could be charged under the common law or a completely different provision. When you said two years, you stopped my breath for a second.

Clare Connelly: There is a maximum of two years on complaint and on indictment. In the case of indictment, the sentence would usually be longer because people are indicted only if they commit a more serious offence.

The Convener: Absolutely. What do you suggest?

Clare Connelly: It is always easier to criticise than to come up with alternatives.

The Convener: The job of the opposition to this committee is to come up with solutions; the committee does not have to do that. However, what is your solution?

Clare Connelly: You rightly said that is possible to proceed on indictment under a common-law offence, that suggests that there is something wrong with the provision. We are talking about a greater period of imprisonment and we need to be precise as to what the maximum should be. Life imprisonment, which always sounds severe, appears elsewhere in the bill.

The Convener: Do we need a statutory term in the case of indictment? Is not that at the discretion of the courts?

Clare Connelly: It is normal to state in statute the maximum that would be available. It is only in common law that discretion would operate automatically.

The Convener: Do we need the section?

Professor Blackie: Do you mean the subsection?

The Convener: Would it not be an aggravated crime under common law to assault or ill treat someone who is suffering from a mental disorder? If so, it would be possible to increase the penalty, rather than including the provision in statute.

Clare Connelly: The statute would have to state that that was an aggravating factor. At present, it is not an aggravation under common law.

The Convener: Should we deal with the matter in the bill, rather than increasing the sentence for the offence? I am thinking of the sheriff court procedures.

Clare Connelly: That would be possible. The committee could opt to delete the whole section, but, considering the bill in the round, it may be appropriate to have a section that deals with protecting against neglect.

Professor Blackie: I am not familiar with the common law in this respect. Publicity is not the only matter involved, although that is a good point. People who use the bill should be able to find such a provision, as otherwise they would have to race around the criminal law books. I recollect that there is a problem with common-law offences that relate to neglect, although not in circumstances that lead to death.

Clare Connelly: Such neglect would come under the offence of reckless conduct, and the common-law offence would normally come under cruel and unnatural treatment. The benefit of including a provision in the statute is that the specific category of people to whom the offence relates is underlined and the courts are then empowered to punish accordingly.

Professor Blackie: That would also deal with acts of omission.

Lord James Douglas-Hamilton: I would like to ask two very brief questions, if I may.

The Convener: Yes, James. I do not think that I could stop you.

Lord James Douglas-Hamilton: In view of the importance of the evidence that you have given, in which there is great interest, could you provide a short précis that sets out the nature of the major improvements that could be made to the bill?

Clare Connelly: Are you asking for a written submission to the committee?

Lord James Douglas-Hamilton: Yes.

Clare Connelly: I would be more than willing to do that, although I do not have much to add to what I have said today.

Lord James Douglas-Hamilton: It would be invaluable if you could set out the most important improvements.

This point may have been made clear already, but I seek clarification about patients who have killed someone—young or old—and who are released on the ground that their mental condition is untreatable. Am I correct in thinking that whether that patient is subject to review or check is a matter more for the provisions of the Criminal Justice (Scotland) Bill than it is for those of the Mental Health (Scotland) Bill?

Clare Connelly: If an offender has killed someone, the matter becomes dependent on whether they have been convicted of murder or culpable homicide. The Ruddle case, which gave—

Lord James Douglas-Hamilton: I am talking about patients who have been detained at Her Majesty's pleasure.

Clare Connelly: That could happen with a murder conviction, which could lead to a life sentence.

Lord James Douglas-Hamilton: If somebody is suffering from severe mental illness and is dissociated at the time of the killing, they would go to the state mental hospital and would be regarded as a patient and not as a criminal.

16:00

Clare Connelly: Are you envisaging a scenario in which the offender has successfully pled the insanity defence and has been acquitted on that ground?

Lord James Douglas-Hamilton: If it is later found that that person's mental disorder is such that they are no longer treatable, would the decision on that person's return to the community be a criminal justice matter? At present, there appears to be no check on the release of someone who is considered to be untreatable, whereas someone who has received a life sentence for murder is subject to life licence conditions.

Clare Connelly: A restriction order would be attached to that person when they went to the state hospital and, therefore, the public safety legislation that we have been discussing would come into play. The First Minister would be empowered to refuse their release from Carstairs on the ground of public safety—he will retain that power under the bill. The attachment of a lifelong restriction order would have the same effect.

Lord James Douglas-Hamilton: If a person who was subject to a lifelong restriction order showed any threat to the community, could they be recalled into the hospital?

Clare Connelly: My understanding is that, if someone is under a lifelong restriction order, they can be recalled in any event.

Professor Blackie: Yes. I think that you are asking whether there is a gap in provision in relation to someone who has not been convicted of a crime because they have successfully pled insanity. The answer is no, because, under the proposed scheme, the restriction order would apply to such a person just as it would to someone who had been convicted.

The Convener: I thank our witnesses for their evidence, which has been interesting. It would be useful if you could provide a paper with bullet points in time for the next committee meeting—it would be useful to have that information in the public domain.

Professor Blackie: What is the time scale?

The Convener: Our next meeting is next week, but we are not considering our report until the following week. We will have one more week of evidence and it would be useful if we received your paper before we produced our report. If that puts too much pressure on you, even if we were to receive the paper after our report had been produced, it would mean that your points—which were extremely interesting—would be highlighted for the Executive. I thank you for your evidence.

Clare Connelly: Thank you.

Petition

Clydesdale Horses (Couping) (PE347)

The Convener: The next item is the petition.

Donald Gorrie: Is there any chance of a half-time break?

The Convener: There will be a half-time break after the petition. We will discuss the petition and then go into private session. We will have a cup of coffee for that.

The petition is PE347, by Mr Kenneth Mitchell, on the couping of horses. I refer the committee to paper J1/02/36/5 and specifically the options in paragraphs 13 and 14. I should also mention that I received apologies from Sylvia Jackson—who is heavily involved in the petition—because she has a clash of committees. Where have we heard that before? It can be very difficult for members.

What are committee members' positions on the options given? You will have seen the responses from the British Equine Veterinary Association, Jim Sharp, who has now taken over the petition after unfortunate demise of the original petitioner, Animal Concern and the Laminitis Clinic. If you have had the opportunity to examine them, I should like your guidance on how you wish to proceed.

Donald Gorrie: First, it is an area that I know nothing about but, secondly, having read through the stuff, I thought that the most sensible suggestion was that judges in showing classes should be instructed to examine horses to see whether they had been couped. They would then blacklist or exclude any horse that was shoed in that unsatisfactory and dangerous way. I can see the difficulty about having vets in Benbecula or wherever, and one respondent says that they have tried instructing the judges, but it does not work. However, that might change if a message went out from the committee that we would propose legislation if judges did not get their act together and disqualify horses that had been couped. I should prefer that rather than bashing into legislation.

Maureen Macmillan: Sylvia Jackson said that she hoped that we would support the petition because she supports it very strongly. I do not think that we should do nothing and, as Donald Gorrie said, we should first try to encourage best practice. However, it seems from some submissions that that is not happening and that people just duck out of it. Donald Gorrie said that the judges could be the ones to impose best practice, but the farriers could do that by not couping horses. Perhaps we should write to the Worshipful Company of Farriers to ask about its stance on couping. Depending on its answer, we could then examine whether to recommend legislation.

Couping is possibly a cosmetic practice that has grown up over the years for no good reason. It is perhaps done just so that horses walk more prettily. It makes me think of Chinese women having their feet bound, although that is clearly an extreme example. However, the principle is the same. It is supposed to be something beautiful, but in the end it causes damage to the health of the horses.

Michael Matheson: I agree with Maureen Macmillan. I do not think that we should do nothing. I note the correspondence from a senior vet, who said that evidence that couping causes orthopaedic problems does not seem to exist. I cannot help but think that it must cause some problems. If it was done to a human being, I am pretty sure that it would cause some difficulty in future years.

I am not so sure about Donald Gorrie's proposal about the judges. I would prefer to go to the Clydesdale Horse Society to ask whether it is prepared to ban couping from its events. I would want to know whether the Farriers Registration Council is prepared to ban its members from doing it. If not, we should be prepared to take action and recommend that legislation be introduced. I do not think that we should ask those involved to introduce new standards of best practice—they are either for it or against it. If they wish to continue with the practice of couping in some form, that is unsatisfactory and we should be prepared to recommend legislation.

Paul Martin: I agree with Michael Matheson's point; we should allow for a response from the British Equine Veterinary Association, which is similar to what Donald Gorrie suggested. We need to be careful about the kind of legislation that could realistically be introduced that would not take us into the animal welfare arena. However, not only Clydesdale horses but other animals suffer regularly for showing purposes. If we were to consider legislation, it could focus not purely on the plight of Clydesdale horses, but on many other animals that have similar experiences.

We have only to visit exhibitions that show animals to see the kind of activities that must be of some discomfort to them. The issue could become an animal welfare issue, rather than being focused on Clydesdale horses. We have to focus on allowing for a response from the BEVA. If it is not willing to educate its members who are involved in couping, the Parliament must consider what to do for the sake of horses' welfare. As I said, we have to be careful and realistic about whether we could allow for focused legislation on couping, or

whether this relates to a wider animal welfare issue.

The Convener: I take the view that legislation should be the last resort in any circumstances and that we should change culture and policy.

Lord James Douglas-Hamilton: I agree with what the convener has just said. I would be grateful to know more about the scale of the problem. I would like to know exactly how many horses are involved and whether the problem exists throughout Britain rather than just in Scotland. I would like a more accurate and complete picture of the extent of the problem.

The Convener: I suspect that that information is somewhere in the papers that we have, although I have not seen it. The view of the committee is that couping is, to put it mildly, an inappropriate, cosmetic practice that is carried out on horses for no reason other than to change their natural walk to what humans think is a more appropriate walk.

We should write to the Farriers Registration Council and the Worshipful Company of Farriers expressing the view that couping is distasteful to us and that we wish it to end by consensus. We should ask them whether they would undertake to ban members or mark members—that is not the word that I want—if they continue to be involved in couping. We should also write to the Clydesdale Horse Society expressing similar views. We should tell the society that we have written to the organisations that I mentioned and ask for a response saying that judges in its competitions will not consider horses that have been shod in that manner and that those horses will be disqualified. Is that agreed?

Members *indicated agreement*.

The Convener: Having done that, we should perhaps address the scale of the problem, although I do not think that the numbers that are involved are relevant. The practice is either right or wrong. I do not think that we should say that if it involves only 20 horses it is right, but if it involves 200 horses it is wrong.

Paul Martin: We should identify the scale of the problem. I agree that the practice is either right or wrong, but we should be aware of the scale. I do not think that if it involved only 10 horses I would be less concerned than I would be if it involved 40 horses. I am concerned whatever the number is.

The Convener: I take your point.

Lord James Douglas-Hamilton: If we know the numbers and scale, it is easier for us to obtain evidence about the number of horses that have actually suffered adverse consequences as a result of the practice.

The Convener: From what we have discovered in our trawling around, it is difficult to get such evidence. The British Equine Veterinary Association had difficulty in giving us that information. I may have misread that evidence, but I think that the association was unable to tell us that. I am quite content that we should try to make inquiries, and perhaps the clerks should do that. Paragraph 7 of the paper for this item states:

"BEVA also states that it would be difficult to enforce the legislation which the petitioner seeks due to 'lack of objective facts (on couping)' and 'diverse interpretations of the definition of couping'."

That is something else that I meant to address. I seem to remember that there was mention of degrees of couping, for some reason. The paper goes on to say that the BEVA

"suggests that it may be more appropriate to encourage best practice through the Farriers Registration Council, the Worshipful Company of Farriers and if necessary the existing law in relation to farriery",

about which I know nothing.

We could come back with proposed letters next week as part of the convener's report and see whether members are content with them. In fact, we could e-mail them. Somebody could always lodge a parliamentary question, although that might already have been done. I fear that we might not get the information that we need in any digestible fashion, but we will try.

Lord James Douglas-Hamilton: I accept the principle that you stated: that the practice is either wrong and should be stopped or it is not. However, it would be useful to have as much background as possible.

The Convener: I know that it would be useful, but I do not know whether we will manage it. We shall endeavour to get that information. Are members content to consider letters at the next meeting?

Members *indicated agreement*.

The Convener: It was agreed that the next item—consideration of a draft report—should be taken in private.

16:16

Meeting suspended until 16:25 and thereafter continued in private until 16:47.

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