JUSTICE 2 COMMITTEE

Wednesday 14 March 2001
(*Morning*)

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JUSTICE 2 COMMITTEE
4th Meeting 2001, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Mrs Lyndsay McIntosh (Central Scotland) (Con)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
Christine Grahame (South of Scotland) (SNP)
*Ms Margo MacDonald (Lothians) (SNP)
Euan Robson (Roxburgh and Berwickshire) (LD)
Karen Whitefield (Airdrie and Shotts) (Lab)

*attended

THE FOLLOWING ALSO ATTENDED:

Peter Beaton (Scottish Executive Justice Department)
Kirsty Finlay (Scottish Executive Justice Department)
Iain Gray (Deputy Minister for Justice)
Edward McKeown (Criminal Injuries Compensation Authority)
Howard Webber (Criminal Injuries Compensation Authority)

CLERK TO THE COMMITTEE

Lynn Tullis

ACTING SENIOR ASSISTANT CLERK

Fiona Groves

ASSISTANT CLERK

Graeme Elliot

LOCATION

Committee Room 3

Scottish Parliament

Justice 2 Committee

Wednesday 14 March 2001

(*Morning*)

[THE CONVENER *opened the meeting at 09:23*]

The Convener (Pauline McNeill): I apologise for not starting on time. We will not make a habit of scheduling meetings to begin at 9.15.

Mrs Lyndsay McIntosh (Central Scotland) (Con): Thank you.

The Convener: We set the earlier start time because, for the first time, we have a heavy agenda, and so that the Deputy Minister for Justice can get away in time.

First, do we agree to consider items 3, 4 and 5—Crown Office and procurator fiscal service issues, a European briefing and lines of questioning for the Criminal Injuries Compensation Authority—in private?

Members *indicated agreement.*

Subordinate Legislation

The Convener: Iain Gray is with us. I apologise for keeping you waiting, minister. We were not quorate at 9.15, but you can rest assured that I shall deal with that when the rest of the committee appears.

I invite you to speak to and move motion S1M-1701, on the approval of the draft Limited Liability Partnerships (Scotland) Regulations 2001.

The Deputy Minister for Justice (Iain Gray): I am happy to say a few words about the Limited Liability Partnerships Act 2000 and the new form of business association that it will bring about: the limited liability partnership. Such a partnership will combine the organisational flexibility and tax status of a partnership with limited liability for its members. That limited liability is possible because the partnership is a legal person separate from its members. That means that a partnership will be able to enter into contracts and hold property and will be able to continue in existence even when there are changes in its membership. A limited liability partnership is therefore rather closer to a company than to a partnership; that has been the guide to framing the regulations.

The creation of types of business associations is a matter reserved to the UK Government, and the department with responsibility for that is the Department of Trade and Industry. Accordingly, the UK Government introduced the Limited Liability Partnerships Bill in 1999. Although the creation of those partnerships is reserved, the legislation impacts on a number of devolved areas of Scots law. On 24 June 1999, the Scottish Parliament considered and approved a Sewel motion that enabled the Limited Liability Partnerships Bill to progress in the UK Parliament.

Scottish ministers have powers within devolved competence to make regulations under the Limited Liability Partnerships Act 2000 in relation to LLPs. That is what the committee is considering today. Because the powers in the act allow ministers to amend primary legislation by statutory instrument, section 17(6) provides for that to be done by the affirmative procedure. The UK Government has laid before the UK Parliament separate regulations that provide for England and Wales in all areas and for Scotland within the reserved areas. Those regulations were considered and approved by the House of Commons yesterday and the House of Lords is expected to consider them next week.

The Scottish regulations are necessary to apply Scots law in relation to the winding up and insolvency of LLPs, to ensure that LLPs registered in Scotland can create floating charges over their assets, to apply the Criminal Procedure (Scotland)

Act 1995 to the members of LLPs, and to provide for the execution of documents by LLPs in accordance with Scots law.

In essence, the regulations will give LLPs parity of treatment with companies. The policy is to make LLPs available throughout Great Britain, so both sets of regulations have been designed to be as consistent as possible, with the result that the regulations may look extremely bulky. However, the approach of making them apply other statutes by reference has been taken to highlight where the changes in company and insolvency law have been made. We hope that that will make it easier for users to identify the changes.

The intention is that both the UK regulations and the Scottish regulations will come into force on 6 April 2001, which will allow those who wish to take up LLP status to do so at the start of a new tax year. Taken as a whole package, the Scottish regulations, the DTI regulations and the Limited Liability Partnerships Act 2000 provide a flexible and useful mechanism for the creation of a new business form that will keep Great Britain at the forefront of international practice. I commend the regulations to the committee.

I move,

That the Justice 2 Committee recommends that the draft Limited Liability Partnerships (Scotland) Regulations 2001 be approved.

The Convener: Members will note that the Subordinate Legislation Committee considered the instrument on 27 February and had no comment to make.

To what extent are the regulations welcomed by businesses and partnerships?

Iain Gray: As you would expect, the most significant consultation on the new form of partnership took place before the initial legislation was introduced. The DTI distributed a pre-legislative consultation paper to about 2,000 organisations and individuals, but the department reckons that 5,000 received it. The bulk of the 5,000 were businesses and professional associations that represented or had an interest in the professions that might take up this new kind of business association. Their response was very largely positive, because they felt that such an association would give some protection to professionals who were members of partnerships.

09:30

The Convener: Okay. We have up to 90 minutes for discussion, if we need it.

Iain Gray: We could read through the regulations slowly.

Scott Barrie (Dunfermline West) (Lab): I do not intend to take up 90 minutes. The explanatory note to the regulations makes it clear why we are taking this route and highlights some of the pitfalls if we did not, such as the possibility that businesses would leave the UK for more advantageous regimes elsewhere. Although I understand the positive aspects of the proposal for companies, does it have any down sides?

Iain Gray: It is difficult to see any. Although the change will certainly give significant protection to members of partnerships, the key point is that the existing forms of partnership for some of the professions now seem very outdated. They date back to a time when professional partnerships were small and local, whereas such partnerships are now increasingly UK-wide and international. As a result, the liability that falls on a member of a partnership can be terrifying. The legislation modernises a kind of association that is past its time.

The question is the impact on the clients of partnerships, and the protections that they would have would be very similar to the protections that they have when they deal with a company. Any weaknesses in that respect would therefore reflect general weaknesses in consumer law's provisions for consumer protection vis-à-vis companies. This legislation would not be the place to deal with that issue.

Mrs McIntosh: I apologise for briefly detaining the minister outside the committee room.

Were chambers of commerce included in the consultation on the DTI document?

Iain Gray: Very much so.

Mrs McIntosh: What was their reaction?

Iain Gray: The response has been almost entirely positive, for the reasons that I outlined in my response to Mr Barrie. The consultees certainly believed that the proposal would give appropriate and additional protection to professionals in partnerships, which would obviously include the members of chambers of commerce.

Mrs McIntosh: I have no further questions, and I certainly do not want to hold up the legislation.

The Convener: Minister, I heard your comments about the DTI consultation. However, why were consumer groups not included in that process?

Iain Gray: They were to some extent. The Consumer Association and the National Council for Voluntary Organisations were both consulted, on the assumption that they would both further consult their membership. It would be only honest to point out that, compared with the much larger number of businesses and professional organisations that were consulted, those

organisations formed a relatively small part of the process. However, they were not excluded.

The Convener: Did the consumer organisations flag up any issues in the consultation?

Iain Gray: No. They felt that the change was both appropriate and overdue.

The Convener: On balance, professionals and businesses have chosen to form partnerships instead of companies. Will the regulations overall mean that the benefits of the partnership structure will remain, but that the members of partnerships will be protected because they will no longer be jointly or severally liable?

Iain Gray: That is correct.

The Convener: What are the benefits of the legislation?

Iain Gray: As you have pointed out, there are benefits as far as the liability of members of the partnership is concerned. Furthermore, the legislation will give partnerships access to some elements of the tax regime that they do not yet have.

The Convener: Do the new regulations mean that there will be other burdens for a new partnership under the Companies Act 1985?

Iain Gray: Yes. The new limited liability partnership carries some burdens that are very similar to current burdens on companies such as the requirement to produce an annual report and accounts. If we were asked about the difference between a very large partnership under the LLP regulations and a small company, the answer would be not a great deal.

The Convener: So the net effect of winding up a partnership under these regulations would be almost similar to winding up a company under the Companies Act 1985.

Iain Gray: Absolutely. Indeed, some of the regulations that are before the committee today will ensure that the Scots law that applies to such circumstances will include LLPs and companies.

The Convener: If there are no further questions, I will put the question on the motion. The question is, that motion S1M-1701, in the name of Iain Gray, be agreed to. Are we agreed?

Motion agreed to.

That the Justice 2 Committee recommends that the draft Limited Liability Partnerships (Scotland) Regulations 2001 be approved.

The Convener: We agreed under item 1 that the committee would go into private session for items 3, 4 and 5.

09:36

Meeting continued in private.

11:30

Meeting continued public.

The Convener: At this point, I want to put on record the apologies that I should have read out under item 1. We have apologies from Christine Grahame, who is unwell today, and Euan Robson, who, as members may know, has been promoted and will no longer serve on the Justice 2 Committee. We will find out in due course who Euan Robson's replacement will be.

We will now take evidence from Peter Beaton and Kirsty Finlay from the civil justice and international division of the Scottish Executive justice department.

I hope that members have had an opportunity to read the background paper on the European Communities (Matrimonial Jurisdiction and Judgements) (Scotland) Regulations 2001 (SSI 2001/36). Before we hear evidence from Peter Beaton and Kirsty Finlay, I should say that the note does not give us much information on the regulations. We should place that comment on the record and have further discussion about the matter later. Perhaps we will be clearer about the practical effect of the regulations when we have heard the evidence.

I ask our witnesses to make an opening statement.

Kirsty Finlay (Scottish Executive Justice Department): It is important to realise that the regulations that are being discussed today serve only to implement the European Council regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, which for reasons that I imagine are fairly obvious is colloquially known as Brussels II.

This instrument, which came into effect on 1 March, changes the law in Scotland and is directly applicable to all European Union member states with the exception of Denmark. All that the Scottish statutory instrument can do is make space in our domestic legislation for the provisions of the Council regulation. The amendments in the statutory instrument simply ensure that our domestic law does not conflict with the Council regulation. I repeat that the regulation is directly applicable and remind the committee that we are not in a position to do anything about that.

The Convener: That said, it is the role of this committee to examine what the practical effect of regulations might be. The difficulty that we have found with this regulation is in determining its

practical effect. Can you give us an indication of what it might mean?

Kirsty Finlay: I appreciate that the statutory instrument presents that difficulty. It has to be read in conjunction with the Council regulation because that regulation determines the changes in the law. Essentially, the regulation makes changes to the jurisdiction in matters of divorce, separation, annulment of marriage and parental responsibility orders that relate to children of both parties of the marriage, providing those parental responsibility orders are dealt with at the same time as the divorce proceedings.

The Convener: Are there any contradictions between Scots law and European Community law under the regulations?

Peter Beaton (Scottish Executive Justice Department): The legal order for external jurisdiction arrangements, which is governed by the Domicile and Matrimonial Proceedings Act 1973, has been changed because there are fundamentally different rules of jurisdiction in Brussels II. The pre-existing regime was founded on domicile and habitual residence for one year in Scotland. The new regime is founded primarily on habitual residence, although there is a residual domicile order, provided there has been habitual residence for six months. In a sense, that inverts the jurisdictional arrangements.

The key practical effect of the abolition of the domicile rule is that someone who is domiciled in Scotland but has been living outside Scotland and who, after separation, comes back to Scotland will no longer be able to raise an action of divorce immediately on their return: they will have to wait for six months. I will not attempt to explain how or why that is the position, but it is the policy.

The previous arrangement in relation to domicile was dependent on an idea of domicile that is found, within the EC, only in the UK and Ireland. Domicile is not known as a general connecting factor elsewhere, although it was used in the European Council Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, which is known as Brussels I. The meaning of domicile in Brussels I was subject to definition in the contracting states. We have an autonomous definition of domicile in the Civil Jurisdiction and Judgements Act 1982, but that applies only to matters covered by the Brussels I convention and the parallel convention that deals with the European economic area.

In general, the concept of domicile is known only in the legal orders in the UK and Ireland. The important part about that is that domicile arrives as a sort of gift at birth. A person is domiciled where they are born or where their parents are domiciled. That domicile of origin remains throughout their life, potentially. For example, I was born in Edinburgh. If I go to the Sierra Nevada for 20 years, my domicile of origin will revive when I come back to Edinburgh.

The Domicile and Matrimonial Proceedings Act 1973 enabled someone who was returning to their original place of domicile to reassume that domicile even if they had been domiciled elsewhere. The difference between domicile and habitual residence is that, at any given time, it is possible to have only one domicile, but it is theoretically possible to have more than one habitual residence. The other difference is that domicile is an autonomous concept, whereas habitual residence is a question of fact and is determined by the facts of every situation.

Mrs McIntosh: The regulation applies to the children of both spouses. What is the position for the children of further relationships?

Kirsty Finlay: Those children are not within the scope of the Brussels II regulation. Let us look at the example of a couple who are getting divorced. One of the party has been married before, has children from a previous marriage and they live together in one family unit. At the same time as the divorce action is taking place, an action for a parental responsibility order is being undertaken as part of that divorce action. If the Brussels II regulation is being followed, the action for parental responsibility can apply only to the children of the parties that are getting divorced or separated; it does not cover children of a previous marriage.

Mrs McIntosh: That distinction is made?

Kirsty Finlay: Yes, because of the narrow scope of the Brussels II regulation. As we were making space in our domestic legislation for the provisions in the regulation, we were unable to amend domestic legislation to take account of that situation.

Scott Barrie: Would that situation apply even if those stepchildren had been adopted by the step-parent?

Peter Beaton: No, they would then be considered to be children of both parents.

Ms Margo MacDonald (Lothians) (SNP): As the regulation is now law, I assume that we have to work out how to apply the law correctly in our legal system.

Kirsty Finlay: Yes.

Ms MacDonald: Are you saying that because only a narrow field of the law has been affected by this new European law, there is scope to amend the regulation, having seen how the legislation is working in practice?

Peter Beaton: We have no scope to amend the regulation by domestic legislation—

Ms MacDonald: Not this one.

Peter Beaton: What development there may be in the Community legal order is a separate question. We are addressing the regulation as it stands. With respect, I have to say that anything else is irrelevant for our present purposes.

Ms MacDonald: Is a differentiation made between children who consider themselves part of one family when that family legally breaks up? We have introduced a law that determines how some children are to be treated as opposed to others. Surely the decision taken as regards custody and access should reflect what the children think?

Kirsty Finlay: Yes, but if an action for access and parental responsibility is taken completely separately from the divorce action, the provisions of Brussels II and the subsequent amendments to the domestic law do not apply.

Ms MacDonald: I understand that, but wonder why we went to the bother of introducing this legislation.

Kirsty Finlay: We were obliged to make provision in our domestic law for it, as European regulations are directly applicable.

Scott Barrie: The regulation amends four pieces of domestic legislation. The Subordinate Legislation Committee was concerned that insufficient detail was given in the background notes to explain how the regulation affects Scots law. That concern has affected some of our lines of questioning today.

I want to look at the issue from a different angle. How much consultation was undertaken with organisations in Scotland about the provisions in this regulation? I am thinking particularly of consultation with legal bodies or children's organisations?

11:45

Kirsty Finlay: Mr Beaton's experience of the negotiations that led to the Brussels II convention make him better placed to answer that question, as the regulation is subsequent to the convention.

Peter Beaton: The Brussels II regulation was introduced under title 4 of the treaty that established the European Community and followed the Treaty of Amsterdam coming into force. The United Kingdom Government took a political decision to opt in to the negotiations that led to the adoption of this instrument. The United Kingdom and Ireland have a protocol to the Treaty of Amsterdam that disapplies title 4 in relation to any proposals that are made unless the United Kingdom and/or Ireland indicate within three months of any proposal being made that they wish to opt in to the negotiations.

In the case of the Brussels II regulation, there was consultation with legal interests before ministers decided to opt in to the negotiations. However, there had been consultation on the substance during the negotiations leading up to the adoption of the text of the convention. As the substance of the text of the convention was taken straight through to the text of the regulation, to all intents and purposes the regulation is the same in substance as the convention. No further consultation was undertaken on the substance of the regulation, but there was consultation on whether there should be an opt-in. The consultation was not wide, but there was consultation.

Scott Barrie: Did people raise anxieties during the limited consultation that took place, or were they happy with what they saw?

Peter Beaton: I cannot say that there was very much response on the substance but, during the consultation on the Brussels II convention, a number of people expressed concerns. There was also parliamentary scrutiny at Westminster, where certain points were made. However, the political decision that was agreed to by the Council of Ministers took into account certain of those concerns, but not all of them.

The United Kingdom was successful in achieving certain amendments that consultees recommended. The retention of a domicile ground of jurisdiction was a direct result of the consultation, as it was the singular issue that was raised by consultees. Certain issues were not taken on board, and I would not like to mention those by name.

There was general dismay about the limited scope of the regulation. That was one of the issues that produced strong arguments during the convention negotiations, but it was withdrawn from the negotiations on the regulation as the Council of Ministers decided to adopt the text of the convention that was submitted in a proposal from the Commission. At that time, therefore, there was no room for argument on the scope. Progress is being made on another initiative that affords room for argument on the scope. However, returning to Margo MacDonald's earlier point, that is irrelevant to the statutory instrument that is before the committee.

The Convener: Mr Beaton said that one of the practical effects of the regulation is that a person who had been living outwith Scotland could not raise an action in the first six months of their return to Scotland. Is that seen as a disadvantage?

Peter Beaton: It is difficult to evaluate. One of the purposes of this instrument is to try to stop parallel actions. For the record, the origin of Brussels II was a concern about cross-border

divorces involving certain member states of the European Community, notably France and Germany, where there was thought to be a problem of parallel actions. There was no international legal order to deal with that. The intention was to ensure that where spouses split up and departed to their states of origin, or to two separate states within the Community, there would not be two actions leading perhaps to inconsistent results.

There is a difference in approach between the United Kingdom jurisdictions and many of the continental jurisdictions as to how to handle parallel actions. In the United Kingdom, there is a doctrine known in Latin as forum non conveniens. It was invented in Scotland, but has largely been adopted in what one might call the legal systems that derive from the Anglo-American influence. Under this doctrine, where there are two competing courts, each of them with jurisdictional competence, the court that is seised first of a process can decline to accept jurisdiction if it seems that in all the circumstances it is better for the other court to take the case, for example if there are connections with the other court or if witnesses are there.

The continental systems have a system of first come first served which, in the Brussels II regulation, is covered by article 11, which says that if two courts are seised with an action, the court that is first seised should take it and the second court should decline jurisdiction. There are those who argue that that system leads to a race to the courts and that that is undesirable in family actions, but that is the regime that we have in Brussels II. No domestic legislation has been amended to deal with that because although there are provisions in domestic legislation to deal with the declining of jurisdiction, they apply only to intra-UK cases.

The Convener: One of the advantages of being part of the European Community is that a citizen can go to their local court and enforce European Community law; that is what is supposed to happen. I see a disadvantage for someone who is Scottish and has been away and come back; they have to wait six months. I hear what you are saying about how issues of jurisdiction and conflicting legal decisions across two countries can be tidied up, but do you agree that it is a disadvantage to the ordinary person if they have to wait six months to raise an action? That is a long time to wait.

Peter Beaton: Anyone could take a qualitative view on that, but I would not like to comment directly on whether it is a disadvantage or an advantage. It funnels back into policy on divorce and family law generally. It has been argued by commentators that there is a disadvantage, particularly in the United Kingdom, where the revival of the domicile of origin allows an action to be raised on the connecting factor of domicile. It should be remembered that the habitual residence ground that was available under the Domicile and Matrimonial Proceedings Act 1973 required habitual residence for a year. That is retained in article 2 of the regulation as one of the connecting factors:

"the applicant is habitually resident"

in a state provided

"he or she resided there for at least a year".

Where a person who was not previously domiciled in Scotland comes to Scotland, they will have to wait a year. Where a person was previously domiciled in Scotland and that domicile revives, they have to wait only six months. Clearly there is a risk that an action can be raised if the other spouse remains in the place where the couple were living together. Under another provision of article 2, an action can be raised directly by that spouse straight away and of course it works the other way, so in the case of somebody who has been living in Scotland and goes away, the spouse who remains in Scotland is able to raise an action straight away. To some extent it cuts both ways.

The Convener: Are there any other questions?

Ms MacDonald: I wish to unpick that a wee bit. You said that you do not want to comment on some of the objections. Why? Is it because of the source of the comments?

Peter Beaton: They are not necessarily directly relevant to the business that we are dealing with, it would take us quite a long time to get into them and it would probably be material for a tutorial on family law. I am not the best qualified person to do that.

Ms MacDonald: No, my head is nipping already, but we will have to revisit this area, so we should bear in mind that objections were raised to this particular part of the regulation. When we come to consider this again, it may be interesting to hear then what the objections were.

The Convener: I do not think that there is an answer to that. We will close the questioning. I thank Peter Beaton and Kirsty Finlay for the time that they have spent at the committee this morning. It has been useful.

The committee now has to prepare a report for Parliament on our scrutiny of these regulations. Two issues have to be included in the report. One concerns timing. Members will see from the note that the 21-day rule has been breached, which the Subordinate Legislation Committee has already drawn to our attention, so that has to go in the

report. The second issue is the quality of the information available to us. We have heard in evidence this morning some of the practical effects of the regulations which, although non-controversial, it is important to draw out. It is important that people understand the practical effects of these regulations. If members agree, the report should say that in future we cannot have a note on regulations that does not contain guidance on what the regulations mean.

In both the public and the private part of this morning's meeting, the committee has had to take in a lot of detailed information on how the European Community deals with these matters. Our job is to try to make the issue real for people, so what we put in our report is important. Are there any additional factors that members feel should be included in our report to Parliament? There are none. We will circulate the text of those two key issues for approval, so members should check their e-mail for it and we will get the report signed off.

Criminal Injuries Compensation Authority

The Convener: Item 7 is about the Criminal Injuries Compensation Authority. I welcome Howard Webber, the chief executive of the CICA, and Edward McKeown. Thank you for coming to the committee this morning. I know that you have travelled a long way to get here. I am sorry that we have kept you waiting, but we have had a busy agenda this morning.

For some time we have wanted to have you along, because we are interested in what you do. We have lots of questions to ask you. We have a time limit of around 12.30, but I think that we will get through them. I invite you to make some preliminary points, then we can get down to business.

Howard Webber (Criminal Injuries Compensation Authority): I am happy to make an opening statement, which may dispose of some of your more basic questions. I will try to keep it to not much more than five minutes.

The criminal injuries compensation scheme was set up in 1964 and is pretty much the oldest in the world. There is competition between Britain and New Zealand for the title of the oldest criminal injuries compensation scheme in the world. It was part of a move at the time to put victims higher up the criminal justice system agenda than they had been. That has continued ever since, with the growth of Victim Support and other measures to support victims.

For the first three decades of the scheme, awards were based entirely on what applicants could expect to receive if they were successful in suing the offender in the courts and collecting money. For 30 years, it was a common-law based system. That was replaced in 1996 with the current tariff system of around 400 injury descriptions, each of which has a set sum of money, to give applicants reasonable knowledge of what they will receive if they are successful.

12:00

We still have the remains of the old, common-law scheme—we are dealing with about 3,000 such cases. In 1996, we had a backlog of 110,000 cases under the old scheme. We have been operating the two schemes in parallel since then. We hope to dispose of the 3,000 cases in the coming year.

We receive more than 75,000 applications a year and make annual payments totalling about £200 million. That makes the scheme by far the largest in the world and larger than all the other

programmes in the European Union put together. It covers the whole of Great Britain—I am sure that we will have more to say about that in a while—and is therefore funded jointly by the Scottish Executive and the Home Office. We have nearly 500 staff, two thirds of whom are based in Glasgow and one third in London. The Glasgow staff deal with all cases that arise in Scotland and Wales and the majority of England. The London staff deal with cases that arise in London, the south-east and other parts of southern England.

Any innocent victim of a crime of violence is eligible to apply to us. We do not make awards for what we consider to be minor injuries, although no injury is minor to the person who has suffered it. The tariff that we apply has a minimum award level of £1,000, so we cannot make awards to people whose injuries would not qualify for that level of compensation. The upper level of the tariff is £250,000, but the vast majority of the awards we make are at the lower end; more than 60 per cent of awards are £2,000 or lower and 90 per cent of awards are £5,000 or lower. If the victim is incapacitated for more than 28 weeks, we can pay for loss of earnings and medical care costs. The total award that we can make is capped at £500,000, which takes account of the pain and suffering award and any loss of earnings and medical care costs.

I mentioned that funding is shared between the Scottish Executive and the Home Office. The Scottish Executive pays a proportion. There is a complicated formula, but the average percentage of our total spend that has gone to victims in Scotland over the previous three years determines the percentage of our annual budget that is paid by the Scottish Executive. For example, this year the Scottish Executive is paying a percentage that reflects the average amount paid to Scottish victims over the previous three years. In general, that amounts to between 11 and 13 per cent of our total budget. The number of awards to Scottish victims is between 11 and 13 per cent of the total number of awards made.

All applications are received in the Glasgow office, which takes the initial action on them. It registers the cases and sends out to the police and the medical authorities identified on the application form for the basic reports. As appropriate, the applications are allocated to a specific, named case worker in a London or Glasgow case work section. From then on, that case worker is the named contact for the applicant and the person who will do all the detailed work on the case. Our system is such that we require at least two people to be involved in any decision. The preparation of cases and recommendations for decision are separate from the actual taking of the decision, partly to ensure high quality and partly to reduce the risk of fraud.

If an applicant is unhappy with our decision, they can ask for the application to be reviewed. That is done in a separate part of the organisation by a more senior officer. If, after the review, the applicant is still unhappy, they can apply for an oral hearing before the Criminal Injuries Compensation Appeals Panel. Authority staff present the cases to the panel, but the panel is independent of us and makes its own decisions. Just over 25 per cent of applicants ask for their case to be reviewed and about 9 per cent of applicants go to appeal. That figure is falling—we might touch on the reasons for that in a moment.

We aim to reach a decision in 90 per cent of cases within 12 months—we have not quite met that target so far. About 80 per cent of cases are settled within 12 months; the average time for settling applications is around nine months. We are taking measures to try to improve on that.

We are in the process of introducing three major customer service improvements. First, we are setting up a freephone helpline, which we hope will be operational from next Monday. Secondly, we have produced for the first time a brief guide to the scheme—I shall leave a few copies behind. It has the number of the helpline on it, and it will be published next week to coincide with the launch of the helpline. It is the first time that we have expressed ourselves in print in such simple terms, and we have a Plain English Campaign award for it—I am very pleased about that. Thirdly, we are undertaking a major information technology upgrade at the moment—that is rather longer term. The first fruits of that will be clear by this summer; the later fruits will not be clear for another 18 months or so.

We have been subject to a fair amount of scrutiny recently. The National Audit Office and the Public Accounts Committee of the House of Commons have given us a once over. The National Audit Office reported on us last April and the Public Accounts Committee examined me in May last year. They identified a number of areas for improvement. A number of the changes that we have made are the result of their work. However, as National Audit Office and PAC reports go, they gave us a relatively clean bill of health. For example, they benchmarked us against three private sector insurance companies that do personal injury work and we were found to be quicker and cheaper than all three. That was very pleasing, although I expect that the National Audit Office did not expect that conclusion when it began the exercise.

The Convener: Your visit is timely if you are about to announce your freephone advice line. I had been going to ask you about structure, but my question has more or less been answered. Do members have any other points on which they feel

they have not had answers?

Ms MacDonald: We did not know about the helpline. Who will man it? Will it be a 24-hour helpline? Will it be charged at local rates? Is the information in the booklet?

Howard Webber: The helpline will be free. I have most of the details in my head, but Edward McKeown has been masterminding the exercise, so he is probably better able to answer the question.

Edward McKeown (Criminal Injuries Compensation Authority): Our partner—an experienced call centre operator—will start the pilot. In due course we will decide whether to continue to do it jointly, to take it in-house or to leave it outside. In any case, we will probably leave the evenings bit outside. Initially, we are talking about 9 am until 8 pm on weekdays and 10 am to 6 pm on Saturdays. The Cabinet Office has produced work that suggests that the kind of service that we are offering—an information service—is not especially useful on a Sunday or late at night. However, we will monitor calls outwith the opening times and if there is a demand for the service later in the evening, we will offer it.

Mrs McIntosh: Who is responsible for informing victims of their eligibility for the scheme? Do they self-refer, or does someone suggest to them that they ought to apply?

Howard Webber: As we understand it, no central requirement is placed on the police in Scotland to inform victims of their right to apply for compensation. In many respects, that is a pity; we would welcome such an obligation being placed on the police. I have no doubt that Victim Support Scotland would refer victims to us.

One of the reasons for producing the guide is to increase our visibility. We are printing 500,000 copies of it and we intend to make it available in every doctor's surgery and every accident and emergency department, as those are places where victims go. We also want to make the guide available in public libraries and post offices, so that the message will be spread widely. We would welcome an obligation on the police in Scotland, as there is on the police in England and Wales, to inform victims of their recourse to us.

The Convener: We take note of that.

Ms MacDonald: Can you please explain the factors that are taken into account in determining whether someone is eligible to apply to the scheme? Can you also briefly explain to us the mechanism and process? Does one person receive an application and decide whether it is eligible or are applications referred to a managerial group that decides? What do you do and how do you do it?

Howard Webber: Are you asking how we make decisions at our end?

Ms MacDonald: Yes.

Howard Webber: The main factors that influence eligibility are the severity of the injury and the way in which the injury was incurred. We must be satisfied that there was a crime of violence, that the applicant was the victim of that crime of violence and that their injury is sufficiently serious to meet the minimum compensation threshold. We are also required to take into account issues such as whether the applicant reported the crime promptly and co-operated with the police during the investigation or whether they were at all responsible for the incident in which they were injured. Whether the applicant provoked a fight or landed the first blow are relevant facts in reducing or withholding an award.

We are required to take into account the extent of the applicant's co-operation with us. If they fail to provide us with basic information after repeated requests, the scheme requires us to take account of that. A feature of every scheme since 1964 has been that an applicant's criminal record is a relevant factor in our consideration, even if it had no impact on the incident in which they were injured.

Ms MacDonald: So, a sinner that hath repented would still be placed in a different category from other people?

Howard Webber: It depends on how far they have repented. If their offences are spent, under the Rehabilitation of Offenders Act 1974, we totally disregard them. If they are still live under that act, they are taken into account in a graduated way. In our main guide to the scheme, which is a fairly technical document, we explain how we take account of people's unspent convictions. Someone with no serious criminal record could expect their award not to be affected much According to the scheme that we operate, if someone had a serious criminal record, that would have a major impact on their award.

Ms MacDonald: I want to press you on that issue. Let us imagine that someone who served time two decades ago for a very serious crime, perhaps even murder, was the victim of a criminal assault and you judged the recompense for that assault to be above the £1,000 level—the first eligibility barrier. Would that person then be excluded from the scheme?

Howard Webber: Probably yes, in general. However, we have discretion in all cases. If someone has served a prison term of more than 30 months, but more than 10 years have elapsed since the end of that sentence, that would count as five penalty points in our system, leading to no more than a 25 per cent reduction in

compensation. I am not saying that the system is good or bad; it simply requires us to take account of people's criminal records. However, that is not an absolute rule. If someone were injured in the course of apprehending an offender, we would have the discretion to say that, despite their criminal record, they should receive a full award.

Ms MacDonald: Five penalty points, but a gold star?

Howard Webber: Yes, something like that.

The Convener: That has been a point of controversy for some members, who will follow this debate with interest. Let us clarify the point about criminal records. If someone had a criminal record for a breach of the peace or a fairly minor offence, would they still incur penalty points if they sought criminal injuries compensation?

Howard Webber: No. It depends not on the nature of the offence, but on the nature of the sentence. We make no judgments at all on the nature of the offence; we rely on the nature of the sentence. It would have to be a significant sentence to have any real effect on the award. For instance, nothing less than imprisonment would result in a reduction in the award, except a build-up of several fines, community service orders or similar community penalties. If an offence did not result in imprisonment, it would have no effect on the award.

The Convener: Thank you.

12:15

Scott Barrie: Will you explain the interaction between the authority and other agencies in establishing the criteria? Have the criteria been met? What reports do you seek? Whom do you approach?

Howard Webber: The people from whom it is crucial that we receive information are the police and medical authorities: those reports are the building blocks of just about every application. We send out a basic report form to the police, which may raise further questions that need to be followed up. The form asks about the circumstances of the incident, whether the applicant co-operated fully, whether anyone has been apprehended for the offence and whether a court case is pending. We will generally await the outcome of any court proceedings before reaching our decisions. The fact that we wait for the verdict of a trial is one of the main reasons for delay. The evidence that we receive from the medical authorities—usually a mixture of GPs, accident and emergency departments and specialists, if someone suffered the sort of injury that required specialist treatment—is also vital. Without the reports, we cannot reach our decisions.

Scott Barrie: In cases of sexual assault, there could be a delay in reporting the offences for a variety of reasons. I assume that discretion is exercised in such cases. From my previous employment in child and family social work, I know that there is an issue surrounding the evaluation of the sexual abuse of children and the determination of the long-term effects of such abuse. The scheme has often been criticised for not being responsive or detailed enough regarding abuse, although improvements have been made. I hope that those factors are taken fully into account and that, although you have a checklist of factors, an element of discretion is allowed.

Howard Webber: We have relatively few absolute bars. However, in the case of the sexual abuse of children, if the offender and child were living under the same roof and the offence happened before 1979, we are unable to compensate for it. Beyond that, we have a lot of discretion. As you say, the time limit rules would not generally apply to cases in which the offence is sexual abuse of children. We would expect the victim to report the matter and apply for compensation within a reasonable period of their reaching adulthood—which could be up to 10 years, in certain cases.

Mrs McIntosh: Do you anticipate that, following the launch of your helpline and leaflet, there will be an increase in applications to the CICA? What provision will be made for that increase?

Howard Webber: Such an increase is quite likely but not definite, so we will respond to it when the time comes. We will have to approach our sponsors, the Scottish Executive and the Home Office, for more staff if there is an increase.

We hope that the increased publicity will result not only in more applications being made—and if they are made by anyone who should apply but would not have done so previously, that is all to the good—but in a reduction of ineligible applications. A high proportion of the applications that we receive do not result in an award. Not far short of 50 per cent of applicants do not receive an award; only about 52 or 53 per cent do. I would like that figure to rise. I believe that my colleagues make the right decisions; we are just not getting our message concerning eligibility across enough. For instance, we receive a lot of applications from people whose awards do not reach the minimum threshold.

We are hoping to make clear, by means of the helpline and the leaflet, the things for which we are likely to be able to compensate and, in effect, to discourage people from making applications that will only take up their time and our time unnecessarily.

Ms MacDonald: Do you monitor or track where

the people who apply to you but who have their applications rejected received their advice, if any? Does it come from voluntary groups, for example?

Howard Webber: We have done some of that, but I confess that I have not broken down the information between Scotland and the rest of Great Britain.

Ms MacDonald: I just wanted to know what the trend was.

Howard Webber: People who are represented by solicitors—or by lawyers of any sort—are no more likely to receive an award than anyone else. The pattern of success among them is no greater than for other people. Applicants who are represented and supported by Victim Support are more likely to receive an award. I believe that that is largely because Victim Support—although it is not for it to tell people, "You shouldn't apply"—can gently advise people that their case is not likely to receive compensation.

Mrs McIntosh: I want to ask about regional variations. Have you noticed whether more claims tend to come from specific areas? Are some areas more litigious than others?

Howard Webber: Not as such. However, we noticed—and the National Audit Office, when it reported on us, pointed out graphically—that the number of applications as a proportion of recorded incidents of violent crime varies greatly among different parts of Great Britain. Many of the police force areas in Scotland produce the lowest percentage. For example, for every 100 violent crimes reported in Grampian region, we received only 10 applications—although that figure is now a couple of years old. The figure might be 30, 40 or 50 for other police force areas.

We have done some investigation into that. It appears that the big difference is due to a variation in reporting practices among police forces, rather than in application rates as such. That is not within our control. There may well still be an effect on application rates and we hope that the publicity and the helpline will help to even that out.

The figures suggest—although I am probably speaking out of turn, beyond my responsibility and perhaps beyond my knowledge in saying this—that Scottish police forces are more inclined to report crimes in instances in which their English and Welsh counterparts might not. That is one of the reasons why the percentage of recorded crimes that result in applications tends to be lower in Scotland than in England and Wales.

The Convener: That is interesting.

Scott Barrie: Much of what I was going to ask about has already been covered, including the profile of the CICA and the steps that it is taking to increase publicity. It has been mentioned that police forces in Scotland do not always let people know about the authority and the scheme. Would that affect the statistics, particularly the number of applications per reported crime?

Howard Webber: It could do. I did not mean to say that the police do not tell victims about the authority; however there is no victims charter obligation on them in Scotland, as there is in England and Wales. That may have an effect on police practice, which might have a knock-on effect on applications to us.

Scott Barrie: Where did the initiative to publicise the scheme come from? Was it a direct result of the NAO report that was commissioned last year?

Howard Webber: It was partly a result of that report. It is also something that my colleagues and I have been thinking of. We have been thinking that we would like to reach all people who are eligible to apply to us and feeling that we might be missing sections of the community.

Scott Barrie: Because of the time bar that applies in most cases—we have touched on exemptions—it is important that people know about the scheme.

Howard Webber: Absolutely.

Scott Barrie: There have been occasions when people have fallen foul of the three-year rule, as I believe it to be.

Howard Webber: That is now a two-year rule.

Scott Barrie: Those people may have met every other criterion, but did not know about the scheme.

Does one of the eligibility criteria depend on a successful prosecution?

Howard Webber: No. Only a minority of applications are linked with the offender's being apprehended, let alone being tried, let alone being convicted. Apart from anything else, we operate on a different standard of proof. We do not need to establish anything beyond reasonable doubt; we just need to establish that it is more likely than not that the victim was indeed the innocent victim of a crime of violence.

Scott Barrie: So you operate on the basis of the burden of probability?

Howard Webber: On the balance of probability, yes.

Ms MacDonald: Before I ask about the tariff scheme, I want to know on whose initiative the time bar was dropped from three years to two.

Howard Webber: I believe that that was in a Government white paper in 1993-94. I do not know whether Edward McKeown will be able to answer

that. I do not know the reasoning for it. I have that white paper with me, so I could look up that information if you wish.

Ms MacDonald: Yes—I am interested in that.

Howard Webber: I am not sure about the reason but, in any case, it is not an absolute bar. If there is a good reason why the application comes in later than two years after the incident, we will exercise our discretion accordingly.

Ms MacDonald: It can take a long time for people suffering from trauma to gather themselves together to go through such a process.

Howard Webber: Absolutely.

Edward McKeown: If we had medical evidence to confirm that someone had been badly affected over that long period, we would certainly take that into account in deciding whether to waive the time limit.

Ms MacDonald: How were the tariffs set? Who was consulted when the list with the types of injury, the levels of award and so on was compiled? Is there the same breakdown and analysis of mental health problems that may result from criminal injury as there is for other health problems? I looked at the tariffs and could not see any such analysis.

Howard Webber: The original tariff, which was set out in draft form, I think at the end of 1993, was based on a fairly major exercise. That was well before my time but, as far as I know, a random third of the 60,000 cases that were settled in 1991-92, under the old scheme, were analysed for the award levels. From those 20,000 cases, the averages were calculated—the number of different types of injury and the average award level were identified. The tariff was derived from that exercise.

The tariff was then uprated and various further checks were carried out to ensure that that was a reasonable way to proceed. The white paper embodying that came jointly from the Scottish Office home and health department and the Home Office. I am not sure what consultation there was in advance of it, but I presume that it was as considerable in Scotland as it was in England. I cannot, however, say specifically how consultation was carried out.

The tariff as it is now is clearly a descendant of that first attempt. However, as members may know, there are plans to increase some elements of the tariff. I know that Jim Wallace has written to you, convener, to set out some of the basics of that. The idea is to improve on the tariff and to increase it, effective from 1 April. I can discuss what that includes, if that would be helpful.

Ms MacDonald: We are really trying to get at the principles just now.

Howard Webber: I should have added that mental injuries were considered in the same way as physical injuries in that exercise—following the 1991-92 awards. We have had a range of awards for mental injury, from a basic shock award of £1,000 to an award for permanent post-traumatic stress disorder of £20,000. Those are the current tariff levels.

Ms MacDonald: I am particularly interested in that area. If you lose a limb and cannot work because of it you are likely to be compensated more than you would be if you were suffering from what is described as post-traumatic shock.

Edward McKeown: If someone cannot work long term because of an injury, whether it is physical or mental, they would, generally speaking, receive the same amount of compensation for loss of earnings and for care costs if they were incapacitated to the same degree. The only difference would be in the tariff awards. Someone who lost a leg would get an award for that and someone who had a permanently disabling mental illness would get a £20,000 award. There might be some difference in the tariff level, but not for other things.

12:30

Ms MacDonald: This is an interesting area, because it can often be difficult to evaluate mental health problems. Mental health problems can come and go, whereas if you lose a limb you lose a limb.

Edward McKeown: Yes.

Howard Webber: I should say that there is scope to reopen a case. If someone's condition turns out to be a lot worse than it appeared when their case was originally settled, they can ask for the case to be medically reopened. We receive a fair few applications for that each year. If there is good evidence that their condition is worse than they thought and we thought at the time of settlement, we will consider it again and see whether a further award is justified.

Ms MacDonald: I welcome that flexibility. However, there is an accusation that there is inflexibility in the tariff scheme in relation to victims of child abuse. The setting of tariffs means that such victims can receive less compensation under the tariff system than they might have received under the old Criminal Injuries Compensation Board. Do you agree?

Howard Webber: It is possible. Any tariff system is, I guess, inherently less flexible than a common-law system, but it is also more transparent, so that people know what they can expect to receive, and more explicable. The

awards were originally set by reference to what people would have received on average under the common-law system. Things may have come slightly adrift since then, because the tariff has not been increased in the way that civil law damages have increased. That is the only way in which there would be any difference between the two.

The Convener: The last set of questions that I have follow on from Margo MacDonald's questions. They concern proposed changes to the tariff scheme, which has been mentioned. You will be familiar with the case of Lisa Potts, the nursery teacher who shielded children. She had 11 serious wounds but, under the system, received compensation for only three of them. How might the new scheme assist someone in that type of situation? Will it change?

Howard Webber: There is no change that will allow us to compensate for more than three injuries. At the moment we are able to compensate for the three most serious injuries by paying 100 per cent of the tariff award for the most serious, 10 per cent of the tariff award for the second most serious and 5 per cent for the third. Those last two figures are going to be increased. We will continue to pay 100 per cent for the most serious award, but the intention is that the 10 per cent will be increased to 30 per cent and the 5 per cent will be increased to 15 per cent. Under the proposed increases, Lisa Potts would have received 30 per cent rather than 10 per cent for her second most serious injury, which was physical scarring, and 15 per cent rather than 5 per cent for her third most serious injury.

In addition, there will be a general uprating of most of the tariff bands. Most of the tariff bands—those that lie between £3,000 and £100,000—will increase by 10 per cent. Every award between £3,000 and £100,000 will therefore increase by 10 per cent in any case. Lisa Potts would also have benefited from that. The other increases would not have benefited her directly, as the other major changes concern the victims of sexual crime. Those awards are going up much more than the rest. For instance, the award for rape is being increased from £7,500 to £11,000, which is nearly a 50 per cent increase. We are also introducing new tariff descriptions of rape involving internal injury and rape involving particularly severe post-traumatic stress, both of which will receive much higher awards than are presently available.

The Convener: Having said that, would it be fair to say that, overall, the scheme is still quite inflexible?

Howard Webber: Inflexible is one way of looking at it, but it is not the word that I would use. There are limits on what we can do: we cannot compensate for more than three injuries and there is nothing we can do to enable us to compensate for more than three injuries. Having said that, there will be some exceptions to that under the revised tariff. Some awards will be in addition to the three injuries. For instance, if a victim is infected with HIV-AIDS, they will receive a significant award for that in addition to any awards for other injuries. In general, however, we are limited to compensating for three injuries. To that extent, the system is inflexible, but it is also clear and certain. As I said at the outset, it remains the best funded scheme of its type in the world. That does not mean that it satisfies every applicant, but it is an important point.

The Convener: The upper limit has been addressed in part. I am not sure of the logic behind having an upper limit, other than perhaps public expenditure reasons. If you went to the civil courts for a solution to a medical negligence claim, there would be no upper limit. As long as the upper limit remains, do you think that it will encourage people to seek redress in the courts under civil remedies?

Howard Webber: Quite possibly, and I am not sure that I see anything wrong with that. When people apply to us they are applying to an organisation that is not remotely at fault and which uses taxpayers' money to express public sympathy for them. If they are pursuing the remedy through the courts, they are seeking remedy from the people who are responsible for whatever happened to them. In most cases, the individual who has injured them is a man or woman of straw and unable to provide much in the way of money. However, if such a person were able to pay out more than £500,000 as compensation for the injury that they inflicted, that is the person the victim should be going after.

The Convener: Thank you. This has been a very interesting session. My deputy convener has suggested that, as you said that you have some literature with you, it might be useful for members to have copies. Do you have enough copies?

Howard Webber: Yes.

The Convener: She has also made the good suggestion that, given that you will have a higher profile and that your helpline is starting on Monday, you might want to give us enough literature so that other MSPs can provide that literature at their surgeries. Would that be possible?

Howard Webber: Thank you for that suggestion. I shall ensure that we send copies to every MSP and MP. We had not thought about doing so, but we shall certainly do so now.

The Convener: We shall have to digest the information that you have given us this morning and there are one or two points on which we may want to come back to you. How should we do

that? You have come a long way today.

Howard Webber: I am in Glasgow every couple of weeks, so it is very easy for me to come to Edinburgh.

The Convener: So you would be able to come back if we so wished?

Howard Webber: Certainly. I would be happy to.

The Convener: That is helpful. Thank you to both of you for your evidence.

Ms MacDonald: Now that we are off the record, who is doing your helpline?

Edward McKeown: Essentia.

Howard Webber: I gather that you have some connection with that.

Ms MacDonald: Oh, no.

The Convener: I remind members that we are still meeting in public and that what we say is on the record. You can chat when I have closed the meeting.

I remind members that we will be going back to our normal start time of 10 o'clock for the next meeting, on Wednesday 28 March. It would be great to have a full attendance and for everybody to be on time, because our agenda is getting busier and busier. Thank you for your questions and input this morning and I shall see you all on 28 March.

Meeting closed at 12:38.

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