JUSTICE AND HOME AFFAIRS COMMITTEE

Tuesday 8 February 2000
(*Morning*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
5th Meeting 2000, Session 1

CONVENER

*Roseanna Cunningham (Perth) (SNP)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Phil Gallie (South of Scotland) (Con)
*Christine Grahame (South of Scotland) (SNP)
*Mrs Lyndsay McIntosh (Central Scotland) (Con)
*Kate MacLean (Dundee West) (Lab)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Pauline McNeill (Glasgow Kelvin) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Euan Robson (Roxburgh and Berwickshire) (LD)

*attended

THE FOLLOWING MEMBERS ALSO ATTENDED:

Iain Gray (Deputy Minister for Community Care)
Angus MacKay (Deputy Minister for Justice)
Nora Radcliffe (Gordon) (LD)

CLERK TEAM LEADER

Andrew Mylne

SENIOR ASSISTANT CLERK

Shelagh McKinlay

ASSISTANT CLERK

Fiona Groves

LOCATION

The Chamber

Scottish Parliament

Justice and Home Affairs Committee

Tuesday 8 February 2000

(*Morning*)

[THE CONVENER *opened the meeting at 09:32*]

The Convener (Roseanna Cunningham): I think that we will get cracking, so would everyone take their seats. We are one or two members down, but the meeting is quorate. I do not think that there is anything desperately controversial this morning. Is everyone ready? [*Interruption.*] Would you like me to speak slowly, Phil?

Phil Gallie (South of Scotland) (Con): Yes, please speak slowly, convener.

The Convener: I will speak slowly.

I will make a couple of comments about how we will manage the meeting this morning. The first item on the agenda is the continuation of our work on stage 2 of the Adults with Incapacity (Scotland) Bill, with amendments to part 7 of the bill.

It is not possible for us to proceed to the amendments to part 5 for a week or two. When we have finished with part 7, members will see from the agenda that we will move on to non-bill business. Our meetings over the next two weeks will also deal with non-bill items, so, at a fairly late stage, we had to put together an agenda to cover what is likely to be more than half of today's meeting.

Although we do not think that part 7 amendments will take a huge amount of time, we will still have an adjournment. It has been pointed out to me that, as long as we meet in the chamber, it is okay to organise tea and coffee for adjournments, because space is available. However, I would not like committee members to assume that the adjournment is to become a consistent feature of our meetings. We will return to our usual, hard-working, three-hour stints, as it is only when we meet in the chamber that we have the facility to adjourn so easily.

Adults with Incapacity (Scotland) Bill: Stage 2

The Convener: I have havered long enough, Phil. Are you about ready to start?

Phil Gallie: Yes.

Section 72—Future appointment of curator bonis etc. incompetent

The Convener: We will begin with amendment 115, which is grouped with amendment 116. Both amendments are in the name of Phil Gallie.

Phil Gallie: Thank you, convener, for giving me time to find my spot.

Amendment 115 is a consequential amendment. The principal amendment to which I will speak is amendment 116, which ensures that the bill applies to all those with incapacity, not simply to those over the age of 16.

The Law Society of Scotland is of the view that it should not be competent to appoint curators bonis, tutors dative or tutors at law to any person, of whatever age, after the commencement of the act. All persons, of whatever age, should be subject to the regime that is set out in the bill.

If a curator bonis, tutor, or whoever is appointed under the authority of another statute, when the person reaches the age of 16 the curator may be assumed to be still in place. Is it intended that the curator would continue for that person after the age of 16, or will there be transitional provisions to ensure that the person acting as curator becomes a guardian under the terms of the bill?

I move amendment 115.

The Convener: Minister, do you have any comments?

The Deputy Minister for Justice (Angus MacKay): Thank you, convener. [*Interruption.*]

The Convener: I caught you by surprise, minister.

Phil Gallie: The minister needs a bit of time as well.

The Convener: Would you like me to wait for a minute or two?

Angus MacKay: I confess that I am suffering from a quite heavy cold and so I might not be as on the ball as usual. Forgive me if I stutter today, convener.

I take the points that Mr Gallie raises in these amendments. The Executive's position is that the bill applies only to adults, that is, to those who have reached the age of 16. The amendments that

Mr Gallie lodged would provide that, once the bill becomes law, it should not be possible to appoint a curator or a tutor to a child in the same way that those offices are being abolished for adults.

In fact, it is beyond the scope of the bill to legislate for children. However, I understand that curators and tutors to children have been replaced by the provisions of the Children (Scotland) Act 1995. Therefore, the amendments appear to be unnecessary. On that basis, I ask Mr Gallie to consider withdrawing his amendments.

Phil Gallie: Thank you, minister. I have a further query; perhaps I did not pick you up fully. Once the child reaches the age of 16, does the role of the guardian terminate? Should someone else be appointed, or should the appointed guardian continue?

Angus MacKay: If the purpose of the amendment is to ensure that curators to children have to reapply for their powers once the child has reached the age of 16, it is the Executive's intention that, under arrangements at schedule 3 of the bill, curators appointed to children will become guardians when the child reaches 16. They will have to reapply to the court within five years if they wish their powers to continue, which is a process that also applies to former curators to adults. The Executive considers that the transitional arrangements offer adequate protection to both adults and children to whom curators have been appointed.

Phil Gallie: If no one else wants to come in—

Christine Grahame (South of Scotland) (SNP): On a point of clarification, minister. While I took in what you were saying, will you advise where the transitional arrangements to which you referred are found?

Angus MacKay: They are found in schedule 3.

Phil Gallie: Thank you for that intervention, Christine.

Given the minister's comments, it seems that he has responded to the points raised in my amendments. His comments were interesting. The parents of such children, or whoever looks after them, will take some comfort from the fact that an extension is possible but that somewhere along the line a review must take place. On that basis, I am prepared to withdraw the amendments.

Amendment 115, by leave, withdrawn.

Amendment 116 not moved.

Section 72 agreed to.

After section 72

Amendment 148 moved—[Angus MacKay]—and agreed to.

Section 73—Limitation of liability

The Convener: Amendment 117, in the name of Phil Gallie, was debated with amendment 94.

Phil Gallie: It seems that we will cover the subject of duty of care when we come to debate amendments to part 5.

Amendment 117 not moved.

Sections 73 and 74 agreed to.

After section 74

The Convener: Next is amendment 269, which is grouped with amendments 273 and 280. All amendments in this group are in the name of the Minister for Justice.

The Deputy Minister for Community Care (Iain Gray): These amendments simplify the way in which the bill makes necessary changes to guardianship under the Criminal Procedure (Scotland) Act 1995. Committee members may know that, under the 1995 act, it is possible for a criminal court to appoint a mental health guardian to an adult with mental disorder who has been convicted of an offence that is punishable by imprisonment. Changes to the 1995 act are required as the Adults with Incapacity (Scotland) Bill replaces mental health guardians with a new form of welfare guardian.

Once appointed, a guardian under the 1995 act is like any other guardian under the bill. It is important that that type of guardianship is seen as for the adult's benefit, not as a punishment. The amendments will ensure that the necessary changes to the 1995 act are made in such a way that that act is as clear and easy to use as possible.

I move amendment 269.

Amendment 269 agreed to.

The Convener: We come to amendment 288, which is grouped with amendment 289.

Iain Gray: Thank you, convener. In the circumstances of my colleague's heavy cold, I will purport to be an expert on private international law for the next few minutes. I hope that the committee will bear with me.

During the debate on stage 1 of the bill, the Deputy First Minister mentioned that the Executive planned to lodge amendments at stage 2 to include provisions for private international law, of which these amendments are the most important. We will lodge further consequential amendments at stage 3.

Also during the stage 1 debate, Christine Grahame referred to The Hague Conference on Private International Law and to Professor Eric

Clive. Ms Grahame indicated that, in her view,

"it would be good for Parliament to take account of that international legislation".—[*Official Report,* 9 December 1999; Vol 3, c 1422.]

These Executive amendments relate to provisions for international and domestic arrangements for jurisdiction, and international arrangements for applicable law and recognition and enforcement of measures taken in relation to adults.

The provisions in the proposed new schedule are derived in large measure from the Convention on the International Protection of Adults, which was signed at The Hague on 2 October 1999. The convention was made under the auspices of The Hague Conference on Private International Law, which, since 1893, has been the leading international organisation that deals with the complex but necessary arrangements for relations between legal systems throughout the world.

The convention has been ratified by the Netherlands, but, because a minimum of three states is required to ratify it, it is not yet in force. We expect the UK to ratify the convention in due course, although that will require legislation in England and Wales. We take the view that it is sensible to pave the way for application of the convention in Scotland. The bill gives us an ideal legislative opportunity to do that now, given that there may not be another suitable legislative vehicle for some time. Although most of the provisions are derived from the convention, some are not dependent on its ratification. It is also possible for ratification to take place for Scotland on its own as one of the convention's provisions enables a state with more than one legal system to ratify in respect of only one of its legal systems. Therefore, it is possible, although unlikely, for the UK to ratify only in respect of Scotland. In any event, the convention's provisions are useful now for dealing with any cases that arise.

09:45

Before the final session of the special commission at The Hague that led to the signing of the convention, there was full consultation on its terms. The overwhelming majority of responses were favourable with only some minor points of detail suggested for negotiation. The majority of those points were incorporated in the final text.

The convention covers jurisdictional competence of courts and other public authorities; recognition and enforcement of measures such as guardianship taken by judicial and administrative authorities; applicable law in relation to those measures and to the granting, for example, of powers of attorney and co-operation between the authorities of the contracting states. In this schedule the Executive introduces into the law of Scotland arrangements based on the convention text that include appropriate measures taken in Scotland under the bill, powers of attorney granted by adults in Scotland, and measures and similar powers granted outwith Scotland that may need to be applied here.

It is appropriate that Christine Grahame mentioned Professor Clive, as he was a member of the Scottish Law Commission in 1995 and was active in the negotiations that led to the conclusion of the convention. As leader of the UK delegation and then as chairman of the special commission that prepared the convention, Professor Clive was fully involved in the process that led up to the text being agreed. The justice department was also represented on the UK delegation to The Hague. I should put on record the Executive's gratitude to Professor Clive for his very considerable help and support in preparing these amendments.

I will give a brief description of the provisions proposed in the new schedule. It is necessary to ensure that measures such as guardianship taken by Scottish authorities will be enforceable in other countries. Equally, it is important that measures properly taken in other legal systems should be recognised and enforced in Scotland. It is important for us that powers of representation such as continuing and welfare powers of attorney should operate outside Scotland. The provisions of the new schedule are intended to make that clear.

Once the convention is ratified, its provisions as applied through the schedule will have effect in relation to other contracting states under the convention. At present, the provisions enable Scottish courts to recognise and enforce measures taken abroad where the convention jurisdiction arrangements apply. They also enable the Scottish authorities not to recognise and enforce certain measures; for example, if the jurisdiction arrangements do not conform to the convention, or on certain other grounds such as where the appropriate procedures have not been carried out, such as where a welfare attorney has powers to have the granter detained against their will in their own country, but could not do so under our law.

The purpose of the provisions on applicable law is to make clear which system of law applies to measures taken and powers granted in respect of an adult. Thus, paragraphs 3 to 6 of the new schedule make it clear that, where an adult is habitually resident in Scotland and grants a continuing or welfare power of attorney, the law of Scotland will apply in relation to it. The only exceptions relate to the manner in which any powers are exercised; for example, if an attorney has powers to carry out transactions in relation to land, the law of the place where the land is will apply. In Scotland that would mean that, for

example, our property law would apply if a foreign attorney's decision had to be enforced in relation to property here. That is appropriate and sensible.

In due course there will be other provisions in relation to international co-operation, including the establishment of a Scottish central authority that will have functions, under the convention, of co-operation and liaison with the central authorities of other contracting states.

We anticipate that if and when the other countries of the United Kingdom incorporate the provisions of the convention in their domestic law, there will be similar arrangements for relations among the UK legal systems that, in turn, will be based on the convention. That must await transposition of the convention into the law of England and Wales, which is a matter for the UK Government.

I hope that committee members will agree that these provisions are sensible and useful and that it is appropriate to take advantage of the recently completed convention.

I move amendment 288.

The Convener: The Deputy Minister for Health and Community Care will be looking forward to committee members' questions.

Iain Gray: I am indeed.

Christine Grahame: I am delighted that the new schedule has been included. In general, it shows the important link between consultation from outside Parliament—Professor Clive—and the committee and the Parliament at stage 1, so that this very important amendment is now introduced. It is more than sensible; it is pioneering. We are ahead of the rest of the UK in incorporating a convention into our law in advance, and it shows Scots law in an international context. I am delighted that it is happening.

Phil Gallie: Sorry, minister, I did not follow every word. I am confused. Is this aimed at ensuring that, when somebody has a welfare or continuing attorney, the attorney's influence extends beyond our shores? The minister reflected on other states that have signed the convention. What states are and are not party to it?

In recent times, it has been apparent that individuals—children in particular—who are removed from this country have no protection under the laws of other countries and that someone can usurp the power of a parent or a guardian in such circumstances. Will the convention prevent that for the incapable adult? What steps can we take to ensure that the law passed in this country extends elsewhere?

Iain Gray: Mr Gallie's understanding is essentially correct. The purpose of the convention is to ensure consistency of protection, in this case for adults, across the countries that sign it. Over 40 states are members of The Hague Conference, although only one has actually ratified the convention as far as we know, that is, the Netherlands. The UK has yet to ratify it, as I said.

We are assuming, as is likely, that the UK will sign up to the convention, and ensuring that the legislation that we are considering today will be consistent with that when it happens. We believe the provision made by the amendment is, in any case, helpful to the legislation. At the moment, however, only one country has signed up to the convention and it needs three to have done so before it comes into force. Our expectation is that that will happen relatively soon.

Phil Gallie: If that is the case, I recognise that there is some merit in including the amendment, but its effects are pretty minimal if there is only one other state involved. What further steps can be taken to protect the interests of incapable adults and their appointed attorneys if they leave our shores? Individuals have the right to a passport and it could well be that, temporarily, responsibility for looking after someone is passed to another person. I would like to think that there was provision made for that.

Iain Gray: The position at present is that there are informal arrangements, as the kind of circumstance that you describe has to be dealt with. I tried to make clear that not all the procedures referred to in the amendment await the convention coming into force. I gave the example of the sale of land in Scotland, which would happen under Scottish law.

We are ensuring the maximum protection possible but also paving the way for the stronger and more consistent protection that the convention will enable when it comes into force. That will happen automatically, rather than us having to add provisions to the legislation at that time. It is the strongest protection possible at the moment.

Phil Gallie: Thank you. I recognise that it is probably the best we can achieve. Will the minister add something about the situation within the UK? There should be little doubt that someone appointed to look after the interests of another by a Scottish court will be recognised in England, Wales and Northern Ireland. Perhaps that should also be the case throughout the European Community, given the role of the European Court of Human Rights.

Iain Gray: The European convention on human rights is in force within our legislation so, as Mr Gallie knows, all our legislation must be compliant with it. Because we have different legal systems, the situation in the UK is the same as the international situation that I have described.

Informal arrangements apply. Were the UK to sign up on behalf of all its legal systems, the convention would apply between the legal systems as it would between the legal system of Scotland and that of another country.

Phil Gallie: Sorry, minister, but that gives me cause for concern. Are you saying that if someone is appointed a guardian in, let us say, Dumfries and if the incapable adult moves across the border to, for example, Carlisle, there would be no rights for the attorney to look after that incapable adult's affairs?

Iain Gray: There are informal arrangements at the moment and there have been discussions about recognising the provisions of this legislation with, for example, Northern Ireland. However, until the convention comes into force, they remain informal arrangements.

Phil Gallie: I am sorry, but—

The Convener: I am not sure that we will get any further on this.

Phil Gallie: Just one final point. Should we not be talking to the UK Government to see if something can be set up to take care of the problem? If so, should the minister lodge a later amendment to take account of it?

Iain Gray: We have been talking to the UK Government; it would have to legislate. The UK delegation's part in the discussions leading up to the convention is part of that dialogue. For clarity, I return to the previous point. We are talking about a consequence of different legal systems within the UK rather than a consequence of devolution. The convention will regularise that so that we are moving towards a stronger position, which I think is what Mr Gallie wants.

Amendment 288 agreed to.

Section 75 agreed to.

Section 76—Interpretation

Amendment 80 moved—[Angus MacKay]—and agreed to.

Amendment 149 not moved.

The Convener: Amendment 150 is grouped with amendments 151 and 152 in the name of the Minister for Justice, and amendment 152A in the name of Nora Radcliffe.

10:00

Iain Gray: This is an important group of amendments. Amendment 151 is fairly straightforward and corrects a cross-reference with regard to the definition of "nearest relative" in the Mental Health (Scotland) Act 1984. In the bill, it is not intended, as it was in the 1984 act, to give priority to a relative who is the adult's day-to-day carer when determining who should be treated as the nearest relative.

Amendments 150 and 152 honour a commitment made by Jim Wallace in the stage 1 debate on 9 December to allow an adult's same-sex partner to be treated as their nearest relative. Although members of the committee are now familiar with the role of the nearest relative, it may be useful if I remind us briefly about that. The nearest relative is important in the bill because, along with others close to the adult, they are likely to have close knowledge of the adult and to be able to provide information that helps proxy decision makers and the statutory authorities make good decisions for the adult's benefit. Under section 1(4), the nearest relative should have their views taken into account

"in so far as it is reasonable and practicable to do so"

by anyone making an intervention in an adult's affairs.

The nearest relative is one of a series of people who should be consulted, including the adult's primary carer, any guardian, continuing attorney or welfare attorney, and any other person whom the sheriff has directed to be consulted. Other people with an interest in the adult's affairs who make their views known will also have their views taken into account, although their opinion need not be sought actively by the person responsible for the decision.

In the bill there are other specific references to the nearest relative. For example, the public guardian must consult the nearest relative and the adult's primary carer when considering whether to allow a guardian to make gifts out of the adult's estate. Similarly, the public guardian must consult the nearest relative and the primary carer when he is considering whether a guardian may buy or sell a house for the adult. Under section 48, which deals with medical research, when there is no guardian or welfare attorney, the nearest relative may consent to the adult's participating in research.

The bill adopts the definition of nearest relative in the Mental Health (Scotland) Act 1984, with the proviso only that the nearest relative need not be caring for the adult, as in mental health legislation. The Mental Health (Scotland) Act 1984 definition sets out a hierarchy of relatives, with a spouse being given highest priority, followed by parents, children, siblings and others. A person living with the adult as husband and wife for at least six months may take the place of the adult's spouse if the adult has no husband or wife or the marriage has ended. A person with whom the adult has "ordinarily resided" for at least five years may also be treated as the nearest relative, so long as the

adult is not married to anyone else. Such a long-term companion is treated as the last of the relatives in the list of those from whom the nearest relative is selected. This type of relationship can be important, and I will return to it later.

The Executive is aware that there has been criticism of the 1984 act's definition of nearest relative, and we know that the Millan committee is examining this issue thoroughly in the context of mental health legislation. It has been agreed with Bruce Millan that the Executive will reconsider the definition in incapacity legislation following his committee's recommendations, if changes are proposed.

The Executive has considered very carefully the representations that were made at stage 1 about same-sex partners, including the comments in the Justice and Home Affairs Committee's stage 1 report that the existing definition does not meet the requirements of today's society. As Jim Wallace announced in the stage 1 debate, we have been persuaded by those representations to amend the definition so that, when certain conditions are met, a same-sex partner may be treated as the nearest relative for the purposes of the bill. The committee has already agreed amendment 131, which allows, in certain circumstances, an adult to seek to have their nearest relative removed from that position. However, that is a different issue.

Amendment 152 inserts in section 76 a reference to a same-sex partner. A qualifying condition is required before a same-sex partner may be treated as the nearest relative. Such a condition is also required for an opposite-sex partner to whom the adult is not married—that the adult should have no married partner or that the marriage should have ended. The Executive considers that that is equitable and non-discriminatory.

We believe that a same-sex partner should have the same status with regard to the right to be consulted as a person who is living as the adult's husband or wife within the definition of nearest relative in the bill. In law, however, two people living together as husband and wife must be of opposite sexes, so it is not possible to use such a description to characterise a same-sex relationship. We have, therefore, tried in amendment 152 to describe the characteristics of the relationship with a same-sex partner in a more appropriate way. In drawing up the definition, we have been guided by case law about what makes otherwise unrelated people partners as opposed to platonic friends. The characteristics of such a relationship are described in the new subsection (1A), to be inserted by amendment 152.

The Executive has found it particularly helpful to study the recent House of Lords decision in the Fitzpatrick v Sterling Housing Association case of 1999. In that case, it was held that a same-sex partner might take on a housing tenancy from his deceased partner. The House of Lords judgment offers a helpful consideration of what constitutes a same-sex relationship. The hallmarks of such a relationship were described as intimate mutual love and affection, long-term commitment and mutual support in times of need. Their lordships agreed that those criteria would have to be met, whether the partners were of the same or the opposite sex. The House of Lords also agreed that they would be unlikely to be met in the absence of a sexual relationship, either present or past. Without one, there would be nothing to distinguish the special nature of a partnership from the relationship of close friends. It is not necessary to define exactly what is meant by a sexual relationship, nor is that done anywhere in statute.

The Executive has considered amendment 152A very carefully, and we know that it has been given a good deal of thought by the Equal Opportunities Committee and those advising that committee. I want to explain why the Executive does not wish to support the amendment in the form in which it is drafted, even though the end result of it would, in practical terms, be the same as that of our amendment 152.

Our difficulty with amendment 152A is that it appears to equate same-sex relationships with the position of husbands and wives. As I have said, in our law husbands and wives must be of the opposite sex. A cohabiting opposite-sex couple cannot be exactly equivalent to a husband and wife, as the partners are not married. In some cases, they may not even be free to marry, as one or both partners might be married to someone else. The Executive would not wish to discriminate against opposite-sex couples, but we think that that might be the unintentional effect of the amendment that Nora Radcliffe has proposed.

Amendment 152 deals with same-sex partnerships without discrimination, by putting accepted case law in partnerships of either sex into primary legislation. I hope that this explanation is helpful to the committee and that members will agree amendment 152 in the terms in which it is drafted and reject amendment 152A. However, I repeat that we recognise and understand that both amendments are attempting to achieve the same aim.

I move amendment 150.

Nora Radcliffe (Gordon) (LD): Amendment 152A is intended to achieve equality of treatment of same-gender and opposite-gender couples. We felt that any qualification or extension of the description of the relationship was, in itself, discriminatory. Our amendment was intended to make the description as simple as possible, to minimise the scope for interpretation or challenge.

Christine Grahame: The new subsection (1A)(b)(i) that is proposed by amendment 152 stipulates

"a period of not less than six months"

as the time during which

"a person of the same sex as the adult"

must have been living with the adult. I am unhappy about such a time being set, when there is nothing in the new subsection that allows the sheriff any flexibility. It might be worth adding a phrase along the lines of "failing that, in circumstances" such as those that are then described. Someone who had been living with the adult for five and a half months would be excluded from this provision, when all the other circumstances showed that it was a serious, committed relationship in which one partner had been placed in the position of an incapable adult by some chance occurrence, such as a road-traffic accident. I would be happier if somewhere in the subsection there were a catch-all phrase that allowed the sheriff to say that, although the partner of the same sex had not been living with the adult for six months, everything else indicated that they should be recognised as the nearest relative.

The Convener: Minister, as other members wish to speak, we will sweep up all the questions for you to answer at the end.

Kate MacLean (Dundee West) (Lab): The best advice that the Equal Opportunities Committee has is that amendment 152 would enshrine discrimination in the new legislation. Subsection (1A)(b)(i), in particular, includes conditions that are difficult to prove. I do not see how "mutual affection" or

"a subsisting or previous sexual relationship"

can be demonstrated. Our advice is—

The Convener: I am sorry to butt in, but when you and Nora Radcliffe say "we", will you make clear that you are referring to the Equal Opportunities Committee?

Kate MacLean: I am sorry—I was referring to the Equal Opportunities Committee. That committee feels that amendment 152A would deal with the difficulties that it has identified. The criterion that the amendment proposes is used in other instances. If there is dubiety about it, the Equal Opportunities Committee would be happy for it to be looked at again. If not, I would be minded to support Nora Radcliffe's amendment.

Gordon Jackson (Glasgow Govan) (Lab): I understand what the Equal Opportunities Committee is doing, but I think it is wrong. What the minister is proposing is not discriminatory against same-sex couples in the sense that has been suggested. The distinction is not between same-sex partners and different-sex partners, but between people who are legally married and those who are not. Under our law, same-sex couples cannot go through a form of marriage, but many opposite-sex couples do not go through a form of marriage either. The language that the minister has proposed is a way of indicating that such couples should be in the same position as legally married people, whether they are of the same sex or of different sex. Although what is proposed here applies to same-sex couples, it could apply equally to different-sex couples.

I feel that, ironically, Nora Radcliffe's amendment would make the situation more difficult for same-sex couples, rather than easier. Under amendment 152, all that is required is for a partner of the same sex to have been living with the adult for six months under the conditions described. Although, as has been said, those conditions may be difficult to prove, people can identify them when they see them. Proving that partners were in

"a relationship equivalent to that between a man and a woman living together as husband and wife"

would, in my judgment, be more difficult.

When do people become the equivalent of husband and wife? Certainly, that does not happen within six months of their living together. If by the equivalent of husband and wife we mean people who live together, have sex with each other and eat together, the issue is quite simple. However, couples would never be accorded the status of married people within six months of living together.

10:15

There was a recent case in Scotland in which a judge refused to accept that two people were living together as husband and wife even though they had been living together for years. The requirement of living together for six months in the circumstances described in amendment 152 would give security to same-sex couples, whereas it might be very difficult for them to prove that their relationship is equivalent to that between husband and wife. Ironically, the Equal Opportunities Committee's amendment does not help.

Pauline McNeill (Glasgow Kelvin) (Lab): I welcome the Executive's amendment. This committee should note that it represents a major progressive step in Scots law. I agree with Gordon Jackson. In a recent High Court case it proved very difficult for a man and woman to pass the test of being a common law married couple. Can you clarify, Nora, whether that is what amendment 152A refers to?

Nora Radcliffe: We think that that description—

The Convener: We try not to have dialogues between committee members.

Nora Radcliffe: I beg your pardon.

Pauline McNeill: Perhaps Nora Radcliffe could confirm that the couple referred to in amendment 152A does not have to be married. I agree with Gordon Jackson that, in essence, the Executive amendment covers what we are trying to achieve.

Nora Radcliffe: The Equal Opportunities Committee felt that amendment 152A came as close as possible, as simply as possible, to a description that equates to a common law husband and wife, who are not married but live together as husband and wife. The intention was that people who live together as a couple, whether they are the same or the opposite gender, should be treated the same.

Phil Gallie: Amendment 152 is flawed, although I agree entirely with the principle that underlies it. I think that the minister and others acknowledge that there is an omission. When one talks only about same-sex couples living together, one excludes individuals of opposite sex who live together but are not married. What goes for one group goes for the other.

On the matter of sexual relationships, it would be difficult, as Kate MacLean says, to prove what happens between couples—also it would be the couple's own business. Therefore, Nora Radcliffe's amendment is probably more appropriate, although perhaps there should be a full stop after

"a man and a woman living together".

Six months might be too short a period for people of the same or opposite sex living together to establish a long-term bond. That may be another aspect that should be changed.

Gordon Jackson: The problem lies in the difference between a colloquial and a legal definition. I understand what Nora Radcliffe means by defining the required relationship as being like that between

"a man and a woman living together as husband and wife."

People may say in the pub that they live together like husband and wife and may call themselves common law husband and wife, but the courts interpret that term in a legal sense. To be a husband and wife in a legal sense, people must have lived together for years. The legal definition would cause problems.

Christine Grahame *indicated disagreement.*

Gordon Jackson: Christine disagrees with me, but the courts will not accept that there is a marriage by habit and repute unless the man and woman have been together for years.

Iain Gray: I will try to respond to the points that members have raised—perhaps, convener, you will remind me if I miss any.

On the definition of husband and wife, about which Gordon Jackson and Nora Radcliffe spoke, it is my understanding—I am no lawyer—that common law marriage does not simply mean living together by habit or repute, but that it requires people to go to court to produce a legal declaration that it is the case. I think that that often happens in cases in which a person claims on their deceased common law spouse's estate. Nora Radcliffe's amendment is wrong to assume that a common law marriage is constituted simply by two people living together. That is part of the problem with amendment 152A. There is a logical inconsistency in that amendment.

One of the definitions of

"a man and woman living together as husband and wife"

is that they have gone through a ceremony of marriage. In law, that is not possible for same-sex partners, so the required relationship cannot be equivalent in law to that between husband and wife. Although there is a concern that the definition in our amendment is discriminatory, I am unconvinced by the arguments that that is the case. The requirements in subsection (1A)(b)(i) would also apply to an opposite-sex couple who wished to be considered nearest relatives.

Gordon Jackson is right: this is not a question of same-sex or opposite-sex couples who have not gone through a form of marriage being equivalent to a husband and wife; it is about a same-sex couple being equivalent to an opposite-sex couple who have not gone through a form of marriage. Neither of those couples is equivalent in law to a husband and wife.

The six-month requirement applies to opposite-sex couples because it is in the mental health legislation definition of nearest relative. As we have said, the Millan committee is examining the definitions in mental health legislation, and its conclusions may affect what we are considering. If they do, and if this amendment has been carried, any change will apply equally to same-sex or opposite-sex couples.

It remains our belief that amendment 152 does not discriminate between same-sex and opposite-sex couples, as it applies the same criteria. I appreciate that it is difficult to know how it can be shown that there has been a previous sexual relationship, but it seems clear to us that the law must make some distinction between partnership of the kind that we are discussing and platonic friendship. The evidence from the application of existing legislation, such as that on mental health, is that it is not necessary to demonstrate that there has been a sexual relationship; what must be

shown if the relationship is challenged is mutual commitment and so on. I repeat that the requirements would apply to same-sex and opposite-sex couples.

As Pauline McNeill said, this is a significant progressive step in Scottish legislation. Christine Grahame spoke about the demonstration of the power of the consultative process, the committee structure and pre-legislative scrutiny. This is another example of how that power can be used to produce modern law that is better and more tolerant. Although amendment 152A aims to do that, we sincerely believe that amendment 152 will do it more effectively.

Kate MacLean: It is my understanding that the criteria in subsection 1A(b)(i) do not always apply when the courts try to define different-sex relationships. A professor in family law at the University of Strathclyde advised the Equal Opportunities Committee on amendment 152A. The Equal Opportunities Committee feels that amendment 152 could introduce inequality to new legislation and that amendment 152A addresses that problem.

The Equal Opportunities Committee welcomes the fact that the bill recognises same-sex relationships. It is a major step forward that is welcomed by organisations that deal with sexual orientation issues, but it is crucial that we get new legislation right. If it is not possible to re-examine the question, I am minded to support Nora Radcliffe's amendment.

The Convener: Do you wish to come back on any point, minister, or will we move to the vote?

Phil Gallie: I wish to make a point.

The Convener: We have now discussed this question for half an hour.

Phil Gallie: It is a very important issue.

The Convener: I am not sure that we are progressing the debate in any way, shape or form. We have reached an impasse. If they are brief, Christine Grahame and Phil Gallie may speak.

Christine Grahame: I do not think that the minister addressed the point that I raised about the absolute nature of the six-month requirement—he may have covered it when he discussed the forthcoming legislation on mental welfare. Can I take it from what the minister said that other circumstances may be taken into consideration? There might be cases of injustice if an absolute limit of six months is introduced.

Phil Gallie: I disagree entirely with what the minister said about sexual relationships being the all-important factor; there are genuine lifelong friendships that are built on commitment and affection. That is why amendment 152 should not be accepted.

Iain Gray: I do not disagree with Phil Gallie on this. The legislation covers the kind of companionship on which he spoke very eloquently in the stage 1 debate, although the defining period is five years rather than six months.

On Christine Grahame's point, six months is an absolute limit, which the sheriff does not have the power to vary. That is the current position in mental health legislation, on which the nearest relative definition is based. That matter is being considered by the Millan committee, which may decide to change it.

Both the committees and the Executive are aiming to achieve the same end. Our discussion this morning suggests that the debate is not played out, so we are prepared to take amendment 152 away and return to the issue at stage 3, if Nora Radcliffe does not press amendment 152A. The principle to which we are all committed is clear.

Phil Gallie: Is it in order for me to say that I welcome the minister's proposal very much?

The Convener: It is in order, but we could have reached this point a little sooner.

Amendment 150, by agreement, withdrawn.

Amendment 151 moved—[Angus MacKay]—and agreed to.

10:30

Angus MacKay: Executive amendments 261, 262 and 263 are entirely technical and stylistic. Section 76 defines terms that are used throughout the bill, including the word "prescribed". This is used on many occasions in the bill to indicate matters that might be or will be prescribed by the public guardian or those that will be prescribed in regulations made by Scottish ministers.

The amendments effect the simple drafting change to define the word "prescribe" rather than "prescribed". That is more correct in terms of parliamentary drafting.

I move amendment 261.

Amendment 261 agreed to.

Amendments 262 and 263 moved—[Angus MacKay]—and agreed to.

Amendment 152 not moved.

Section 76, as amended, agreed to.

Section 77 agreed to.

Before schedule 3

Amendment 289 moved—[Angus MacKay]—and agreed to.

Schedule 3

CONTINUATION OF EXISTING CURATORS, TUTORS, GUARDIANS AND ATTORNEYS UNDER THIS ACT

The Convener: Amendment 290 is grouped with amendments 291, 292, 293 and 294.

Angus MacKay: These Executive amendments have been suggested by Adrian Ward of the alliance for the promotion of the bill. As a solicitor who is extremely knowledgeable in this field, he has helpfully identified some problems with the provisions of paragraph 4 of schedule 3, which deals with the position of attorneys when the bill comes into force.

The effect of the amendments is to ensure that attorneys, whose powers are intended to continue when the granter loses capacity, will become continuing or welfare attorneys under the bill. Where attorneys are exercising both types of power, they will become both welfare and continuing attorneys. They will have to act according to the general principles and might be subject to court orders and supervision by the statutory authorities if they do not carry out those duties properly. In the case of welfare attorneys, their powers will be limited, as the committee has already discussed in relation to sensitive medical treatments and the detention of the adult.

It is not intended, however, that attorneys appointed before the incapacity legislation comes into force should have to have their powers registered by the public guardian. That would be difficult to enforce. The Executive also believes that it would be wrong in principle to impose such a requirement, which was not part of the law in force at the time the powers were granted. We are confident that the bill offers sufficient protection to the granters of such pre-act powers, through the other safeguards such as the role of the courts and the statutory authorities.

I move amendment 290.

Amendment 290 agreed to.

The Convener: Since we have a series of amendments that follow on from that amendment, we will try a slightly different procedure. Opportunity for a debate on the amendments has been allowed, in effect. I invite the minister to move amendments 291 to 294 en bloc. If any member of the committee objects to the question being put in this form, they can say so now.

Amendments 291 to 294 moved—[Angus MacKay]—and agreed to.

Iain Gray: Amendment 264 ensures that hospital managers looking after patients' funds under current statutory arrangements may continue to do so under the old arrangements for a limited period only. After a period of no more than three years, the provisions of part 4 will apply. For example, a fresh certificate of incapacity would be required. The period of three years is consistent with the review period provided under section 35(7) for residents of care establishments.

I move amendment 264.

Amendment 264 agreed to.

Angus MacKay: Amendments 270, 271 and 272 are designed to rationalise the transitional arrangements under the bill for curators bonis, tutors at law and tutors dative who are converted into guardians under schedule 3. At present, there is an unnecessary distinction between what happens to converted welfare guardians and converted financial guardians when it comes to the renewal of their powers. These amendments ensure that all converted guardians will have to apply for renewal within five years of their appointment under the provisions of section 54. Mental Health Act guardians will be able to continue as guardians until the expiry of their appointment under the 1984 act but any renewal of their status must be sought under section 54.

I move amendment 270.

Amendment 270 agreed to.

Amendments 271 and 272 moved—[Angus MacKay]—and agreed to.

Angus MacKay: Amendment 265 inserts provisions in the bill that allow for different parts coming into force on different dates. Jim Wallace announced in the stage 1 debate on 9 December 1999 that the Executive intends to implement the provisions for attorneys, withdrawers and care establishments in 2001 and those for guardians and intervention orders in 2002.

For example, section 21 of the bill requires a continuing or welfare attorney wishing to resign to notify, amongst other people, any guardian or the adult's primary carer. The amendment provides that, between 2001 and 2002, when guardianship under the bill has not started, only the primary carer need be informed.

The other parts of the new provision inserted by the amendment deal with similar matters before the new form of guardianship comes into effect.

I move amendment 265.

Amendment 265 agreed to.

Schedule 3, as amended, agreed to.

Schedule 4

GUARDIANSHIP ORDERS UNDER THE CRIMINAL PROCEDURES (SCOTLAND) ACT 1995

Amendment 273 moved—[Angus MacKay]—and agreed to.

Schedule 5

MINOR AND CONSEQUENTIAL AMENDMENTS

Angus MacKay: Amendments 274 and 275 are entirely technical amendments, dealing with consequential amendments to other legislation. The paragraphs affected remove references to tutors and curators from existing legislation. The current text of the bill's amendments to the Judicial Factors Acts 1849, 1880 and 1889 does not reflect amendments made by the Children (Scotland) Act 1995 in relation to guardians of children. With these guardians removed by the act, many of the consequential amendments are not required and the aim can be met by simple repeal. Amendments 281 to 285 provide accompanying repeals to the Judicial Factors Act 1849 and will be debated later this morning.

Amendments 274 and 275 therefore alter the text of the bill to take account of the changes made by the 1995 act.

I move amendment 274.

Amendment 274 agreed to.

Amendment 275 moved—[Angus MacKay]—and agreed to.

Angus MacKay: Amendment 295, which is entirely technical, affects paragraph 8 of schedule 5, which amends the Heritable Securities (Scotland) Act 1894. The current text of that act was amended by the Children (Scotland) Act 1995. Amendment 295 ensures that our amendment to the 1894 act suits the style of its current text and that it will read clearly.

I move amendment 295.

Amendment 295 agreed to.

Angus MacKay: The consequential amendment to the Trusts (Scotland) Act 1921 in paragraph 9 of schedule 5 is designed to ensure that the 1921 act no longer refers to curators or tutors and makes it clear that it is not the intention to substitute references to guardians under the bill. However, changes made by the Children (Scotland) Act 1995 to the 1921 act have altered what is required. Only repeals to the current text of the Trusts (Scotland) Act 1921 are now required to give the same effect and those are provided in schedule 6, through amendments 304, 305 and 306. Amendment to the 1921 act in schedule 5 is now unnecessary.

I move amendment 296.

Amendment 296 agreed to.

Amendments 266 and 267 moved—[Angus MacKay]—and agreed to.

Iain Gray: Amendment 276 is a technical amendment to ensure that a correct reference in the Social Work (Scotland) Act 1968 is made.

Section 68 of the 1968 act gives local authorities a duty to visit people living in residential establishments in their area

"in the interests of their well-being."

This is part of the inspection process. The section is being amended by the bill to add a requirement to visit to check that residents' financial affairs are being properly managed, where the establishment has the power to do so.

The amendment will enable the extended wording, describing the local authority's duty, to be inserted into section 68(1), where it belongs, rather than into section 68(3).

I move amendment 276.

Amendment 276 agreed to.

Angus MacKay: Amendment 268 to the Land Registrations (Scotland) Act 1979 is required following the provisions about protection of third parties inserted by amendments 22, 45 and 114, already discussed by the committee as part of group 15 on 25 January.

Amendment 268 prevents the adult whose property has been wrongly sold from seeking compensation from public funds—the keeper's indemnity. It does not, however, stop the adult from seeking recourse from the attorney, intervener or guardian who has wrongly sold his or her heritable property.

I move amendment 268.

Amendment 268 agreed to.

The Convener: Amendment 277 is grouped with amendments 278, 297, 298, 299 and 300, all in the name of the minister.

Iain Gray: These changes ensure that the bill correctly amends the Mental Health (Scotland) Act 1984 in respect of the new flexible form of guardianship that the bill creates.

Amendment 278 corrects a typing error in the bill which refers to "guardianship" rather than "guardian".

Amendments 297 and 298 ensure that changes made by the bill to the detention provisions of the Mental Health (Scotland) Act 1984 work correctly. The bill allows guardians and welfare attorneys with relevant powers to have a role in applications for formal detention and subsequent matters relevant to detention similar to that of the patient's nearest relative.

Amendment 299 provides that welfare attorneys and guardians are informed and consulted, as is the patient's nearest relative, about various matters to do with community care orders made under the 1984 act.

Amendment 300 ensures that statutory provisions for transfers of people under mental health guardianship between different parts of the UK will work correctly when the bill becomes law.

I move amendment 277.

Amendment 277 agreed to.

The Convener: I invite the minister to move amendments 278, 297, 298, 299 and 300 en bloc. If any member of the committee objects to the question being put in this way, they may say so.

Amendments 278 and 297 to 300 moved—[Iain Gray]—and agreed to.

Angus MacKay: The provisions of the bill are extremely complex in attempting to provide adults with incapacity with a number of new rights. Amendment 301 builds on existing legal aid provision and ensures that legal aid, subject to the usual statutory tests, will be available for all proceedings under the bill to attorneys, guardians and persons claiming an interest in the personal welfare of the adult. In assessing whether a legal aid application satisfies the financial eligibility test, it is usual to assess the means of the applicant; however, there will be a number of proceedings under the bill where that would be inappropriate, for example, where a guardian intends to raise a court action on behalf of an adult with incapacity.

The Executive believes that, in those situations, the means assessment should be carried out on the assets of the adult. A further Executive amendment will be lodged, before the stage 3 debate. That amendment will ensure that, subject to the usual statutory tests, legal aid will be available not only to a person with an interest in the personal welfare of an adult, but to a person with an interest in the adult's property or financial affairs. The resulting regulations will be laid before the Parliament.

I move amendment 301.

Amendment 301 agreed to.

10:45

Iain Gray: Amendment 279 reinstates a provision from the Scottish Law Commission's draft bill, which was mistakenly deleted. The Executive is grateful to the Mental Welfare Commission for pointing out that omission. The Access to Health Records Act 1990 already provides for some circumstances in which people can apply for access to another person's health records. That includes any person appointed by a court to manage the affairs of a patient who lacks capacity. The 1990 act would therefore cover guardians or those authorised under intervention orders in the bill. However, it would not include welfare attorneys, who are equally likely to require access to an adult's health records. This amendment ensures that attorneys are included.

I move amendment 279.

Amendment 279 agreed to.

Angus MacKay: Amendments 302 and 303 are purely technical amendments, which affect sections of the Child Support Act 1991 and the Social Security Administration Act 1992, concerning hospital managers looking after patients' funds, under section 94 of the Mental Health (Scotland) Act 1984. Section 94 is replaced by part 4 of the bill, and references to it in the social security legislation will be replaced by references to a guardian, or anyone else appointed to act for the adult under the bill.

I move amendment 302.

Amendment 302 agreed to.

Amendment 303 moved—[Angus MacKay]—and agreed to.

Amendment 280 moved—[Angus MacKay]—and agreed to.

Schedule 5, as amended, agreed to.

Schedule 6

REPEALS

The Convener: Amendment 281 is grouped with amendments 282, 283, 284, 285, 304, 305, 306, 286, 287 and 307.

Angus MacKay: Amendments 281 to 285 are purely technical amendments, repealing references to tutors and curators from the Judicial Factors Act 1849. The current text of the bill does not reflect amendments made by the Children (Scotland) Act 1995 in relation to guardians of children. These amendments alter the text of the bill, to take account of the changes the 1995 act made.

The 1995 act removed references to guardians, which the bill would otherwise have left in place. Therefore, changes that would have been amendments that appeared in schedule 5 are now simply repeals, and amendments 281 to 285 insert the repeals into schedule 6.

On amendments 304, 305 and 306, the consequential amendment to the Trusts (Scotland) Act 1921 in paragraph 9 of schedule 5 was designed to ensure that the 1921 act no longer refers to curators or tutors and made it clear that it is not our intention to substitute references to guardians under the bill.

However, the Children (Scotland) Act 1995 also amended the 1921 act, and this has altered which amendments are required. Therefore, amendment 296 removed paragraph 9 from schedule 5, and

amendments 304, 305 and 306 provide the relevant repeals to the current text of the Trusts (Scotland) Act 1921. These ensure that the 1921 act does not refer to tutors, curators or guardians.

Amendment 286 provides purely technical changes to English mental health legislation, to deal with the abolition under the bill of curators and tutors to adults.

Amendment 287 ensures that the bill correctly amends the Mental Health (Scotland) Act 1984, where it refers to the Mental Welfare Commission's remit.

Amendment 307 ensures that statutory provisions for transfers of people under mental health guardianship between different parts of the UK will work correctly when the bill becomes law. It is currently possible for such transfers to be made both into and out of Scotland without requiring a fresh application for guardianship through the courts. When the adult and guardian move to another country within the UK, this is possible because all Mental Health Act guardians in the UK have the same three powers: to decide where the adult lives; to decide who has access to the adult; and to decide where they attend perhaps for education or training.

However, once the new, flexible form of guardianship comes into effect in Scotland, it will not be possible to transfer adults under guardianship from Scotland to guardianship in other UK countries in the same way. Scottish guardians are likely, in future, to have different powers to the current standard package, since powers will be tailored to meet the adult's individual needs. The guardian's powers would not be recognised elsewhere in the UK. Amendment 307 therefore removes provisions for transfers from Scotland from the Mental Health (Scotland) Act 1984.

I move amendment 281.

Amendment 281 agreed to.

The Convener: I invite the minister to move amendments 282, 283, 284, 285, 304, 305, 306, 286, 287 and 307 en bloc. If any member of the committee objects to a single question being put, will they indicate so now.

Amendments 282 to 285, 304 to 306, 286, 287 and 307 moved—[Angus MacKay]—and agreed to.

Schedule 6, as amended, agreed to.

Section 78 agreed to.

The Convener: That takes us to the end of part 7. I understand that we will not return to the bill until 29 February. I thank members, ministers and the Executive team. Everyone will be relieved to have a small break. The ministers and the Executive team are invited to join us, even though they are no longer involved in the meeting.

10:52

Meeting adjourned.

11:10

On resuming—

Petition (Road Traffic Deaths)

The Convener: We now move back into non-bill mode, which will probably feel quite strange. The next item on the agenda is petition PE29, from Alex and Margaret Dekker, on road traffic deaths.

The item is on the agenda so that we can have a preliminary discussion about the issue and get some indication of the committee's thinking about Lord Hardie's letter, which has been circulated to members and was written in response to my letter. The committee will remember that when we discussed the Dekker petition previously, it was decided that I should write to the Lord Advocate—Michael Matheson is shaking his head, reminding me that he does not remember as he was not a member of the committee then.

Members will see that there is a brief note from the Scottish Parliament information centre on the generality of the issue. We agreed at our previous meeting that we would ask SPICe for a brief run-down—sorry, that was perhaps an inappropriate phrase to use in the circumstances—or summary of the situation. The SPICe researchers have provided that, for which we thank them.

We need to decide how we will deal with this petition. The Lord Advocate's reply has been circulated to committee members. If they have not read it, they will not have much to contribute today. The letter comments on the statistical information that is referred to in the petition, and sets out in detail the Crown Office's position in relation to prosecutions under the Road Traffic Act 1988. The letter explains that prosecuting decisions are for the Crown, not the police, and that, therefore, the suggestion in the petition that charges are downgraded from causing death by dangerous driving to careless driving is misleading. That is probably attributable to a misunderstanding of when the word "charges" is used instead of more formal terms. The police may charge, but it is up to the Crown Office to decide whether to proceed.

The letter also explains that prosecution policy is based on the standard of driving that is displayed in the circumstances and the quality of the evidence that is available. The Lord Advocate's letter sets out a defence of the decisions that were made in the case of Steven Dekker, who was the son of the petitioners.

The SPICe paper has been circulated with today's papers, and sets out recent statements in the Scottish Parliament and the UK Parliament that are relevant to the issue. The petition has been formally referred to this committee, so we need to think carefully about how we want to proceed. No time limit has been set, nor are our options limited in any way. It is clear that we have a duty to decide on a course of action that will conclude consideration of the petition.

11:15

We have to start consideration of the Abolition of Feudal Tenure (Scotland) Bill in mid-March. We have three meetings in the next few weeks at which we will have an opportunity to deal with non-bill matters. The committee must decide whether it needs further evidence or information. I believe that the Dekkers have said that they intend to submit a written response to Lord Hardie's letter, which the committee will want to see before making a final decision. It would be useful to have some kind of preliminary indication of the committee's response to the Lord Advocate's letter. That would allow us to ask the Dekkers to focus on aspects of the argument that they think are more central to the committee's work on the petition.

We should have a brief discussion to decide how to proceed on the extremely wide issues that were raised by the Dekkers, some of which are outside the capacity of the Parliament. I believe that the road traffic acts are reserved to Westminster.

Gordon Jackson: My position is that the Lord Advocate is 100 per cent right. I do not always think that. I have no quarrel with his long and careful letter. The problem is with the concept of someone doing something carelessly and not having to pay for a death that might result from their actions. The press can whip that up by asking questions such as, "Is this person's life worth only £30?", but careless driving accidents can often result from only a moment's inattention. Everyone who has driven has had lapses of attention and it is only by the grace of God that horrendous consequences are avoided. Occasionally, people drive dangerously. That is out of order, and if someone dies as a result, the charge should be one of causing death by dangerous driving and the appropriate punishment should be delivered.

We have to balance the culpability of the act of carelessness—which is not very culpable—and the horrendous consequences of someone dying. That cannot be changed in any way. People die because motor cars are dangerous and people are occasionally careless.

With regard to Lord Hardie's position on downgrading, I would point out that the police charge at the highest level. For tactical reasons, the police do not charge at a low level. That

means that, inevitably, when the independent prosecution examines the case, the charge is downgraded. That does not mean that the decision to downgrade is wrong.

I do not want to talk about this particular case, but it is worth noting that, in the fatal accident inquiry, the sheriff chose to point out that the charge could never have been death by dangerous driving. In all honesty, although I appreciate the emotional intensity of this matter in the public mind and in the minds of families and friends, I do not think that we can do anything other than accept what the Lord Advocate has said on this occasion.

Phil Gallie: Justice must be seen to be done. The fine words of Gordon Jackson, who is a QC, and of the Lord Advocate, all seem perfectly logical, but we must look at the wider picture in considering the law. I accept much of what the Lord Advocate says in his letter. I accept that the police will probably charge with the worst possible offence and leave it to the prosecution to determine thereafter. I can accept that that explains the ratio of 53 per cent: 40 per cent: 7 per cent, for prosecutions under a charge of causing death by dangerous driving.

Gordon suggested that carelessness can be a momentary lapse. I recognise that and I imagine that there is nobody on this committee who has not at some time or other driven carelessly when split seconds have determined that we got away with a stupid action. However, we are discussing deliberate actions. In the Dekker case, somebody took a deliberate decision to do something extremely dangerous: going the wrong way up a slip road. They thought about it before they did it and as a consequence of their decision someone died. I can understand the feelings and concerns of the family in this case.

In the case of the death of David MacKenzie, the individual involved had no MOT and no insurance, and was driving a car with only a provisional licence. Surely that is a considered position. Surely that suggests that that individual did something extremely dangerous and totally ignored the law. We need an element of consistency. The victims' interests must be taken on board.

The Scottish Campaign against Irresponsible Drivers has suggested that victims' families should be able to look to a fatal accident inquiry somewhere along the line. That seems logical if the charge is careless driving. I am not suggesting that every death should result in a charge of death by dangerous driving; I accept that, in many cases, a charge of careless driving is the right one to bring. With careless driving, however, the death is not recorded as such and is not part of the procedures. That leaves victims' families feeling hurt, wounded and unable to understand the judicial process.

We must try to ensure that justice is seen to be done. If we took evidence from the Dekker family and talked about the case with the Lord Advocate and SCID, we could perhaps form a better view of the whole situation. There must be some change somewhere along the line.

Pauline McNeill: A number of points about the Dekker case strike me. I do not think that the knowledge or information we have gleaned is conducive to what we are trying to do on victim support. Although I have no difficulty with what the Lord Advocate's letter says about the law, I think that work must be done on transparency. There should have been a quicker answer than this; we should not be sitting here, four months after the petition was submitted, considering a response that the family could have got without recourse to this committee. There must be transparency in decisions on victim support for any family or individual who feels that the judicial process has been unjust.

In this case, there is a question about whether the law recognises an offence that is a bit more than carelessness but a bit less than dangerous driving. I shall come back to that and make a recommendation on what we should do.

There may be issues about evidence in the Donegans' case that I do not entirely understand, but I would like to consider what happened. Although, as you pointed out convener, the Road Traffic Acts deal with reserved matters, we should see what is covered by the study of

"clear guidance on the law and its purpose, and how this affects the choice of penalty; comparison of sentencing trends before and since the 1991 Act".

That is the broad issue we need to consider. I would like us to see what that research has to say.

The Convener: Are you referring to the research mentioned in the SPICe paper?

Pauline McNeill: Yes. We need to have something broader than specific cases to work with, although the cases have highlighted concerns that are probably shared by the wider public. The starting point needs to be more scientific.

The Convener: The Government has commissioned research into the effects of the introduction of the offence of dangerous driving on charging and sentencing. The Lord Advocate has said that the Crown Office and the fiscals are co-operating with that research. It is studying

"the effect of the Road Traffic Act 1991 on prosecutions for dangerous driving. The project, which is being undertaken by the Department of the Environment, Transport and the Regions . . . began in May 1998 and it is due to be

completed in October 2000. Issues covered by the study include: whether there is sufficiently clear guidance on the law and its purpose, and how this affects the choice of penalty; comparison of sentencing trends before and since the 1991 Act; and how the changes in the definition of bad driving offences have been implemented by police and courts".

That reference to the police relates more to England and Wales.

"The aim is to obtain an understanding of what leads prosecutors and courts to select one offence or one penalty rather than another."

They are examining the whole procedure from charging to sentencing. I agree that the research is highly relevant to our discussion.

Christine Grahame: I agree with Gordon Jackson. Nothing I say should be taken as even for a moment not wholly sympathising with the Dekkers on the loss of their son. It is something they will never recover from—I have two sons of my own. Looking at it objectively, criminal prosecutions are based on culpability and the charge that is brought must be based on the degree of culpability, not on the consequences, which, when there is negligence, are a matter for civil law.

I went over a crossroads the other day without noticing. We have all had moments like that. If another car had been there I could have killed myself and someone else. The degree of my carelessness in driving, rather than the consequences, would have been at issue. That information must be given to people so that they can separate the civil from the criminal issues.

The matter of previous convictions is often raised. We must make clearer the distinction between trying somebody on the evidence for a particular charge, and previous convictions that are relevant to the sentencing. Although an action may result in death from horrendous injuries, it is the degree of culpability in the driving that is at issue—and it may be minor. You might look away for just a moment, your car mounts the pavement and there happen to be people there. Another time, there might be nobody, and you might hit only a lamp-post.

I do not think that, as has been suggested, legal aid is available for fatal accident inquiries, although I may be wrong.

The Convener: I do not think that that is central to our discussion today.

Christine Grahame: Fatal accident inquiries were raised during the discussion of the Dekker petition.

The Convener: A separate petition on legal aid and how it applies to fatal accident inquiries will come before us soon. We will not get too caught up in that now.

11:30

Christine Grahame: I would just like to say in passing that allowing victims' relatives access to legal aid would help them to expose the facts of a case.

Research into sentencing policy has been mentioned. The communication with victims' families to which Pauline McNeill referred is terribly important throughout the process. From the time the police charge or catch the accused to the point of sentencing, no referral is made to a victim's parents or relatives, so they have no idea what is going on. They are not valued in that process, but valuing them would help them.

A more immediate problem, which must be mentioned, is the pressure on the procurator fiscal service. We must examine that service's work load and the number of cases with which it must deal. That work load—I am making no allegations here—might lead to some cases being processed more rapidly than others. Anyone who attends a sheriff court will see the pile of papers procurators fiscal must go through and which they might have received only that morning. We must examine the possibility of putting money into the service to ensure that every case receives the attention it deserves.

It would not be appropriate for the committee to take evidence from Mr and Mrs Dekker.

Kate MacLean: We should not bring the Dekkers to the committee—they have been through enough. Members have had plenty of correspondence from them. There is nothing the Justice and Home Affairs Committee can do and I am reluctant to ask them to come along if that would give them false hope that we might find a solution.

Christine's point about victims' families and fatal accident inquiries is important. I am lodging a motion on that subject. The procurator fiscal exists to serve the public interest, but the Legal Aid Board seems to think that the procurator fiscal should serve victims' families' interests—the two do not necessarily coincide. In cases such as that of the Dekkers, families might be more inclined to feel that justice has been served if they can be represented at fatal accident inquiries.

I agree with Gordon Jackson—it is important that a line is drawn. It would be wrong of the committee to give people false hopes that it might investigate cases and, perhaps, have decisions overturned.

Phil Gallie: We talk about open government but, at times, there seems to be a cloak of secrecy around the Lord Advocate. As Christine Grahame suggested, there is often a lack of communication with victims' families in the run-up to a trial. That

must be examined.

Christine also mentioned careless driving. I emphasised that I appreciate that somebody might die as the result of an act of carelessness, but when people take deliberate actions that they know cut across the law, they endanger everybody.

Kate said that the Dekkers see the case as continuing and that they are looking for some personal support. I do not think that they are. They feel great grief at the loss of their son and they want to protect those who find themselves in the same situation in the future. They have seen that a problem exists and they want it to be changed. I have sympathy with them. We can do something about the problem by looking at the Dekker case and others. The problem will not go away.

I know of the Montgomery family who lost a daughter. It is possible that, in that case, the fire service arrived before the police and removed evidence that would have enabled the police to determine whether there was a case for pursuing an action for careless driving rather than dangerous driving. Doubts were left in the minds of the victim's family. In a fatal accident inquiry, families should feel reasonably sure that all the evidence has been examined and that a charge of, for example, careless driving was justified.

Christine said something that concerns me. She talked about the pressures on the Crown Office. I appreciate those pressures, and the pressures on sheriffs and sheriff courts in view of the recent problems with temporary sheriffs. I would hate to think that that was a factor in determining justice. We will be told by the Lord Advocate that it is not, but the fact that Christine mentioned it shows that it is in people's minds. I believe that it could be a factor. If a dangerous driving charge is brought and requires a lot of evidence to be gathered and a lot of court time to be taken up, and it is known that the driver will plead guilty to the charge, there may be a great temptation to ease the pressure that Christine spoke about. With that in mind, my concerns remain.

If these incidents had happened in industry, a fatal accident inquiry would have followed automatically. We might consider that. I am not saying that it is a solution; I am suggesting that the committee could consider the matter with a view to the future and making people more comfortable with the law.

Gordon Jackson: Phil says that we should distinguish between an act of momentary carelessness and a deliberate flouting of the law. We do. That is why we prosecute people for dangerous driving. I accept that there may be occasions when the Lord Advocate gets it wrong. With the benefit of hindsight, with thousands of charges, one could query individual decisions, but the way in which those decisions were made was not wrong.

In the case of the Dekker family, there was a fatal accident inquiry, at which the sheriff said, having studied the case, that in his view the decision was correct. There cannot be a fatal accident inquiry every time there is a road traffic fatality. That is not possible. I am not even sure there could be one every time the family wanted it unless there was an objective reason for having one. What is true is that we may need to improve transparency and openness and the way in which we deal with victims.

It is true to say that the culture in the law of Scotland—going back to my generation—was to ignore victims. Going back 15 or 20 years, nobody gave them a thought. That was a disgraceful way to deal with people who had suffered through crime. We have gone a long way towards improving that. If the committee can suggest ways in which to make progress, perhaps we should do so, but that is not a road traffic issue; it has to do with how we deal with victims of violence, victims of house breaking and victims of every sort of crime.

The law is not wrong on this issue. There is a misunderstanding. Phil mentioned a person who goes out with no MOT, no insurance and no licence—a deliberate flouter of the law—but that does not tell us how they were driving. Someone can go out with no documentation and have a momentary lapse. Somebody can go out kitted out with all the documentation in the world and drive dangerously. We have to consider their driving. We can ask the Lord Advocate to meet us, but I do not see the point. I do not speak for him, but he has written a long letter and I do not think that he has anything further to tell us.

I take Kate's point. I do not want to give out the message that we will have another inquiry, set aside two weeks, invite witnesses and tell people who are terribly concerned about this issue that the Justice and Home Affairs Committee will help them. We would be giving a false message and it would not be a kindness. We have to draw a line under this issue.

Kate MacLean: Gordon covered the point that I wanted to make: just because someone does not have an MOT or road tax it does not mean that they are a dangerous driver.

Christine Grahame: I presume that that would also be in the complaint, but that was not the point I wish to make.

I want to ask Gordon a question that does not concern this case. I mentioned pressure on the procurator fiscal. He will see it more than I do. Do we need to provide more funding for the Crown

Office so that it can take time on a range of cases?

The Convener: I do not want us to go into that now, because our discussion would not be informed by any evidence. However, it is an issue that we may want to consider in our first meeting after the Easter recess, when we will consider a range of issues, including the accessibility of legal aid. At that meeting we will also be able to plan our future business.

We should try to stick to the general issues that are raised in this petition, rather than go down the road of revisiting specific cases. We are in danger of doing that. I am thinking particularly of cases that have already been dealt with under all the available legal procedures. The committee is under great pressure from many individuals who see us as some kind of alternative appeal court. We have to be careful not to put ourselves in that position.

We are under no obligation to come to a final decision on this matter today, and we should not try to do so. We do not need to resolve this today.

On page 8 of his letter of 5 January, the Lord Advocate says that, at the moment, there is

"a feasibility study looking at a model for the delivery of better, integrated services to victims and witnesses and, in particular, to the provision of information in a more structured way to victims of crimes that are reported to the Procurator Fiscal."

In his evidence to the committee in August, the Lord Advocate said that he wants to advise the committee of the outcome of that work. In his letter, he says that he hopes to be in a position to do that in the spring. Therefore, we may get some more relevant information on the involvement of victims and their families in the next few months.

On the basis of the information that we have received from the Scottish Parliament information centre, I wish, if the committee agrees, to write to the Department of the Environment, Transport and the Regions about its study. Apart from anything else, I feel that it should have these petitions brought to its attention, if that has not already been done. We are entitled to do that, and I would like to hear the DETR's response in more detail than we have from SPICe.

I would like the committee to wait until it has seen the response of the Dekker family to the Lord Advocate's letter. The family has advised us that it will ensure that committee members have a copy of that response. That is another reason for not coming to a final decision today.

We have to be careful not to raise false hopes and expectations about what can be achieved. We may go back to the Lord Advocate to inquire more closely into victim support, and whether things such as these petitions are being taken into account. I am sure that they are. I hope that we can return to this issue during one of our meetings in February, so that it is not put off for too long. Because we have moved to stage 2 of Executive bills, it will often be difficult to make room for other things.

Kate MacLean: Will you, or the Public Petitions Committee, contact the Dekker family to let them know that we are still considering their petition?

The Convener: Yes. The family is being kept informed of what we are doing and what we are not doing. The prosecution service may want to take note of that example.

With the committee's agreement, we will deal with this, in the short term, in the way that I have outlined; in the near future, we will have to agree on what to do in the longer term.

Members *indicated agreement.*

Domestic Violence

The Convener: Item 3, on domestic violence, is accompanied by a note from the assistant clerk and Maureen Macmillan, the reporter. The intention is to try to get an idea from the committee about how we wish to take the item forward. I understand that Maureen has not yet been able to meet the Minister for Justice—she may wish to say something about that—to discuss the interplay between what the committee is proposing and his surprise announcement about the introduction of domestic interdicts, which may have some bearing on how Maureen wishes us to proceed.

I understand that a meeting has been set up with the Minister and Deputy Minister for Communities on 17 February, so this item will undoubtedly appear on the agenda of the meeting on 22 February. Again, a final decision may not be advisable today. Do you wish to speak to this item, Maureen?

11:45

Maureen Macmillan (Highlands and Islands) (Lab): Yes, I thought I would give a résumé of how we have reached the current situation. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 was aimed at excluding a violent husband from the family home. The tenancy or ownership of the home would probably have been in the husband's name in 1981. The exclusion meant that the woman was protected from his violence and could continue to live with her children, if any, at her home. That was the purpose of the act. I should point out that I am just using the words "husband" and "woman" as shorthand.

The powers of arrest were attached to the interdict to give it teeth, and the exclusion zone might have been extended, for example, to the street where the house was located or to the wife's place of work. All such protection was based on the occupancy rights of the spouse to the matrimonial home. Serious drawbacks to the 1981 act soon became apparent, and they increased with changing social conditions. On divorce, the couple ceased to be spouses, and protection ceased despite that being a time when danger to the woman increased.

If a couple was cohabiting, the act applied if they were joint tenants or owners. If the woman was not a tenant, she had to apply to the court for occupancy rights, which could take time and make her more liable to abuse and intimidation.

Same-gender couples and other family members could not access protection because they were not spouses. I would say that there is an urgent need for a law that protects the whole range of people who suffer from domestic abuse. When we took evidence on this matter in the autumn, it became apparent to me that if the occupancy rights qualification for accessing protection were retained, it would be extremely difficult to extend protection to all those who required it.

Other members of the committee shared that point of view, and it was suggested that we examine the possibility of introducing a completely separate bill to protect people from domestic abuse. The bill would add powers of arrest to a common law interdict in cases of domestic abuse. It would complement the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and could offer protection to those excluded from that act, but would not be able to deprive a person of his or her occupancy rights to their home. There will always be some people—usually married couples—for whom the matrimonial homes act will be more appropriate.

The reaction from the organisations with whom I discussed the proposals has been very positive. Although there have been differences in emphasis, there is agreement that court procedures could broadly follow those for the matrimonial homes act. The details of the court procedures are in the paper members have in front of them. The difference would not be the court procedure, but the definition of who could access protection.

Affordability is allied to protection. I am concerned that victims of domestic abuse may not be able to take full advantage of any new inclusive legislation because of the civil legal aid regulations, which require people on fairly low incomes to pay several hundred pounds towards court costs. I would hope that no contributions should be required for an interdict to protect from violence, because I do not believe that people should have to pay for personal protection.

Since we began our investigation, the Executive has announced, as Roseanna Cunningham said, that it is introducing proposals to reform family law, including the 1981 act. We knew that that was going to be part of the programme, but I hope that the committee's work and my research can speed up change in this aspect of the law, in advance of the Executive's proposals. I think that change is urgently needed, as victims can be seriously injured or killed.

I had hoped to meet the Deputy First Minister last week, but the meeting has been postponed until next week. I want to find the quickest way forward. I want to talk to Mr Wallace. I hope that he will appreciate the work that we have done and accept that it could be used to initiate legislation sooner rather than later. I do not know what

method will be used.

I suspect that it will take quite a long time for the Executive's proposals to reform family law to become law. I hope that, if a bill is introduced—either a member's bill in my name or a committee bill—the change will be achieved more quickly. However, the clerks have no idea how long it will take. Considering that the committee has a lot of other business, the quickest method may be for me to initiate a member's bill.

The Convener: A meeting has been set up for 17 February. It would therefore be premature of the committee to make a final decision now. I hope that Maureen will press the minister on the time scale for his proposals. We must make it clear to him that the committee will make a final decision on 22 February and that if we are not convinced about the Executive's time scale, the likelihood is that we will want to press ahead ourselves.

On the merits of a member's bill as opposed to a committee bill, a member's bill would simply be referred to this committee anyway, so I am not sure that that is the best option.

Maureen Macmillan: According to the clerks, that is not necessarily the case.

The Convener: The advantage of a committee bill is that committee business can command time in the chamber. There is no real ability to command time for members' business. Standing orders allow for hours to be set aside for committee business in the chamber. For example, the Standards Committee has had time set aside in the chamber to discuss the code of conduct. The Procedures Committee has also had chamber time. We will need to explore those issues with the clerk to ensure that we reach a balanced decision on how to proceed. However, in any case, it would be premature to make a decision now.

Gordon Jackson: I have a question, which might be a stupid one, but it is a long time since we discussed the matter. Perhaps Maureen Macmillan or Fiona Groves will be able to help me. The proposal is for a bill that will either amend the matrimonial homes act to cover former spouses or provide domestic violence interdicts. Why are those two things mutually exclusive? Have I lost the plot? Why can one bill not do both?

Maureen Macmillan: Because one is attached to property and occupancy rights. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 gives protection to spouses, because of their occupancy rights in the matrimonial home. The legislation was designed to exclude violent husbands from the matrimonial home.

Gordon Jackson: It is coming back to me. I could not remember what the problem was, because it has been so long. I am open to forgetting things, but I remember now.

Maureen Macmillan: The protection was secondary. The legislation was designed to give the woman the house.

The Convener: I suggest that we postpone the issue until the meeting on 22 February at which I would expect us to make a final decision. That will allow Maureen to press the minister as strongly as she can and to use the threat of the committee to hurry him along, if that looks as if it will work.

Christine Grahame: Another interesting point to note is that we are entitled to legal advice on the drafting of committee bills, which is quite rare. That would be very useful, particularly if we go for the stand-alone option, which in my view is the best. We could then press on quite quickly, which would resolve some of the practical issues.

The Convener: I thought that the clerk's note was fairly straightforward, but if we want to simplify the matter, we will get an outline of the pros and cons of the committee bill process and the member's bill process at the meeting on 22 February, so that we can weigh up the advantages and ensure that we choose the best way to push the matter forward.

I suggest that we remit the matter to the meeting of 22 February. We thank Maureen Macmillan for the work that she has done so far and look forward to the final part of this stage of the process on 22 February.

Social Partnership Funding

The Convener: The issue of social partnership funding was included on the agenda at my request, because I am aware, through debates and discussions at the conveners liaison group, that money has been set aside—as an individual, stand-alone budget—to facilitate civic participation in the work of the Parliament. There will be similar provision in next year's budget and, probably, in those of subsequent years.

Before now, committees have not taken a terribly close interest in that issue, but I have considered with the clerk some ways in which we may choose to spend the money. It struck me that there were a number of interesting and useful things that we might do, which are outlined in the note from the clerk. They include consensus conferences, which bring together lay people and experts; citizens juries, where a group of randomly selected citizens take evidence from witnesses over a number of days, before compiling a report; deliberative opinion polling, where a random sample of 250 to 600 citizens are brought together to debate an issue, with an opportunity to question experts and politicians, before being polled for their views; and citizens panels, where a sample of a local population is used to access local opinion on a particular topic, either on a one-off basis or over time. We also have the options of appointing advisers, commissioning external research or having an expert panel.

One or two other committees have begun to make moves in that area. I would like us to discuss ways in which this committee might access social partnership funding and how it might serve as a useful adjunct to our deliberations. The clerk's note contains two suggestions that illustrate the possibilities that are available. Members of the committee might be able to think of others. I would like us to try, at least in a preliminary way, to begin moving towards adopting one or other of the methods, and to think about some of the subject matter that we would like to cover.

One example that I came up with was to commission a deliberative polling exercise about alternatives to custody, aimed at finding out what considered public opinion really is, as opposed to what some of the tabloid newspapers would have us believe it is. Any work that we did would feed into the wider debate and would itself become something that other bodies and interested parties might want to refer to. The alternative would be to assemble an expert panel to consider and report to the committee on the special problems and needs of women prisoners. In my view, the deliberative opinion polling would be more interesting and, ultimately, more useful in terms of the presentation of arguments.

There are also issues relating to the forthcoming land reform bill. However, in this instance I am inclined to suggest to the Executive that if there are one or two things that can usefully be done, it should put its hand in its pockets and fund them separately, rather than have that come out of the committee's budget. The Executive ought to be prepared to finance such work, rather than our taking it out of a much smaller budget for committee-oriented work. However, establishing a citizens panel is something that the committee could consider at stage 1 of the bill, if members thought that appropriate.

Some of that might be new to members who had not realised that £50,000 was sitting around waiting to be spent. I hope that we can agree quickly that we should consider ways of accessing that money. We might have a more lively debate for 10 or 15 minutes about what we choose to do with it.

12:00

Scott Barrie (Dunfermline West) (Lab): That sounds like an exciting idea. I was relatively enthused when I read the papers last night and came across this item. From the agenda, I could not work out what it meant, and was pleasantly surprised when I read the clerk's background note and found cited examples of where we can use the money.

The idea of having alternatives to custody is good. The issue does not concern women only, and the committee has touched on the related issue of youth custody. I hope that we will return to the issue of fine defaulting and what is to be done about the number of women who end up in Cornton Vale for committing crimes that did not carry a custodial sentence in the first place.

It would be interesting to find out what the general public think about that. When sentencing policy is discussed, it is always in connection with a specific case that is highly emotive and on which people have strong views. However, when the general issues are teased out, people have much more balanced and reasonable views. In those circumstances, they can accept the argument that locking people up is not the solution, and that more innovative ways of dealing with the problem exist.

The different examples that are provided in the clerk's note are worth considering. It is not about taking a representative sample and saying that, just because 58 per cent think this or 42 per cent think that, that is the way to do it. Other people should not do our job for us. Sometimes we assume that we speak from knowledge of public opinion, but we are not always sure what that

opinion is based on. We should have social partnership funding, not just because the money is there to spend, but because there are innovative ways in which to use it. The Scottish Parliament is constructed differently from Westminster, which, with its archaic methods and centuries of tradition, could not envisage working in that way.

I would make a strong bid for one of the examples that has been given—alternatives to custody—but other members might want to consider other examples.

Christine Grahame: I feel as if I am on "Countdown" and about to show you what I had marked on my paper earlier—deliberative opinion polling, which is probably the most fruitful route for the committee. I like the idea of having a debate before polling, which would enable us to get away from tabloid discussion and into some depth. I also marked down the issue of young offenders, as that ties in with our review of Scottish prisons.

I marked down the issue of drug offences. I do not think that we will talk about young offenders without talking about the drug culture that appears to be integral to that issue. We should somehow bring those two issues together, and get an informed view of what people think about the way in which we tackle drug culture and young offenders.

Euan Robson (Roxburgh and Berwickshire) (LD): I want us to consider what we mean by rehabilitation of people who have been drug users. We could use some of the money to ask people who have been through a successful rehabilitation programme to describe what made the difference for them—how they were able to get rid of the habit and defend themselves when the dealer reappeared on the doorstep. I envisage using the fund to assemble some individuals to assist us in defining what we mean by rehabilitation. We need to determine what was successful for them, how it worked for them, and what messages we need to deliver across the Government system to enhance rehabilitation and target it more accurately.

Pauline McNeill: Whatever we do, we should establish some criteria. I would like the committee to be interactive with a cross-section of the population rather than hearing from those who already come along to give us evidence. We should have a particular aim in mind—perhaps a potential change in the law.

I am particularly interested in the issue of serious crimes. At the moment, High Court judges operate a computer system that makes available information on sentencing for particular crimes from the previous 10 years. Although judges are free to pass whatever sentence they want, they are considering what has gone before.

I support in principle the suggestion that was made by Christine Grahame and Euan Robson that we should examine the issue of drugs. There should be a narrow focus, whether it is on rehabilitation or on some of the matters that we have already considered in relation to the prison population. One suggestion might be how to aim for a drug-free environment in prisons. That would involve detailed examination of how drugs get into prisons and consideration of successful rehabilitation programmes.

There have been some good suggestions. I support the fact that the convener put social partnership funding on the agenda.

Gordon Jackson: I should confess to having been nobbled by the convener in the back of a taxi on this issue. However, I like the idea.

There is a consensus on deliberative opinion polling. I will add my thruppence-worth. It would be a great opportunity publicly to take the Parliament out and to show that we are consulting people. We should do it with a fanfare, because it is a tremendous opportunity to demonstrate what the Parliament is about.

There is also a consensus that we should examine how we deal with offenders. I am all for that. However, it is important that we focus carefully on the issues that we will examine. I have listed eight different matters that the committee wants to examine: fine default; alternatives to custody; women; young offenders; drugs; rehabilitation; serious crime; and sentencing consistency. The danger is that the subject is so big that our inquiry could become vague. We must be ruthless. Some members might not manage to examine the issues that they would like to consider. We must decide that we will look at specific issues in relation to offending. As long as we exercise that control, this is a smashing idea.

Maureen Macmillan: I agree with Gordon Jackson. This is in danger of becoming too diffuse. We must focus on a narrow range of issues. Can we do this more than once?

The Convener: Perhaps I can interject at this point, to explain how we will proceed. The committee will have to produce a detailed, focused and costed proposal, which has a clear purpose. It will have to be agreed by the conveners liaison group, which is where the bids are going. Ultimately, there is a finite amount of money for civic participation. If there are too many bids and they would exceed the budget, a decision will have to be made at the conveners liaison group on what should go ahead.

Some of the points that Gordon Jackson made also occurred to me as members spoke. It is okay, at this stage, for us to have a wide discussion. It is clear that—even if we have not focused on the specifics—we are talking about roughly the same

general subject matter. The application will require to be detailed, focused and costed. We cannot just snap our fingers and cause the process to start a week on Tuesday. It will not work like that.

That is how we will proceed. Does that answer some of Maureen Macmillan's questions?

Maureen Macmillan: I wondered how often we could apply for social partnership funding; it would obviously depend on the budget and whether we could do several things under one heading.

The Convener: It would depend on whether the conveners liaison group considered the proposal—or proposals—appropriate. It must try to balance the funding fairly among committees. We have not accessed any of it; some committees are already doing so. We have not yet held a meeting outside Edinburgh; other committees have already done so. This committee is morally owed something, because we have not yet made demands on the system.

In theory, we could access the budget every year. Some proposals will be for much smaller things than others. It is a question of how much money is available, who else bids for it, and what the conveners liaison group decides is appropriate.

Scott Barrie: It is fine to have a wide-ranging debate, but we are not doing this for the sake of doing it. Opinion polling must be on a specific topic. I would be concerned if we focused on drugs rehabilitation because that subject is not reserved for this committee—I know that the Social Inclusion, Housing and Voluntary Sector Committee has been discussing and taking evidence on that. We must exercise a bit of caution because we do not want various committees to do similar things on similar subjects.

Michael Matheson (Central Scotland) (SNP): Many of the issues that I wanted to raise have been addressed. I support the idea of conducting some type of deliberative polling. However, my concern is about how we take forward the results of that polling. We might have to do it in two stages. The first stage is to take opinions, and the second is to action points that are raised. That might require other panels of experts to formulate ideas. Although it is important that we are focused, we must aim to take something forward from the polling.

The Convener: The aim of deliberative opinion polling, no matter what the subject matter is, is to establish what people's views are when they are presented with situations. It is not just a matter of ticking yes or no on a sheet of paper. A random sample of people will be brought together to debate an issue and reach a decision. It is a kind of informed polling, which, given the approach that we are taking to prisons, will be of enormous value.

At one of our next meetings, the prisons issue will be back on the agenda, to allow us to finalise the first stage of what we were doing and to move on to other issues. The kind of opinion polling that we are discussing will help to inform our debate as we move forward. We are not precluded from submitting for another project as part of the same debate. In a sense, the purpose of deliberative opinion polling is the opinion itself—we do not have to say that we are conducting opinion polling because we want to reach a conclusion about X and Y. The purpose is to inform our debate.

This is our first discussion, but it seems that we are in the same ballpark. Scott Barrie made a fair point, which had not occurred to me. We must be careful if we make proposals that cross into another committee's remit. There is nothing wrong with doing that, and there is no reason why there should not be a joint committee proposal, but if we go down that road, we should formally approach the other committee and should not just submit a proposal to the conveners liaison group that cuts across issues that the other committee covers.

We should narrow our proposal down a little. There is work to be done on the logistics, as we cannot do the random sampling ourselves. We will have to consider time scales, costings and the rest—it will take some time.

At this stage, can we agree that we do not want to consider drugs rehabilitation because of the other issues that have been suggested already, but that we will consider the question of attitudes to sentencing or, more specifically, alternatives to custody? There are arguments for and against both issues—deliberative opinion polling on attitudes to sentencing would be quite an interesting exercise. However, we would jump beyond that if we were to poll on alternatives to custody. By asking about alternatives to custody, we would present people with the view that we wanted to introduce them. We will have to resolve those issues.

12:15

I ask the clerks to present a preliminary paper to an appropriate meeting, to bring the issue into slightly sharper focus. We still will not have the detail, but at least that will start to narrow down the process and it will be the best way in which to proceed.

Ideally, I would like to submit the bid before the end of the financial year. However, some of that pressure is off, because I gather that the threat no longer exists that the budget might disappear if it were not used. I would still like us to try—quite apart from anything else, having that project

running alongside our other work would permit something useful to be done while we are up to our eyeballs dealing with an Executive bill. It would allow the committee to make useful progress on issues and arguments.

If the clerks are happy to do that, we will have a somewhat more focused paper.

Future Business

The Convener: The final item on the agenda is future business. I do not want us to have a detailed discussion as we have dealt with some items of future business already today.

The forward programme, which was circulated to all committee members, comes with the qualification that, as with everything that the committee does at the moment, it is provisional. Our meetings on 16 and 22 February will deal with non-bill items. We have already agreed a further item—domestic violence—for 22 February.

At my instigation, freedom of information is on the agenda. While I have no expectation that we will be able to deal with that in a detailed fashion, the consultation process on the freedom of information white paper closes on 15 March. At the very least, it would be appropriate for the committee to have an input to that process in some way, shape or form, even if we submit only an agreed letter from me to the Executive. That is why freedom of information is on the agendas for both Wednesday 16 February and Monday 6 March. I hope that members are happy with that—I thought that it would be wrong to allow the consultation process to conclude without the committee considering that matter.

We must also come back to the Abolition of Poindings and Warrant Sales Bill, which is on the agenda. Members will greet with great enthusiasm the fact that we must also deal with some statutory instruments. We may revise the agendas before those meetings take place.

We will return to the Adults with Incapacity (Scotland) Bill on 29 February and 1 March, and we hope to complete part 5 during those two meetings. If that does not happen, the agendas—and time scales—for later meetings will change, although it is unlikely that we will discuss amendments to the bill on 6 March, when we will be in Stirling. We consider that it would be inappropriate to drag ministerial teams and so on to Stirling, and other members might want to attend, particularly for part 5 of the bill. Therefore, we will stick to the current proposal for 6 March.

Pauline McNeill: Is the meeting on Monday 6 March in Stirling our only meeting that week, or is it additional?

The Convener: It is our only meeting that week.

Pauline McNeill: Is that the meeting that was planned for Glasgow?

The Convener: Yes. Glasgow was not available as another committee was using the venue, so we agreed to go to Stirling.

Maureen Macmillan: What is the venue in Stirling?

The Convener: I have not inquired in detail, but I assume that it will be at the council.

Assuming that we have finished with adults with incapacity, we will move on to stage 2 of the Abolition of Feudal Tenure etc (Scotland) Bill, starting on 14 March. Members are now familiar with the stage 2 process; if we start on 14 March, we will have more than enough time to complete that work by the Easter recess. Again, we have slotted in twice-weekly meetings, but I do not think that we will need to use them, other than perhaps once. If our progress on adults with incapacity is anything to go by, I would guess that we will not require both slots each week, but members should have those slots as filled space in their diaries.

The Parliament has agreed business motions that require us to complete stage 2 consideration of the Adults with Incapacity (Scotland) Bill by 1 March. If that date needs to be amended, it will be. The date for the Abolition of Feudal Tenure etc (Scotland) Bill is 6 April. We do not think that there will be a problem with that.

The forward programme that is before members today is aimed at meeting the targets. It takes into account the fact that we have a slight hiatus in relation to part 5 of adults with incapacity. It also takes into account our starting stage 2 of the feudal tenure bill sufficiently early to offer the prospect of completing that bill by the target date without meeting twice a week.

I did not want to go into the details of future business today; I am merely giving members the opportunity to ask specific questions relating to the forward programme.

Gordon Jackson: Out of curiosity, are other bills coming, or will we get a break?

The Convener: As I understand it—although this is all very provisional—the land reform bill has been delayed and will not now be introduced until after the Easter recess. We will not deal with stage 1 of land reform until after the recess.

The complicating factor is the requirement to process an intrusive investigations bill; that has to be done contemporaneously with the bill that is going through the UK Parliament. That might cause us difficulties, but if we are in the midst of stage 2 of abolition of feudal tenure when the intrusive investigations bill has to be introduced, the Executive has indicated that it is prepared to use Executive time to help move that bill along. Quite what that would mean in practice, I do not know, but we can assume that some consideration will be given to the effect on our business.

The answer to Gordon's question is that another bill that is destined for the committee will be introduced before the Easter recess. Obviously, I will have to negotiate on how we handle that bill, but the Executive has indicated that it is prepared to come and go.

Gordon Jackson: Is the land reform bill definitely coming to us?

The Convener: As far as I am aware, yes. I have heard nothing to the contrary and it would be remarkable for that to change now.

Members ought also to be aware that I have been keeping an eye on petitions. Other petitions have been lodged that are undoubtedly destined for us, including one on the availability of legal aid for fatal accident inquiries. More statutory instruments might also come our way. All those items might have to be added to the programme. I know for certain that we will receive more petitions—I have seen them in the business bulletin.

Are there any further questions?

Members *indicated disagreement.*

The Convener: In that case, I close the meeting. I will see members next Wednesday.

Meeting closed at 12:24.

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