

JUSTICE AND HOME AFFAIRS COMMITTEE

Monday 6 March 2000
(*Afternoon*)

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2000.

Applications for reproduction should be made in writing to the Copyright Unit,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The
Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now
trading as The Stationery Office Ltd, which is responsible for printing and publishing
Scottish Parliamentary Corporate Body publications.

CONTENTS

Monday 6 March 2000

Col.

ABOLITION OF FEUDAL TENURE ETC (SCOTLAND) BILL	879
SCOTTISH PRISONS	880
FREEDOM OF INFORMATION.....	899

JUSTICE AND HOME AFFAIRS COMMITTEE

10th 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

WITNESSES

Ms Kate Donegan (Governor, HM Establishment Cornton Vale)

Professor Alan Miller (Scottish Human Rights Centre)

CLERK TEAM LEADER

Andrew Mylne

SENIOR ASSISTANT CLERK

Shelagh McKinlay

ASSISTANT CLERK

Fiona Groves

LOCATION

Stirling Council Chambers, Viewforth, Stirling

Scottish Parliament

Justice and Home Affairs Committee

Monday 6 March 2000

(Afternoon)

[THE CONVENER *opened the meeting at 14:07*]

The Convener (Roseanna Cunningham): Although we are still waiting for some people to arrive, it is time to start our meeting. I have apologies from Euan Robson, who cannot be here. Kate McLean, who is a member of this committee, is also the convener of the Equal Opportunities Committee, which is taking evidence this afternoon on the Ethical Standards in Public Life etc (Scotland) Bill, so it was always highly unlikely that she would be able to attend this meeting. Other members are finding their way here by various means. One of them represents the Black Isle, so I suppose that we should cut her a little slack.

Abolition of Feudal Tenure etc (Scotland) Bill

The Convener: Item 1 is a purely formal item. As members will recall, we are moving to stage 2 of the Abolition of Feudal Tenure etc (Scotland) Bill next week. In order to do that, I must move the motion that in consideration of the bill at stage 2, the committee will take the sections in numerical order and each schedule immediately after the section that introduces it. Is that agreed?

Members indicated agreement.

The Convener: The second item on the agenda is consideration of petition PE44 from Archie MacAlister calling for the Scottish Parliament to reconsider section 17 of the Abolition of Feudal Tenure etc (Scotland) Bill. At this stage, it is perhaps best for the committee simply to take note of the petition and consider it at the relevant point in stage 2 of our consideration of the bill.

Scottish Prisons

The Convener: The third item on the agenda is an evidence session on Scottish prisons. I welcome Ms Kate Donegan, the governor of HM establishment Cornton Vale, to the committee. I am sure that she is relieved that she had just to motor for a few minutes up the road today.

Committee members should be aware that Cornton Vale has recently received an Investors In People award, which might have been controversial in some areas. The governor might be asked some questions about that this afternoon.

Members will recall that there is an entirely separate petition about the availability of legal aid for fatal accident inquiries, which has arisen out of a suicide in Cornton Vale. Although I do not want us to discuss that petition or particular incident in detail today, that is not to say that the governor will not be asked about the problem in general.

I invite the governor to make a short opening statement about the problems facing women prisoners and about the steps that she, as the governor of Scotland's only all-women prison, has taken to address them. Perhaps you could start by telling us how long you have been at Cornton Vale. I gather that you have not been there for a long time.

Ms Kate Donegan (Governor, HM Establishment Cornton Vale): I have been the governor of Cornton Vale since September 1996.

First of all, I thank the committee for the opportunity to give evidence about issues affecting women in Cornton Vale prison. I view the opportunity as a considerable privilege.

For the committee's information, I have put together some data gleaned from the latest Government prison statistics bulletin and a synopsis of some of the principal facts and figures about the prison. Although neither document is exhaustive, I hope that they will give the committee a flavour of some of the issues and challenges.

I want to address the committee on the subject of the challenges that we face. Perhaps it is unsurprising that I should first comment on the tragic suicides that have occurred in Cornton Vale. Although the death by suicide of any human being is profoundly sad, there is a particular sense of sadness and loss when such a death occurs in prison. The effect on staff and prisoners alike—indeed on the whole prison community—is deeply felt and long-lasting, and for me has been the particular spur to introducing a raft of developments and improvements that have significantly impacted on reducing the risk of self-

harm and suicide, and will continue to do so.

I took up the post of governor of Cornton Vale in 1996, after being deputy chief inspector of prisons and part of the team that inspected the prison in April 1996. For seven years at the beginning of my career, I was an assistant governor in Cornton Vale, and, as a result, my experience of working with women in custody has prepared me comprehensively, and probably uniquely, for understanding and addressing the challenges posed by Cornton Vale's population.

However, I must say that I was completely unprepared for the physical, mental and emotional condition of the majority of the women in the prison. I found appalling damage, mostly as a consequence of chronic poly-drug abuse, and a variety of mental health problems related to those addictions. I found a population that was characterised by social exclusion, ill health, poor educational attainment, lack of employment skills, backgrounds of violence and abuse and chaotic lifestyles. Many of the women were persistent petty offenders and, along with those on remand, were finding the combination of drug withdrawal, uncertainty about the future and separation from friends and family an almost intolerable burden.

14:15

My initial focus was therefore on addressing the needs of the most unstable part of the population—the remands and the newly convicted women and girls. At my request, the Scottish Prison Service commissioned comprehensive research on the nature of the population, so that we could better understand the range and depth of the problems that we faced. The headlines of that research by Dr Nancy Loucks are included in my summary of the facts and figures for the prison.

I confess that, despite the fact that I have presented those statistics on many occasions to many different audiences, I am still shocked by them. I am even more shocked by the fact that women are still arriving in an appalling mental and physical condition. That said, the research helped enormously to focus our energies and resources on the most pressing problems. I will be happy to describe the steps that we have taken in more detail, but there is no magic answer to addressing the needs of my uniquely vulnerable population. Systematic and methodical analyses of the underlying problems, along with a raft of improvements, have been made across the board in relation to a number of core activities. I have done all that I can to advocate for more resources and to provide clear direction and goals for staff.

Perhaps the only constant throughout the process of change in the prison has been the compassion and commitment of all staff and their

determination to contribute both towards moving the prison on and towards finding ways to lessen—or, ideally, to eradicate—the risk of self-harm and suicide. My wish would be that the daily challenges that are faced by Cornton Vale staff be much more widely understood and appreciated and that their huge efforts to provide a safe, secure and positive environment for many of Scotland's most damaged women be recognised and supported by the community. In seeking to move on from the past, we do not try to minimise the tragedy of the suicides. However, Cornton Vale has many reasons to be positive and much of which to be proud. Our energies will continue to be poured into providing the best possible regime for our challenging population.

The Convener: We can now move straight to the evidence-taking session. A lot of issues have arisen in the context of what the Justice and Home Affairs Committee has been doing so far. We started by considering Clive Fairweather's report in a general way, but that consideration was somewhat extended because of the Executive's decision to take away £13 million from the amount of money that was available to the Scottish Prison Service, a decision that has resulted in closures.

Our consideration has gone on for longer than we had expected. After considering the report briefly, we wanted to consider the specific issues of women offenders and young offenders, and to consider the treatment of both those categories of offenders in our prisons and in alternatives to prison. That is why we have invited you to give evidence. You are part of the next wave of our interest, which may take a good bit longer than the first.

There will be plenty of time for all members to ask questions. We will allocate roughly another 45 minutes for this discussion. I would like to ask one or two general questions just to get things started.

I have been interested in some of the evidence that we have heard from representatives of the trade unions. They seemed dissatisfied with the level of training that staff received, especially when they were moved from one kind of establishment to another one that might have quite different inmates. They felt that they were not getting appropriate training and that what they got was anything but sufficient. I would like you to comment on the training that your staff receive to deal with problems.

As a result of the evidence that we have taken, particularly the research of Dr Loucks, we are aware of the enormously complex series of problems that women in Cornton Vale exhibit. Could you comment on the difficulties that those problems pose for the work of you and your staff? How is that work different from the kind of work that is done in all-male prisons?

Ms Donegan: Each establishment is responsible for arranging induction training that is appropriate to its population. I read the transcript of the meeting at which Dr Loucks gave evidence and was surprised that Mr David Melrose said that Cornton Vale did not have that kind of training. In fact, our staff training leads the female prison services in the UK.

We run a women in custody programme for all staff; it is not just for uniformed staff and I, too, have taken the course. It lasts two and a half days and explores issues that are peculiar to women and, in particular, examines the stresses and strains that are relevant to women in custody. It gives staff a range of tools to understand and cope with women in custody.

We also run self-harm training modules so that staff understand the reasons for self-harm and how to cope with it. We also run assessment, care, teamwork, or ACT, strategy training programmes, which are detailed, specific and comprehensive. Therefore, I am satisfied that the training provision at Cornton Vale equips staff well to work with women. It is a prerequisite for new staff that they undertake the women in custody programme as soon as possible. Our training is comprehensive and has gone on for a considerable time.

On your question about the challenge that is posed by the raft of problems that women bring to prison, in my introductory statement I said that I was taken aback by what I found in the Cornton Vale population when I returned after being away for about 10 years. The chronic nature of the mental health and addiction problems of women at Cornton Vale means that behaviour is unpredictable. The women find concentrating on the programmes that we offer extremely difficult.

By and large, for about the first four to six weeks, it is difficult for the women to engage positively with very much that goes on, because their concentration is so poor. Often they are still withdrawing, so mentally they are quite depressed, anxious, and without hope. They are also very vulnerable and impulsive. The early stages on remand and after conviction are the most dangerous times for the women because they are in a poor mental state, imprisoned and separated from friends and family, and, if they are remanded, because they are uncertain about the future.

Because the women's behaviour is so unpredictable, it requires considerable skill to cope with them. I do not mean that the women necessarily represent serious management problems because they are violent to others, as they are more likely to focus their violence inwards.

Pauline McNeill (Glasgow Kelvin) (Lab): I have two questions. First, you will know that there have been discussions in Parliament and elsewhere about alternatives to locking women up and that the member for Stirling, Sylvia Jackson, has raised questions in Parliament about different types of prison accommodation. Do you want to comment on that?

Ms Donegan: Your question takes me to the boundary of what is appropriate for me to comment on, so my answer must be taken as a personal opinion rather than representative of the Prison Service's thinking on this. Sylvia Jackson has been enormously interested in Cornton Vale and I appreciate the support that she has given. Sylvia and I have had a number of discussions about how it is all very well to say that many women come to prison inappropriately, but quite another matter to suggest what ought to be done about that.

We need to have a range of credible, viable alternatives for sentencers. If those alternatives existed in the community, I am perfectly sure that sentencers would use them. I have in mind supported accommodation in the community. My notion is of what I call halfway houses. It is not a terribly satisfactory description, but it would fill the gap between non-custodial sentences and prison. At the moment, there is a fairly yawning gap. If an individual fails on the non-custodial alternatives, there is no other alternative for sentencers other than prison. We need something on the way into prison. Arguably, we need something on the way out too, to help with readjustment into the community.

We can do a lot at Cornton Vale. Even if women are only with us for a short time, on remand or on a short convicted sentence, we can pick them up, dust them down and set them off in the right direction. If, however, we return them whence they came, without any additional support, their chances of succeeding are quite limited. It would be an enormous advantage to do something for women on the way in and on the way out of prison.

Pauline McNeill: I am sure that other members will want to ask about that too.

I want, however, to ask about a different subject: remand prisoners. Unfortunately, I have not had the opportunity to visit Cornton Vale, but I hope to do so in the near future. I would like to know as much as you are able to tell the committee about how you feel about the conditions for remand prisoners. I am getting increasingly concerned about the Scottish Prison Service in general, and about the conditions which the remand prisoners have to suffer.

Can you tell the committee anything about improvements that you think could be made for the remand prisoners at Cornton Vale?

Ms Donegan: One of the first things that I did when I arrived at Cornton Vale was to focus on remand prisoners. Six of the suicides that had taken place were among remand women. Having accompanied the inspectorate, and having seen a number of remand units around the Prison Service, it became very clear that a good deal more attention needs to be paid to the regime and to the facilities for remand prisoners. I started with that, but I was not satisfied, even at the most basic level, with the women's accommodation.

I therefore pitched for resources to have the remand house refurbished. The request for additional resources to do that was accepted, and there has been a substantial investment of almost £2 million in the refurbishing of our remand unit. That is an exciting initiative, because the design of the building is very different from what exists at present. Uniquely, we met with the architects and designers to tell them what we felt remand prisoners needed, to talk about our philosophy and the way that we do things around here and to ask them to design a building fit for purpose. That is exactly what we have. The building is light and airy. It will, I hope, foster a real sense of community. Its rooms are available for the various kinds of activity that the remand prisoners will undertake.

We will also begin an initiative that will provide work for remand prisoners who want to work. There is no obligation on remand prisoners, but we want to offer them that facility. Quite a number of the women who come to us on remand have no resources and no money. They are provided not only with the opportunity to work in association, but with an opportunity to earn something. Remand resources are therefore important at Cornton Vale, and the remand prisoners are quite well catered for.

Gordon Jackson (Glasgow Govan) (Lab): I would like to return to what Pauline McNeill was talking about. I should say right away that I have a bee in my bonnet: I believe that far too many people are in jail. I accept that serious offenders should be there, but I think that we lock up far too many people.

I do not want to draw you into areas which it is inappropriate for you to talk about, but I am interested in the scale of the problem, and in the number of prisoners who might be accommodated in a different way. My view is that fine defaulters should not be in jail at all. I feel strongly about that. Nor can I see much point in putting women in jail for prostitution, and I feel the same about a certain degree of shoplifting offences.

Those are the categories of offenders that we are talking about. There may be other categories, but I hope that you can see the idea in my mind. In a place such as Cornton Vale, at any one time, what percentage of inmates who have committed that kind of crime—or non-crime—might be accommodated in another way?

14:30

Ms Donegan: The numbers fluctuate. Some of the statistics for 1998, the last year for which we have official statistics, are helpful. A significant proportion of the prison's population is serving two years or less. Fine defaulters account for about 20 per cent of our annual admissions. That is a significant proportion of the prison population.

Gordon Jackson: If those women were not imprisoned, would it free up a lot of space, allowing other things to be done?

Ms Donegan: Yes. If Cornton Vale contained only those women who represent a serious danger to the public, the number of inmates would be fewer, which would allow us to concentrate on the most needy cases.

Gordon Jackson: Now for something completely different, as they say. Drugs is always a big issue for the Justice and Home Affairs Committee.

Christine Grahame (South of Scotland) (SNP): Perhaps you should put that another way, Gordon.

Gordon Jackson: I am sorry. I have been given anecdotal evidence that jails are awash with drugs. I spend a lot of my time in jails, one way or another. I have been told that Cornton Vale has a lot of drugs, not just so-called soft drugs, but hard drugs as well. What is the scale of the problem?

Ms Donegan: When I arrived, three and a half years ago, the mandatory drug testing random positive rate was 45 per cent. Last month, the rate was 12 per cent and has been as low as 9 per cent. When prisoners say that they can easily get their hands on drugs and claim that the place is awash with them, I am not convinced. However, there are drugs in prison.

There are drugs in Cornton Vale because the women smuggle them in by hiding them vaginally. We are not permitted to search body cavities and it is well known that people who are expecting to be convicted and sentenced to prison time come prepared. Women will hide drugs internally either for their own use or to sell to others. As the committee will have heard, drugs also enter the prison through visits. Without taking all kinds of draconian measures, it is enormously difficult to stop that happening. However, that is a much smaller source of drugs than women bringing them

in internally. We even have anecdotal evidence that fine defaulters are paid in the community to come in with drugs to sell. It is a difficult problem.

However, we have reduced the rate of positive testing because we have become very skilled at intelligence gathering and dissemination. We prevent and find out about much drug use, although in some cases we do not know that the drugs are in the prison until we find a prisoner who is clearly under the influence.

Gordon Jackson: Some members of our committee—perhaps not those who are here today—take the view that jail is the one place in which we should be able to stop people taking drugs. Is that almost impossible?

Ms Donegan: I would say so. At the moment we do not have the technology to detect whether someone is carrying drugs internally. Until such time as we have both the technology and the permission to carry out internal searches, it will not be possible to stop drugs coming in.

Gordon Jackson: Would you, as a prison governor, want to be able to do that?

Ms Donegan: No.

Gordon Jackson: I do not mean that facetiously. Do you think that having the drugs is the lesser evil?

Ms Donegan: There is no choice or, rather, it is Hobson's choice. There are serious dangers in having drugs in prison. I can give the committee an example of a woman who brought heroin into the prison by hiding it internally. She and her cellmate smoked the heroin, but they were not aware of its purity. Because they were long-standing drug addicts, they thought that they knew how much it was appropriate to smoke. It is possible to buy a couple of tenner bags on a street corner, one of which is pure and one of which is not. The women smoked the heroin, and the night shift officer, on hearing some noisy breathing, went into the cell to discover that one of the prisoners, who was asthmatic, was smoking pure heroin. She almost lost her life as a consequence. It is very difficult decision for me to have to make and for me to say—and, in a sense, tacitly accept—that this is the lesser evil.

Gordon Jackson: In a prison such as Cornton Vale, are there programmes—methadone reduction programmes and so on—to get people off drugs? We are told that one of the dangers is that when people go into jail and cannot get drugs, their bodies become less immune. When they are released and take a tenner bag, which they had been able to take four months earlier, it kills them. The inability to get drugs in jail can be responsible for killing people once they are released. The problem is complex. What do you do, in terms of

rehabilitation and so on, to get people off drugs?

Ms Donegan: We have a drug detox process, which takes about 28 days and is a humane way of reducing the number of women who are taking drugs. By and large, the same sort of protocol applies for everyone. These days, there is no question of people having to suffer physically and emotionally from drug withdrawal.

We have a close relationship with Turning Point Scotland in Glasgow. Turning Point's Cornton Vale project is called Turnaround. We manage women on the loop, as it were, and talk to each other a lot about through-care issues and so on. Turning Point's drugs workers work with the women individually and in groups, on drug education and harm reduction. A drugs worker from the local community comes in for 20 hours a week. Our medical officer is extremely skilled and experienced in dealing with drugs. We have a variety of different approaches. Our experience is that unless and until a woman is ready to address her drug problem, few interventions of any kind are likely to succeed.

Scott Barrie (Dunfermline West) (Lab): Gordon Jackson has already touched on most of what I wanted to ask about in relation to drugs, so we can skip that.

In your introductory remarks, you mentioned your shock, on your return to Cornton Vale, at the type of prisoner whom you were meeting. How does that type of prisoner differ from the type whom you would expect to find in a men's prison? What are the main differences?

Ms Donegan: The main difference is probably the chronic nature of the problem. A male establishment such as Barlinnie, where I was deputy governor for a couple of years, has the same kinds of problems, but not to the same extent and not so chronically. I do not want to make sweeping generalisations about the differences in drug taking by male and by female prisoners, but there is a slightly different pattern. Women in Cornton Vale who take drugs tend to do so at the heavy end of the scale—their drugs of preference are the opiates and the benzodiazepines. They tend to take drugs in order to cope with their lives and they tend to take them either in isolation or in small groups. They are poly-drug abusers, whereas the men tend to take drugs more recreationally. That characterises the drug taking, although there are, of course, exceptions.

As women tend to be poly-drug abusers and tend to take drugs at the heavy end of the scale, the physical and mental effects are much more serious and more difficult to deal with. More than 80 per cent of the women in Cornton Vale are drug abusers; many are chronic poly-drug abusers of

long standing. The difference is characterised by the chronic nature of the problem for women.

Scott Barrie: That is interesting. We have heard evidence that more women from the west of Scotland are being sentenced than from the east. Would you agree that that is the case?

Ms Donegan: Yes.

Scott Barrie: What reasons might there be for that, apart from, perhaps, the sentencing policy of the courts?

Ms Donegan: I do not know what the reasons might be, but most of the Cornton Vale prison population come from the west of Scotland. That has been the case for as long as I can remember. An interesting statistic on prostitutes—admittedly, the figures date back to 1995—comes from a commendable report called “Where is She Tonight”, which focuses on street prostitution in Glasgow. It shows that, in one year, more than 700 cases of prostitution ended in custody in default of fines. The figures were something like six from Edinburgh, 16 from Aberdeen and 643 from Glasgow. Those figures are extraordinary.

The Convener: It is a matter of record that the council in Edinburgh and the council in Glasgow treat prostitution differently. That difference will give rise to some of the disparities.

Ms Donegan: That is almost certainly the case.

Scott Barrie: The statistic is significant, nevertheless. You talked about the number of petty offenders who find themselves in Cornton Vale. What is the recidivism rate among petty offenders? Do you see many of them semi-regularly? What proportion of the prison population do they make up?

Ms Donegan: I cannot give that figure at the moment, but I will find it out for you. A significant number of women return to Cornton Vale. They come back again and again until they address their addiction problem—there is usually a close relationship between their addiction and their criminality. As the principal female establishment in Scotland, our failures tend to be evident, which can be dispiriting.

The Convener: You have given us details of 554 adult female fine default receptions by length of sentence. With the exception of 26 of those, the sentences were between seven and 14 days. You talked about ways in which people with drug abuse problems can be helped in prison, but is there anything that you can do to help those women if they are in prison for so short a time?

Ms Donegan: We think in terms of emergency aid. We deal with the most pressing problems that the woman has. She might be in a period of drug-induced psychosis, she might suffer from seizures

or she might be unstable in a variety of ways. We tend to deal with the worst presenting problem, dust the woman down and make sure that she has a home to go to and a social work contact and that she is registered with a general practitioner before she leaves us. We do basic work like that but we cannot begin to address the notions of rehabilitation, intervention and so on. It would not be possible with such a rapid turnaround.

The Convener: That rapid turnaround must have an enormously disruptive effect on the way in which you have to work in Cornton Vale and on the administration of the prison. Is that the case?

Ms Donegan: It is. There is a tremendous amount of administration involved, even when we take in a woman for one day, which often happens with fine defaulters. Each woman is assessed for the suicide prevention strategy and so on.

Our greatest concern is that the prison population is so great at the short-term end that resources are diverted from our work in tackling the problems of women who have longer sentences. The short-term end of the prison population is hugely demanding.

The Convener: And constantly shifting.

Ms Donegan: Yes.

Michael Matheson (Central Scotland) (SNP): I am conscious that, both as an institution and as an agency, the prison can do only a certain number of things and that you have to work in partnership with other organisations. I see that you took a number of initiatives in response to Dr Loucks's research, such as establishing a community psychiatric nurse initiative and occupational therapy, bringing in a community drugs worker and having a rough sleeper housing officer in the prison. Can you provide us with more detail on those initiatives and of your links with other agencies, particularly the health service and the local authorities? How receptive did you find them to working in partnership with you to address specific problems?

14:45

Ms Donegan: There are many initiatives. In the summary of facts and figures, I have tried to give the committee a flavour of the main ones, but there is a lot going on. The community psychiatric nurse initiative has been taken in conjunction with Greater Glasgow Health Board, which runs a project for mentally disordered offenders. We, along with Barlinnie prison, are part of an experimental project that involves community psychiatric nurses coming to the prison, identifying women with mental problems and following them back out into the community. That is very good, because mentally disordered offenders are one of

our most vulnerable groups. The project has made a good start and we hope to build on it across Scotland.

I have talked about Turning Point. We were given money for an occupational therapist, who deals with our most vulnerable and needy group, including the kind of women about whom I was speaking earlier—those with little or no concentration, poor coping skills and poor social skills, who would otherwise be very isolated from the rest of the community. The therapist works on a one-to-one basis.

Drugs workers come into the prison, along with representatives of many voluntary organisations. That helps to ventilate the establishment. A number of organisations working in the prison deal specifically and very skilfully with women. They include Rape Crisis, Women's Aid, Crew 2000, Hope and Relate.

We found local authorities and health boards to be very receptive to building up our range of initiatives. We have been quite assertive—almost aggressive—in the way in which we have gone out to establish partnerships, because we are aware that it is crucial for us to try to build bridges with the community, so that the women get support when they leave us. We have found that local authorities are first class at supporting us. Once they have understood the nature of the problem, that we are serious about dealing with it, and that we are capable and professional people, they have been happy to engage with us. We have had a number of successes, which are helping to move the process forward.

Michael Matheson: It is striking how many prisoners—male or female—suffer from a diagnosed mental health problem. Are there any plans to evaluate whether the initiatives that you take in conjunction with mental health services—particularly the CPN initiative—help to keep women out of prisons, or is the initiative designed purely to manage their medical condition?

Ms Donegan: We do both. When we introduce initiatives, we do not simply wait to find out whether they fly. An evaluation is built into the CPN initiative. I guess that it will be some time before we know whether the initiative is having an effect on recidivism but, once it has been up and running for a while, we will evaluate it to see whether it does. We do that for all our links with the community. If we find that some of our initiatives that seemed like a jolly good idea at the start are not delivering the goods, we will end them and build on others that are more successful.

The Convener: Maureen, do you have a question?

Maureen Macmillan (Highlands and Islands) (Lab): I was going to ask about abuse, but my

question has already been answered.

Mrs Lyndsay McIntosh (Central Scotland)

(Con): What steps are you taking for offenders who have children and what are you doing to keep families together? I am concerned that the effects of people being sent to prison extend beyond the offender to the whole family; I am deeply concerned about the effects on younger members of families. What do you do to keep people in touch and the family unit in some semblance of order so that there is something to go back to?

Ms Donegan: We have significantly increased the quality and quantity of visits offered. Three or so years ago, Cornton Vale offered the minimum amount of visits. That has now been improved dramatically; the injection of 12 probation staff has allowed us to create a specially dedicated visits group, which enables us to offer visits much more frequently than previously. That helps to maintain contact.

In common with many establishments across Scotland, we have family contact development officers. In addition, we have links with the Scottish Forum on Prisons and Families in Prisons, a group that tries to facilitate better contact with families on the outside. We encourage family contact development officers to be present at visit times so that families can approach us if there are issues that they want to discuss. We proactively encourage visitors and family members to talk to us about their friend or family member who is in custody and to let us know if they have any anxieties. We also encourage them to tell us the kind of information that they need to help them with visits.

We have a play area for children in the visits room. We are unique in the Prison Service in providing bonding visits, which allow mothers and children of up to 12 years of age to spend quality time together away from other visitors. We also have social work visits and family visits—a range of different kinds of visits to try to accommodate different needs.

All other things being equal, I am content to have babies in prison. It is not an ideal environment but, as long as the mother is capable of coping with the stresses and strains of having a small baby in prison, we accommodate them. We have two gorgeous babies in the prison at the moment.

Mrs McIntosh: Is there a case for saying that children are safer in prison, where prisoners are under the supervision and guidance of staff, than left to their own devices outside?

Ms Donegan: Do you mean babies?

Mrs McIntosh: Yes.

Ms Donegan: I think that, paradoxically, babies

in Cornton Vale get a fabulous start in life. They have more mothers than you can shake a stick at. The quality of the environment is super. Fully qualified health visitors come in from the community and we have qualified midwives on the nursing staff. We also have parenting classes. Once the babies get slightly older, we put them out to a local nursery. The support that mother gets and the stimulation that baby gets are excellent.

Christine Grahame: First, I apologise to you, convener, to the committee and especially to Ms Donegan for being late. The clock in the office had stopped. I know that that is not a great excuse.

Gordon Jackson: Is that the best that you could do?

Christine Grahame: It is the truth, sir. I really wanted to hear what Ms Donegan had to say, but I will read the *Official Report* afterwards.

A couple of things arise from what has been said. Ms Donegan said that very few of the prisoners are a danger to the public. What percentage of the women in Cornton Vale have to be in prison to protect the rest of us?

Ms Donegan: I do not think that it would appropriate for me to answer that.

The Convener: Christine, I think that you are asking a question that is difficult for Kate Donegan to answer in her capacity as governor.

Christine Grahame: I appreciate that. In that case, my second question relates to what Roseanna said, which is partly what I thought. At Low Moss, too, there is a difficulty due to the high turnover. You have instructional staff, but I imagine that they have little chance of getting anywhere. To some extent you came to the point by talking about Turning Point Scotland and the other ancillary groups and intermediary links back into society. You may not be able to answer this question either, but if we could address three priorities in Cornton Vale and for women in prison in general, what would they be, not necessarily in order of priority?

Ms Donegan: I would love to see viable and credible alternatives to imprisonment for the kind of women that I described. Cornton Vale is neither a residential drug rehab unit nor a psychiatric hospital. Arguably, colleagues and others in the community are better able to deal with the complex problems that our women have. Viable alternatives to imprisonment should be considered; a pilot study should be carried out into whether halfway houses, or supported accommodation in the community, are viable. How much would that accommodation cost? Is it feasible? Would the public accept it? Would it be legitimate and credible in terms of sentencing? If Cornton Vale could concentrate on the knitting—in

dealing with offenders who represent a danger to society—that would make life a great deal easier for us.

In other respects, Cornton Vale is well resourced. I would never say, "If only I had another £100,000 or some more staff, I could do great things." I am well resourced, and need nothing in that respect—which will probably induce great joy in my colleagues in the rest of Scotland when we fight for resources. I am content that I am well resourced.

Christine Grahame: What you have said is very clear. Many women at Cornton Vale are in the wrong place. They would be better off elsewhere and would be helped better elsewhere. That is not through any fault of your system, which is just not the system for them.

Ms Donegan: That seems sensible.

The Convener: I still have one or two questions.

At the back of the report of Her Majesty's chief inspector of prisons, which we have considered, is a summary of recommendations that were made in 1998-99. One of them was:

"The Scottish Office should consult on how to ensure that by the year 2000, young women under 18 years of age are not held in prison establishments and on how and by when to achieve the same for males under 18."

The latter has nothing to do with you. The report remarked that the recommendation was agreed in principle for women, although it acknowledged that there were resource implications. Now that we are in 2000, can you tell the committee what progress has been made towards that target?

Ms Donegan: In respect of reducing the number of 16 to 18-year-olds?

The Convener: To zero. The recommendation was that the Scottish Office should consult on how to ensure that, by 2000—which is now—young women under 18 were not held in prison establishments. Can you say how many under-18s are in Cornton Vale? You do not have to give a precise number.

Ms Donegan: We have 13.

The Convener: How does that compare to the past year?

Ms Donegan: The number of 16 to 18-year-olds has been rising. When Dr Loucks conducted her research, she expected to find perhaps 12 to 14. In fact, during the period that she was examining, the number of 16 to 18-year-olds in prison establishments was 28—many more than expected. We have 13, which is very high. To date, 11 are convicted and two are untried.

The Convener: So the target to have none by 2000 will not be achieved.

Ms Donegan: No.

The Convener: You have said that the number appears to be rising. Can you say whether any progress is being made, in the longer term, towards a reduction?

Ms Donegan: Unless some alternative is found in the community, I cannot foresee any reduction. The number of young offenders in Cornton Vale has risen significantly since I have been there.

The Convener: I was curious about what progress was being made on that recommendation, which I note was agreed in principle. In practice there are clearly difficulties.

You helpfully gave us the extract statistical data—the sheets of numbers that I have already used in the context of fine default. There is some interesting information right at the end, in what is called “contextual data” on sample prison populations per 100,000 by jurisdiction. I take it that those data represent an averaging out of male and female numbers.

We should be hugely grateful that we are not competing with Russia and the USA, which seem to be level-pegging in jailing as much of their population as possible. However, Scotland has markedly higher levels than many other countries have, although, in 1988, the level was not as high as it was in England and Wales. The figures that you have provided suggest that the number of women in custody has risen during the past 10 years by 31 per cent, whereas the increase among men has been considerably smaller.

Are you aware of what might be described as international best practice? Japan, for example, jails only 42 people per 100,000, so I dare say that the number of women jailed there is considerably smaller. Sweden jails 60 people per 100,000 and France 89. Australia, which people might not consider a hugely different culture from ours, still jails fewer people than Scotland. Do you have an idea of what some of those other countries are doing that we are not doing and could be doing?

15:00

Ms Donegan: I have been to a number of female establishments as a guest inspector. I went back into Holloway with David Ramsbotham after he had walked out following his first inspection. I have also been to Framingham in Massachusetts as a guest inspector. I have visited jails in Canada and have done a lot of research on female establishments in other countries.

Setting aside sentencing policy, I have not found the establishment that demonstrates all-round best practice. Each usually has a pocket of excellence in some area. Framingham’s best feature was its health care; the women were screened through

blood and urine tests for absolutely everything when they went into custody. I thought that that was an example of best practice. I did not find an establishment that did everything that would constitute best practice. However, I shall tell my director that you were interested and he might fund my globetrotting to examine other jurisdictions. There is excellence all over. My vision for Cornton Vale is that it could become a centre of excellence. The top slot for a female establishment has not been filled by any establishment that I can find.

The Convener: The overall prison population figures for Sweden and France are considerably lower than they are for Scotland. You may not know the answer to this question, but are those figures lower because there is provision for alternatives? Why can those countries get away with jailing far fewer people when, I suspect, they are no more law abiding?

Ms Donegan: Those countries have different methods of dealing with people who offend. There are weekend prisons and other options that serve to make the prison population at any time seem less than it really is. However, I am afraid that I do not have the detailed information that would fully answer your question.

The Convener: That is okay; I just hoped that you might have some idea.

Before I ask my final question, I want to ask about induction for prisoners. Clive Fairweather’s report commended Inverness and one other prison for induction and the effect that he thought that it was beginning to have on the atmosphere and on people’s ability to cope. However, his report did not mention induction at Cornton Vale; information on induction concentrated on the male intake rather than on the female intake. Although you have said that it takes about half a day to get the women into prison, the suggested induction procedures take time and allow people to understand what they can expect. What is Cornton Vale doing along such lines for women?

Ms Donegan: Very much the same as everyone else. Induction procedures are fairly sophisticated and comprehensive—more so for long-term prisoners because there is more time to go through the process, instead of simply telling the prisoner, “Today you do the induction; tomorrow you will do something else.” Induction happens over a number of days for a variety of reasons, not the least of which—as Clive Fairweather pointed out in his previous report—is that women can take the induction on the first day and not remember it at the end of the week. That is linked to their feeling poorly and lacking concentration.

In Cornton Vale, we have individual care folders. If a woman comes back to the prison for a second

or third time, we can take her folder off the shelf and start where we left off the previous time.

The Convener: Is not the ability to track individuals through the system a relatively new development?

Ms Donegan: It has never been difficult for us to do that as women always come back to Cornton Vale. Part of our induction procedure is to pick up where we left off, if appropriate, and to build on that. You asked what we could do with short termers. We have devised some short modular programmes that a woman can pick up again if she comes back into prison. However, induction is quite comprehensive, and I am pleased that part of the process works very well. For example, remand prisoners are interviewed by a social worker within one working day. A variety of inputs, such as social workers, the chaplain and the uniformed staff, endeavour to ensure that we pick up all the issues that the prisoners might have.

The Convener: Thanks. You might feel that you have already dealt with my final question in your response to Christine Grahame. When you mentioned centres of excellence, you said that the top slot has not yet been taken and that, ideally, you would like to put Cornton Vale in that position. If you had a magic wand, what would you do to make Cornton Vale an international centre of excellence?

Ms Donegan: I would make sure that all the initiatives that have been introduced had reached their full potential to allow the whole machine to swing into action and to be flexible enough to deal with each individual's needs. Furthermore, our assessment tools would all be present and evaluated. The programmes that we offer prisoners would all be accredited. We would not have simply a range of cosmetic interventions; they would be proven to have an effect on criminogenic behaviour and on women's needs. We would also have incredibly robust throughcare links so that we had strong links with the community and managed the whole very successfully. We do not have so many women offenders in Scotland that it is impossible to do that in a systematic and methodical way. Finally, as with IIP, we should get recognition from external professionals that what we are doing is effective and of very high quality. Then, I will be happy—or retired.

It is a process, a journey, a continuous effort to improve what we are doing and never to be satisfied with anything that we have done. Although some of our initiatives work quite well, we constantly revisit what we have done and what we are doing to make sure that nothing has lost its focus. The population's needs are changing all the time. From my experience, the population is more needy now than three years ago, and then I did

not think that the situation could get much worse.

The Convener: If there are no more questions, I thank you on behalf of the committee for agreeing to speak to us. As it is almost certain that the committee will want to visit Cornton Vale when we can fit it into our schedule—which is not always very easy to do—we will probably get back in touch with you about that.

Freedom of Information

The Convener: I thank Alan Miller for joining us. *[Interruption.]* We can deduce that the press is less interested in freedom of information than we thought it would be.

This part of the meeting is the committee's attempt to find time to deal with freedom of information while the consultation process is still going on. Given the committee's work load, it has been difficult to give the issue extensive time, but we agreed to make some inquiries. After your visit, Professor Miller, and once we have decided what line we will take, we will make a brief submission by letter to the consultation process. You will be aware of the line of questioning that we pursued when we took evidence from the Scottish Executive team and from Mr David Goldberg, with whom, I am sure, you are well acquainted.

Perhaps you could make a short opening statement about the Executive paper, highlighting the good and bad points.

Professor Alan Miller (Scottish Human Rights Centre): I know that it is customary to say that it is a pleasure to be invited to speak to any meeting, but I can genuinely say that this is a pleasure. I was a bit player in the consultative steering group process and was a strong advocate of a powerful committee system, so I am glad to provide any assistance I can.

I do not want to revisit the topics that I know you have considered. There has been a broad welcome for the Scottish Executive's proposals on freedom of information. That is justifiable and I do not want to waste time going over ground that you have covered. I want to provide something new to your consideration and give a perspective on what the relationship might be between a freedom of information regime and the European convention on human rights, given that that convention provides the framework in which law in Scotland is made and applied.

There are three areas on which I wish to advise the committee. The first is the potential interface between freedom of information proposals and certain rights in the ECHR. Secondly, I want to relate the convention to some points that have concerned the committee, such as exemptions, ministerial veto, public authorities and interests, and the distinction between Holyrood and Westminster. Thirdly, I will examine monitoring.

It would be wrong to think that the convention has little to say on the potential interface between a freedom of information regime and the convention, although at first glance that may seem to be the case. I refer the committee to two rights in the convention that will impact significantly on any freedom of information regime. Article 8 is the

right to respect for privacy of individual and family life, home and correspondence.

The article is interesting because, first, it is unique in placing on the state a positive obligation; the state is obliged to protect privacy. Secondly, recent case law from Strasbourg has shown that this right is the most dynamic as it is being used successfully in environmental law and in the protection of the environmental rights of individuals.

Therefore, when public authorities come to consider freedom of information, they will have to take into account their obligations under the European convention. For example, if a member of the public wants information about the risk of radiation from Dounreay, which is a reserved matter, but still an issue, or about the risk of radiation from mobile phone transmitters around schools or neighbourhoods, which is a devolved matter, because it is the responsibility of the local authority, my view is that, under article 8, that member of the public is entitled to be given that information. Some cases from Strasbourg would support that view.

Another example of entitlement to information would be that of a victim who seeks an explanation of why a particular prosecution has not taken place, or of why a particular anti-social behaviour order has not been imposed by a local authority. There is a potential, through the convention, for information to be obtained.

Article 6 refers to the right to a fair and public hearing or trial. The accused in a criminal case is entitled to information from the prosecution that would be material to the defence. In other types of proceedings, a constituent may want to challenge a public authority in court and may need access to medical information or records. In the McGinlay case, McGinlay wanted to find out what his risk had been of being exposed to radiation as a result of his service in the British Army. His right to obtain that information was recognised by the Strasbourg court.

Equally, before a pension tribunal or a social security tribunal, access to medical information would be obtainable through the convention.

The other important contribution that the convention will make to freedom of information is the test for whether something should be disclosed. That test will be one of proportionality. Proportionality may be defined as being whether there is a reasonable relationship between a justified aim of not disclosing information and the means employed by the state to achieve that aim.

Using the test, it would be asked whether there had been an alternative, or whether a compromise could have been reached by the public authority in providing some information, as opposed to none.

Strasbourg has defined proportionality by saying that the state can withhold information only if doing so is necessary in a democratic society and if there is a pressing social need for it to be withheld. In the absence of that, no matter what any freedom of information act may say, the state could be found wanting under the convention and could be required to hand over the information.

I know that some concerns have been expressed to or within the committee about a number of the aspects of the proposals. The first of those concerns is about class-based exemptions. It would not really matter whether something was class based or content based, because where a right under the European convention is at issue—I have given some examples of that—the test of proportionality, not whether the case was class based or content based, will be decisive. For a court to determine whether the state has got a decision right in terms of proportionality, it will have to consider the facts, circumstances and merits of each case.

The second concern was about the ministerial veto. The same argument applies. The ministerial veto must also be subject to the test of proportionality and the facts of the case and the justification given for the ministerial veto will be subject to challenge. For example, it will be asked whether there was not some alternative information that could have been made available.

What is the public interest? The European convention has not given a definition of that, other than the test of proportionality. In my view, that is the test that the courts will come to use when rights under the convention are being argued.

What is a public authority? When rights under the convention are being argued to obtain information, there is no doubt that the Scottish Parliament will be a public body; whether it seeks to opt in or out would be irrelevant. A range of other bodies—including privatised utilities and quangos—would also be public authorities from the point of view of the human rights act.

A distinction must be made between Holyrood and Westminster. There will be two different acts and two different regimes, and there will be distinctions between the two pieces of legislation. If information is disproportionately withheld by a public authority, in line with the UK freedom of information act the citizen will be able ask the court to consider that that is incompatible with the convention and, if need be, an appeal can be made to Strasbourg.

In Scotland, the situation will be different. If the Scottish freedom of information act is used by a public authority to prevent the disclosure of information and the applicant can successfully use convention rights to convince the court that the

state was wrong in not disclosing information, the court will be able to disapply what the public authority in Scotland has done, and can give a remedy, there and then, to the member of the public.

Finally, on monitoring, compatibility with the ECHR is becoming an increasingly relevant issue. Stage 1 would be to determine whether the draft bill is compatible. My suspicion is that it would be. Stage 2, however, is what really matters—the application of the freedom of information bill to examine how it is applied in real cases. That is where compatibility with the ECHR begins to be tested.

At the third stage, there must be some system of monitoring how the freedom of information regime is implemented. There have been suggestions that that should come within the remit of this committee, although I suspect that that would not be welcomed—and I understand why. A debate took place in the Parliament last week on the merits of a human rights commission. It strikes me that a human rights commission could be expected to play a role in monitoring the way in which a freedom of information regime was being used.

The Convener: Thank you, Alan. Yes, we were a bit alarmed last Thursday morning when some back-bench MSPs seemed to think that this committee could take on the role of a human rights commission as well as the rest of its work. That idea betrays a lack of understanding of what is required.

Gordon Jackson: Was that suggested on Thursday?

The Convener: Yes, that suggestion was made on Thursday morning and it was greeted with shock by most members of the committee.

I would like to begin by clarifying some of what you said right at the beginning of your speech, about the articles of the ECHR that impinge directly on freedom of information. You talked about article 8, the right to privacy. I made a joke on Thursday morning about it now almost being necessary for us to walk around with copies of the ECHR in our pockets. Although I think that that should be made compulsory, I have omitted to bring mine today.

I do not have in my head the wording of article 8, but from what you said, the right to privacy seems to be construed as a right to disclosure. When you began to speak, I wondered whether that was a point at which freedom of information and the ECHR were going to clash. Notwithstanding what is understood as freedom of information, the ECHR could stop that if somebody else claimed that it was breaching their privacy. You seem to be saying that article 8 implies a right to disclosure as

well. Is that what you are saying?

Professor Miller: Yes. Article 8 confers a particularly dynamic right under the convention. It has been open to modern interpretation: it provides for the individual and the family to enjoy their life, home and possessions, and any interference with the enjoyment of those could lead to a breach of that right of privacy.

In the disclosure of information, that could mean a variety of things. It could mean the right to get information about whether the family or house is subject to environmental contamination and whether the state has failed in its obligations to protect them. It could mean the right to have access to information that a children's panel is using to decide a child's situation. Similarly, if a victim is subject to an assault or some interference in the enjoyment of his or her family life and home and the state does not provide a remedy, there is an entitlement to get at least an explanation from the state of why no remedy has been provided.

The Convener: A number of committee members would be interested if you could elaborate on the issue of information from the Crown Office, because at the moment that is one of the exemptions. Is it your understanding that that exemption would be challengeable under the European convention on human rights? Do you think that the current lack of disclosure on why cases are not proceeded with is challengeable?

Professor Miller: The Lord Advocate is a minister and a member of the Scottish Executive. As such, he must act in a manner that is compatible with the convention. Under article 8, an individual who is the victim of some crime or interference with their rights and privacy is entitled to a remedy. If the state fails to provide that, the victim is entitled to an explanation. The Lord Advocate could be judicially reviewed on, for example, the decision not to prosecute in a particular case.

Although the Lord Advocate could be judicially reviewed, he might himself use arguments from the convention to explain why disclosure could not be made. He could, for example, refer to the presumption of innocence or the need to respect the privacy of others, such as witnesses or potential accused.

There is a new framework within which challenges can be made that the Crown Office has never had to face before. One suspects that the Crown Office is, therefore, thinking about providing at least some additional information to what has historically been given. However, at the end of the day the Crown might be able to use other, perfectly proper, arguments in court for why it did not have to disclose information.

The Convener: Are you aware of jurisdictions in

which more information is given?

Professor Miller: Experience elsewhere would lead us to expect that the Crown might, voluntarily, become more forthcoming, as it would not want to be judicially reviewed time and time again.

The Convener: So the answer is yes—there probably are freer systems.

Gordon Jackson: I am not as up to speed on this as I would like to be and I have a suspicion that other members of the committee may feel the same. This is a very tricky and technical area. If I ask silly questions, please bear with me.

One would think that an attempt would be made to make any freedom of information act compatible with the ECHR. Are you suggesting that the ECHR would force these provisions to be made anyway? Are you saying that we might as well codify freedom of information because the ECHR has made it inevitable?

Professor Miller: You are moving in the right direction. The state can be required to act compatibly with the convention where there is a convention right at stake. That is why I have identified the right to privacy as an important potential way of obtaining information. The same applies to the right to a fair hearing or a fair trial. When information can be obtained via those convention rights, a freedom of information act may not be relevant, necessary or the only way. However, there may be other bits of information that fall outwith convention rights, to obtain which one would require the buttress of a freedom of information regime.

Gordon Jackson: But a change in culture towards freedom of information is being to some extent forced on us by the ECHR, whether or not we have an act.

Professor Miller: That is correct.

Gordon Jackson: I have read that we will have ministerial exemption certificates. In the past, we had public interest immunity certificates—the things that Heseltine and Rifkind may or may not have signed. My only experience of those was when I once went to the English Court of Appeal during the arms to Iran affair. Is that the same sort of thing, with the same standard and tests, but reformulated?

Professor Miller: The European convention on human rights may act as a driving force towards a culture of freedom of information. The convention does not favour generalised immunities, privileges and exclusions—it deals with the facts and circumstances of each case and whether the test of proportionality has been met. Many conventions—written or unwritten—will have to be revisited.

Gordon Jackson: After the arms to Iraq scandal, the theory that ministers could sign something—a public interest immunity certificate—and put it on the table, without questions being asked, disappeared. After that, the courts began to consider what lay behind public interest immunity certificates. Will the ministerial exemption be similar to the development of the immunity certificate, with the courts looking at what lies behind them?

Professor Miller: Yes. Public authorities, including the Executive, will be subject to the convention and therefore open to scrutiny and challenge. In the Osmond case, which was very well known—

Gordon Jackson: It is so well known that even we have heard of it.

15:30

Professor Miller: Previously, local authorities, social work services and the police had immunity from paying damages if, from negligence, they had failed to protect the rights of an individual. The Strasbourg court found that that did not stand up. If the police or the local authority have failed to protect the privacy rights of an individual—removed a child from care when they should not have done, or should have removed a child from a family and did not—the merits of the case can be opened up for scrutiny, the local authority can be held to account and damages can be awarded to the victim. That is part and parcel of increased accountability in public authorities, including the Executive.

Gordon Jackson: I think that I know the difference between class-based and content-based exemptions. Are you saying that, in practical terms, class-based exemptions will disappear? That was always much more developed in England. You have said that it is no longer a relevant distinction—that we must consider individual cases and that classes no longer matter.

Professor Miller: Class will not be a decisive factor. It can be triggered only when a convention right has been breached, such as the right to privacy or a fair hearing. If one can argue that people are entitled to the information, there will be a test of proportionality. The convention test is what will count, rather than whether an exemption is content based or class based.

Gordon Jackson: Most of us understand your perspective and the interests that you represent, but I want to ask whether you feel confident about the new freedom of information bill.

Professor Miller: I became more optimistic—more than I had been—when, on the day the

consultation paper was issued, I was invited to a pre-publication, confidential briefing. That made me think that something was changing.

The proposals are positive and compare well with those south of the border. The Executive has taken on many important points, such as a higher threshold in the test and the information commissioner, so it can be proud of what it has done. We want to see that being implemented. South of the border, as the bill passed through Parliament, some good intentions began to wither on the vine.

Gordon Jackson: Are you reasonably optimistic?

Professor Miller: Yes.

The Convener: There is already a healthy interest from south of the border because it looks as though the Scottish bill will be better than Westminster's. I have had some correspondence on those lines.

Christine Grahame: I sometimes feel that I am in a constitutional law class again—I have a headache coming on, like I used to get. I want to get my head round this.

I want to illustrate what you have been saying, and I allude to article 8 of the ECHR. If someone in Scotland wanted to inquire about environmental matters relating to the bombardment range at Cape Wrath or about low flying, and they were denied that information because those matters were defined as reserved under the proposed Scottish freedom of information legislation, they could invoke ECHR. The person could take the matter to a Scottish court and get a decision there and then.

Professor Miller: No.

Christine Grahame: So the case would have to be taken to the UK courts? Would the person have to go to Strasbourg because those matters had been defined as reserved?

Professor Miller: Yes.

Christine Grahame: Could one challenge the definition of those matters as reserved?

Professor Miller: The case that you suggest concerns a reserved power and would be dealt with by Westminster legislation; the Ministry of Defence and its decision would have to be challenged. If the person were unsuccessful in a UK court such as the Court of Session, they would have to go to Strasbourg eventually.

If someone had concerns about radiation, which pertained to a devolved body such as a local authority, they could obtain a remedy in a Scottish court.

Christine Grahame: Could the person take such a matter to court, even if the authority from which the person was endeavouring to get information said that it could not supply that information because it pertained to a reserved matter? Could they challenge the authority by raising the matter as an environmental issue and therefore not a reserved one?

Professor Miller: Yes, like the case of mobile phone transmitters. That is a good example, because planning and so on are local authorities' responsibility.

Christine Grahame: I raised that because I have had difficulties with written questions along those lines.

The impact of ECHR is also important in civil cases. Children's evidence may be taken in camera and the parents—or usually just one parent—does not know, and never finds out, what the child said. Could the parent get more information by invoking ECHR? I think that an attempt has been made to challenge the current arrangements.

Professor Miller: There was a Scottish case involving someone called McMichael. The children's panel was found to be in breach of the convention because it was taking into account information that had not been made available to the parent. The children's panel procedure had to be changed and parents now have access to all information that the panel uses in making its decision.

Christine Grahame: I want to return to my point that whether particular information falls under the proposed freedom of information legislation in Scotland rests not with whether the matter is devolved or reserved, but with who holds the information. Do you agree with that? When information on a devolved matter is concerned, should not there be a reciprocal arrangement between UK and Scottish legislation such that the Scottish freedom of information legislation would apply?

Professor Miller: I can see arguments on both sides. Such situations may be an inevitable outcome of a devolved constitutional arrangement, under which sovereignty remains at Westminster and there is a demarcation between reserved and devolved matters.

The attraction of the proposed system is that there is a single regime, of which each public authority is aware. Clearly, Westminster and Whitehall would not wish information to come out the back door from Scotland. On the other hand, it might appear illogical that people cannot get information about a matter that affects Scotland and that is implemented by a Scottish body. That will be one of a number of anomalies which we will

live with under a devolutionary constitutional arrangement.

Christine Grahame: You said that, through a ruling in Strasbourg, the police could be found liable—or at least could be taken to court—with regard to damages. On a point that is of interest to me, could the Department of Trade and Industry be taken to court?

Professor Miller: It will become a public authority in October.

Christine Grahame: The DTI could be taken to court?

Professor Miller: Come October, any public authority is under obligation to act compatibly with the ECHR, and could be taken to court by any victim claiming a breach.

Christine Grahame: And for past acts?

Professor Miller: No.

Christine Grahame: That has given me a free bit of advice.

The Convener: Christine obviously had something specific in mind that she was not letting the rest of us in on. [*Laughter.*]

Information about devolved matters that is held by bodies that are not themselves devolved will not be able to be got at. Would such circumstances provide the opportunity for deliberate evasion, with information simply being shifted to take it out of the regime that would apply in Scotland and into a less rigorous regime? Is that a potential danger?

Professor Miller: From the state's point of view, there would be a greater degree of protection under the UK rather than the Scottish regime, because of the difference in threshold and the powers of the commissioner. At the same time, where a convention right is at stake, the standard will be the same whether the public authority is Scottish or UK. There will be a test of proportionality, so there will be no escape if the Human Rights Act 1998 is the means of challenge. However, there would be a greater degree of protection under a freedom of information act at a UK level than there would be at a Scottish level. There may be those who would want to shift information as you suggest.

The Convener: I am thinking of sneaky little statutory instruments that redefine whole chunks of information into a stricter category. If the information is devolved, is it subject to the ECHR?

Professor Miller: Whether the information is devolved, reserved or transferred from devolved to reserved—in other words, kept south of the border—as long as the person can trigger a privacy right, a fair hearing right, or any other

convention right, the test will remain that of proportionality.

The Convener: The point about the incorporation of the ECHR is that it is infinitely easier now to trigger the right in Scotland because there is no need to wait for years and go to Strasbourg. That is why there were not many cases before and now there are suddenly hundreds. If the information is about devolved issues but is being held under the reserved regime, will the incorporated ECHR be triggered in a Scottish court—I am thinking about between now and October—or will the longer-term situation obtain?

Professor Miller: It is post-October. When there is a level playing field north and south of the border and all public authorities, reserved or devolved—

The Convener: That would not touch the Westminster Parliament. What about Westminster departments?

Professor Miller: It will.

The Convener: So Westminster departments will be affected, but not acts of that Parliament?

Professor Miller: Yes.

The Convener: Once 3 October has gone by, it will make no difference.

Professor Miller: That is right.

The Convener: Thank you. I wanted to be clear about that.

Gordon Jackson: They will not be able to hide it down the road.

The Convener: No, they will not. Perhaps I am being paranoid, but I think that that was a reasonable point to raise. In countries that have freedom of information regimes, ways of avoiding freedom of information can become quite sophisticated. We must ensure that there will be no hiding places after 3 October, regardless of the fact that the regimes might appear different at first.

Gordon Jackson: This may be looking into a crystal ball, but it is fair to say that the number of cases that have arisen under the ECHR has taken one or two people by surprise, to put it mildly. *[Laughter.]* Not me, of course. I anticipated it all along.

The Convener: Of course you did. You knew the facts. Donald Dewar did not anticipate it.

Gordon Jackson: None of us anticipated the number of cases. Looking ahead, after 3 October it will no longer be the Crown Office alone that will be affected. The whole workings of everybody and their auntie will be open to review under freedom of information legislation.

The Convener: Lots of work for lawyers.

Gordon Jackson: Is it the case that the freedom of information regime has the potential for a phenomenal explosion in litigation, and people are starting to panic a bit?

15:45

Professor Miller: That could happen. In Canada and Australia, which had similar systems and went through similar experiences, there was a great deal of activity in and around the courts for two or three years, and in Parliament and the local authorities, as the bodies got themselves up to speed. The situation became clearer and everyone settled down again, although things were not as settled as they had been before.

It is healthy that there should be a transitional process, with light being shone where it should have been shone before. That is how things will go in Scotland for the next two or three years.

Gordon Jackson: Things tend to settle down, presumably, because Government departments get to know what they have to do and people learn to operate in the new world.

Professor Miller: That is part of it. The courts' interpretation of various matters also becomes clearer. At the moment, though, there is much uncharted territory.

Michael Matheson: My understanding is that the biggest problem in Canada, which has had freedom of information legislation for 15 years, is changing the culture. I am concerned about whether sufficient groundwork has been done to ensure that the culture of public bodies can be changed. That would prevent the commissioner having to deal with constant challenges and make rulings that bodies should provide the information.

What work could be done to put some changes in place prior to the bill's coming into force?

Will the powers of the freedom of information commissioner be sufficient? What do you think about how the commissioner will be appointed? Will the post be sufficiently accountable to Parliament or to ministers? In the debate on the European convention of human rights last week, we considered to whom the commission would be answerable. I raised the issue of the Paris principles; should those principles apply equally to an information commissioner? How would that work in practice?

Earlier, you mentioned the possibility of the freedom of information commissioner being part of the human rights commission. Do you think that that should happen or would the establishment of a human rights commission make the legislation less effective?

I hope that you will not ask me to repeat all that.

Professor Miller: I will start with the last question, since I have long since forgotten the first.

I think that there should be a separate and independent information commissioner because some areas of information will be beyond the reach of the convention.

There is an argument that the commissioner should be appointed by the Parliament, as the UN says that a human rights commission should be appointed. The Parliament—and not the state—should be accountable. As Michael Matheson said, the culture is critical.

For the past 12 months, I have been giving training and seminars on the ECHR until they are coming out of my ears. Depending on the institution people come from, they tend to filter the information they receive about human rights and freedom of information; they will either have a certain cultural resistance or they will be welcoming.

The critical factor will be how, in time, the information is disseminated. A lot will depend on the impetus that comes from the Scottish Executive. The consultation indicates that the intention exists, but the matter has to go right down to the public authorities, which is where much of the information that your constituents will want exists. There is a real job to be done in local authorities—it is not something that can be left to direction from the Scottish Executive.

At the end of the day, it will be about the extent to which the public is aware of its rights of access to information and the extent to which it exercises those rights and creates a climate of expectation that it will get what it wants or needs. Public authorities have pressure from both sides: from the Executive and from the person on the street. It will take time—you are right that that is the critical factor in all issues such as this.

Pauline McNeill: I apologise for missing a bit of the evidence—I had to sort out my car, which broke down on the way here.

My point follows on from something Michael Matheson has raised twice and concerns the idea of a change in culture. I apologise if this has already been covered, Alan. I come quite new to this concept—it is not something in which I have taken a strong interest in the past, although I suspect that I will do in future. Any discussion on this issue has been about legal technicalities and ECHR—we can all follow it now because we have been so involved in it. It is our life at the moment.

Michael's point is entirely relevant. At some point we must begin to convey what this is really all about. For me, what it is really all about is, for

example, that ordinary people should be able to ask why their health board offers one kind of in vitro fertilisation treatment and not another. They should get an answer—one that they can understand—within a couple of weeks.

It is important for us to understand all the technicalities because we are going to be legislating on this. Do you think that the people who will ultimately be handling the new legislation when it becomes an act should be asked to drive home a simpler message about the importance of this issue? I fear that it will get lost.

Professor Miller: As a practising lawyer in Glasgow, day after day I am asked in the common room what all this will mean. In Glasgow, unless you have a one line answer, no one has the patience to listen to the end of your explanation. The issue is about an increase in the public accountability of public authorities. That is the bottom line in all of these technical debates. It is about improving the quality of public life in Scotland. We are beginning to see that improvement, although it is not widely understood that that is what is happening. In two or three years' time, when we look back at the key decisions that are being made, that will be the common thread through them all.

The Convener: Are there any other questions?

Maureen Macmillan: A lot of work will fall on administrative staff in local authorities and health boards, for example. When we consider how it will all work, we have to consider the resource implications as well.

The Convener: Thank you for coming to speak to us, Alan.

We will make a brief submission to the consultation process, on the basis of what we have heard. We will outline some of the issues that we have identified as being of concern, such as changing the culture of organisations. Things are at a very early stage because this is just the consultation on the document.

We do not know precisely when the bill will be introduced, although we expect it in the year beginning September. It will then be referred to us for stage 1. It is highly likely that you will be before us again then to go through the principles of the bill.

Before I let you go, I will ask a question relating to the European convention that has arisen from our consideration of the prisons issue—we will discuss our draft report on prisons in private next. An issue that was raised last week was the potential to invoke ECHR on such matters as stopping out by prisoners, and in particular by prisoners on remand. I am advised that the report on that will not be published until 23 March, so we

have nothing more to go on than what journalists say. Do you have a view about the susceptibility of the practice of stopping out to challenge under ECHR?

Professor Miller: I have long held the view that this area is susceptible to challenge. In 1997, I gave evidence to the United Nations Human Rights Committee in Geneva on the International Covenant on Civil and Political Rights. When I raised the matter of overcrowding and stopping out in Scottish prisons, it was the only time in that session that the interpreter stopped; there was consternation because there was no equivalent to “stopping out” in German, French or any other language.

A challenge to stopping out could undoubtedly be made under ECHR and it is possible that it would be successful. The early ECHR cases on prison conditions were brought in the '70s and '80s. There is no doubt that the convention is a living instrument and the threshold of what is acceptable in prisons changes as the years go by.

A significant factor that Strasbourg might now take into account in considering a case—no stopping out case has ever gone to Strasbourg—is the recommendation, made by the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment which visited British prisons between 1990 and 1994, that stopping out is inhumane and degrading treatment.

That recommendation is not binding on the European Court of Human Rights in Strasbourg, but the court would certainly pay attention to it. It is possible that if there were other factors, such as overcrowding, lack of exercise and association, the package might amount to degrading treatment. Whatever the judgment of the European Court of Human Rights, it would be extremely embarrassing internationally to be taken to Strasbourg on that issue.

The Convener: Such a challenge would be made under article 3, the short title of which is “Prohibition of torture”, but the full text of which is:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Gordon Jackson: I am not in favour of the practice of stopping out and understand that it could be challenged. The problem is that although we look at our system and see the deficits, every country has a bit of the bad. I visited Saughton prison recently with some German lawyers, who were fascinated by the fact that we keep our sex offenders apart from other prisoners. They put them in with the rest and allow them to get beaten up. It is as crude as that. What will Europe do: take the worst of everybody—

16:00

Professor Miller: No. The Strasbourg court does not consider the system as a whole; it considers the facts and circumstances of each case that comes before it. If it is a bad case, and an indefensible point, it will find that. It will not say, “Well, it’s swings and roundabouts. There are other good things, so we will not bother about this bad thing.” It will deal with the hard case that comes before it, rather than the general policy.

The Convener: So Scotland will not get credit for the 110-day rule? It will not get a balance in credit for the fact that people can be on remand for only a limited time?

Professor Miller: The relevant point is that the UK state would argue—if it was taken to Strasbourg over the issue of remand prisoners in Scotland stopping out—that remand prisoners are in prison for only a very short time in Scotland. The effect of stopping out may not necessarily debase them, as they might do it for only 20 to 30 days, or three months at most. The Strasbourg court would pay attention to that argument, although the defence may not be successful.

The Convener: Thank you very much, Alan. As I said, in one guise or another, we will probably hear from you quite often over the years.

Professor Miller: Thanks very much.

The Convener: Gordon Jackson is indicating that a brief adjournment might be advisable as we move into private session. All those who are not internal to the committee are required to leave. Some members of the public have been present, and I extend a welcome to them although they must now leave. We will take five minutes, which will allow the team to switch off and pack up.

16:01

Meeting continued in private until 17:00.

Members who would like a printed copy of the Official Report to be forwarded to them should give notice at the Document Supply Centre.

Members who would like a copy of the bound volume should also give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the bound volume should mark them clearly in the daily edition, and send it to the Official Report, Parliamentary Headquarters, George IV Bridge, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Tuesday 14 March 2000

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5

Annual subscriptions: £640

BOUND VOLUMES OF DEBATES are issued periodically during the session.

Single copies: £70

Standing orders will be accepted at the Document Supply Centre.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £2.50

Special issue price: £5

Annual subscriptions: £82.50

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £2.50

Annual subscriptions: £80

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0131 228 4181 Fax 0131 622 7017

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 0171 242 6393 Fax 0171 242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 01232 238451 Fax 01232 235401
The Stationery Office Oriol Bookshop,
18-19 High Street, Cardiff CF1 2BZ
Tel 01222 395548 Fax 01222 384347

The Stationery Office Scottish Parliament Documentation
Helpline may be able to assist with additional information
on publications of or about the Scottish Parliament,
their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers