JUSTICE AND HOME AFFAIRS COMMITTEE

Tuesday 2 May 2000
(*Morning*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
16th 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 MEMBER ALSO ATTENDED:

Cathie Craigie (Cumbernauld and Kilsyth) (Lab)

WITNESSES

Gerard Brown (Law Society of Scotland)
Michael Clancy (Law Society of Scotland)
Martin McAllister (Law Society of Scotland)
Professor Frank Stephen (University of Strathclyde)

CLERK TEAM LEADER

Andrew Mylne

SENIOR ASSISTANT CLERK

Shelagh McKinlay

ASSISTANT CLERK

Fiona Groves

LOCATION

The Hub

Scottish Parliament

Justice and Home Affairs Committee

Tuesday 2 May 2000

(*Morning*)

[THE CONVENER *opened the meeting at 10:03*]

The Convener (Roseanna Cunningham): Good morning, everyone. Hello Gerry; hello Michael.

I have received apologies from Euan Robson, who phoned this morning to say that he is unable to be here. I am wondering whether Donald Gorrie will turn up today. The Local Government Committee has been keeping a watching brief on the budget scrutiny being carried out by other committees, so he may pop in again today.

I ask members of the committee whether they have received in their postbag this morning a letter from Eileen McBride, who is one of the petitioners. Has everybody received that?

Members: No.

The Convener: Do we have enough copies for people to share, when the time comes to discuss it?

Members: No.

The Convener: If anybody has had an e-mail from Eileen McBride, the text of the e-mail is the same as the letter. There are probably enough to go around, then, without having to make photocopies.

It is unfortunate for us, but it may be fortunate for her, that Shelagh McKinlay, who has recently joined us, will be leaving the clerking team. It is nothing too exciting. She is to be the acting Clerk Team Leader to the Transport and the Environment Committee. Shelagh may regard that as a bit of a holiday after this. We do not yet have a replacement for Shelagh. We will have one soon, but we do not know who that will be.

Budget Process

The Convener: The first item is our continuation of the budget scrutiny for the 2001-02 budget. In today's session we will hear evidence from the Law Society of Scotland, and from its legal aid committee, on the Executive's expenditure proposals and on the situation it faces in respect of what is coming up.

We have here also today Professor Frank Stephen, who has done some detailed research on the effect of the summary procedure on the legal aid bill. There is a pamphlet before everybody, which some of you received only this morning, so I appreciate that you will not have had time to read it. However, I have read it, and maybe one or two others will also have done so.

The aim is to consider general issues. The total sum that is available to the Executive is fixed, so what we are talking about is whether the share of the total allocated to justice and to the Crown Office is about right and whether, within the justice/Crown Office budget, the distribution among the key heads of expenditure is about right.

We have had no responses yet to our initial investigation last week. Members will remember that we asked for a number of specific figures to be given to us, including the specific amounts of end-year flexibility contained within each of the headings in table 5.24, on expenditure expressed in real terms. We asked what the actual figures for the end-year flexibility were, and for the previous years' figures for planned expenditure. Those figures have not come forward yet, so we are still working off the aggregated figures that are contained here.

The Scottish Legal Aid Board is attending separately next week, to answer more detailed questions in respect of the budget. The minister will also be attending next week.

Would you like to say a few words, Gerry? Mr McAllister?

Martin McAllister (Law Society of Scotland): Many of you will know some of the people behind the table here. I am the vice-president elect of the Law Society of Scotland. To my right is Gerry Brown, who convenes the legal aid committee. To his right is Michael Clancy, director of law reform and an employee of the society. Convener, you have already introduced Professor Frank Stephen, who is not on a retainer by the society but who has produced research that was commissioned by it. That is the book to which you referred.

I wish to thank the committee for inviting us along today. We are anxious to be as helpful as possible. If any issues are raised today that we

cannot answer, we will tell you that. We are happy to follow up in writing, after we have done some research.

The Convener: Thank you. We have received various papers, although I do not know whether you have seen copies of them. I think that a copy of the one from the Crown Office has been forwarded to you.

Martin McAllister: Yes.

The Convener: So you will be aware of the detail of what it is suggesting. Chapter 5 of "Investing in You", the annual expenditure report of the Scottish Executive, is the chapter to which we are directing our concern, for obvious reasons.

I now invite questions and comments from committee members. It sometimes takes a little while for members to get to grips with an issue.

Maureen Macmillan (Highlands and Islands) (Lab): Perhaps I should declare an interest, in that my husband is a member of the Law Society of Scotland. Michael Clancy and I have talked quite a lot about civil legal aid, particularly for victims of domestic or other violence, but I have not been terribly successful in getting information on that disaggregated from the legal aid statistics.

I am interested in finding out why people turn down the offer of legal aid. Is it because the rules are too strict and they find that they cannot afford it? I feel that that is a hole in the budget that ought to be plugged. Last week, we found out that there seemed to be a £9 million underspend in the legal aid budget because of things such as fixed fees. [*Interruption.*] The microphone is not working.

The Convener: You were not being heard, Maureen, and now you are whistling.

Maureen Macmillan: I shall start again.

I am talking about people who cannot afford to access legal aid because the rules are too strict. Those people may receive working families tax credit and be unable to access civil legal aid. What annoys me is that the Legal Aid Board seems unable to disaggregate its statistics, although I have tried to find out why people do not access legal aid. However, I am not sure whether that issue is relevant to today's discussion

The Convener: We can ask for the Law Society's view on the matter, as it represents the people who probably have more anecdotal information than anybody else in Scotland. Other members may be able to pick up on issues that relate to civil legal aid.

Martin McAllister: The issues that have been identified by Mrs Macmillan are ones that we would also identify. The tightening of eligibility for legal aid, which occurred in 1993, impacted more directly on women and children than on any other sector of the community. The representations that we made at that time to the Scottish Affairs Committee made that point. It might be useful for me to sketch out the issue of eligibility in detail, as that will address the point.

Legal advice and assistance, and civil legal aid in its present form, came into being at the beginning of the 1970s. Prior to that, legal aid was provided on an ad hoc basis. The present system allows anyone whose net weekly income is less than £180 to apply for cover under a legal advice and assistance scheme. Initial interviews and work thereafter in the office are carried out by a solicitor. Account can be taken of the fact that an applicant is married, living with someone or supporting children, and various levels of contribution are payable for bandings between £76 and £180. Completely free legal advice and assistance is provided for those whose weekly income is £76 or less; for those whose income is greater, there is banding up to £180. Anyone who is in receipt of income support or working families tax credit is entitled to legal advice and assistance with a nil contribution.

A different system with different criteria is applied to the assessment of eligibility for legal aid: a merits test is carried out in addition to a means test. The Legal Aid Board has to be convinced that there is a probable cause in the action. Anyone with a net income of less than £2,723 per annum qualifies for legal aid with no contribution. Contributions are payable by those with an income of up to £8,891 a year, which means that someone with an income of £8,891 will receive legal aid, but will have to pay a contribution. Deductions can be made for spouses, partners, children and so on.

Unlike the case for advice and assistance, contributions between those income thresholds for legal aid can be very high—I think that that was what Mrs Macmillan was referring to—which can discourage applicants who are not so well off. Professor Frank Stephen has carried out an initial examination of the figures, and it appears that the non-take-up of legal aid had doubled over the past decade. The present system of legal aid has been in existence for around 30 years, during which time the levels of contribution have altered. However, the criteria for legal advice and assistance and civil legal aid have remained unchanged.

Fees that are chargeable for legal advice and assistance and civil legal aid are different. There has been a small up-rating in the fees for the civil legal aid scheme over the past eight or nine years. We think that the system requires careful review, especially in the light of the concerns that Mrs Macmillan has expressed. Perhaps Gerry could provide an example of one problem situation.

10:15

Gerard Brown (Law Society of Scotland): Yes. Many examples were available when we last commented on this matter to the Scottish Affairs Committee at Westminster in 1993. One example is of a lady whose husband is seeking access to their two children, who are aged 11 and 13. She works part time at a local dry cleaners and has a net income of between £250 and £300 a month, depending on overtime. Because of the lack of staff, she sometimes gets more overtime than normal. In addition to her wage, she receives child benefit of £24 a week, together with working families tax credit of £85 a week. She therefore has about £200 a week with which to look after herself and the two children as well as pay all the normal household expenses.

She has been taken to court by her husband, who wants access to the two children, although the children do not want to see him. She must defend the action—she has no alternative—and requires legal representation. She applied for civil legal aid, and her income was assessed as eligible for such aid; however, her contribution was assessed at £1,063 payable over 10 months with an initial contribution of £106.30. Even allowing for my failure of O-level arithmetic, I can work out that the remaining balance is nine monthly payments of £106.30.

The woman's solicitor wrote to the Legal Aid Board. This is not a problem for the Legal Aid Board, because it has to comply with the eligibility assessments that are set down by regulation. The contribution levels are also determined by regulation. The woman asked to be allowed to pay the contribution over a longer period than 10 months. That was refused as unreasonable. Now, if she does not make the first payment, she will not be granted a legal aid certificate. I understand that the board is concerned about that, and there is currently a pilot scheme to allow contributions to be paid over a period of 20 months.

The case highlights two issues: the level of contribution that is being sought from people of low incomes, and the period over which payment is made. Both are set by regulation, and every year the Law Society raises these issues in its comments on the regulations. Concerns were expressed some years ago at the Scottish Affairs Select Committee about civil legal aid. The memorandum by the then Secretary of State for Scotland forecast that the number of grants of civil legal aid was set to rise from 23,027 in 1991-92 to just over 29,000 in 1995-96. According to the previous report by the Scottish Legal Aid Board for 1989-99, in 1997-98 the number of grants stood at 17,405, which is a big reduction on the anticipated forecast. Last year, unfortunately, there were only 15,661 grants.

The number of applications is also decreasing. It is very difficult to extrapolate anything from that, other than to say that it is perceived in the profession that fewer people are willing to make applications for civil legal aid unless applications are being granted, because of the regulatory framework that is currently in place. The forecasts would seem to have been very optimistic.

Christine Grahame: I should declare an interest, in that I am a member of the Law Society. This time last year I was a practising civil lawyer, dealing mostly with legal aid cases. I could ask you hundreds of questions, but I will restrict myself to two or three.

First, you say that applications are falling. Is that in part the result of solicitors no longer being prepared to do legal aid work? If that is the case, why is that?

Secondly, do you think that the test of probabilis causa is more stringent as exercised by the board?

The Convener: If you are going to use Latin phrases, you must explain them to those members of the committee who are not conversant with legal phraseology.

Christine Grahame: The test of probabilis causa is the test of whether there is the prospect of a case running. It involves people being asked to provide statements in corroboration. Is that test becoming more onerous?

Thirdly, people can make an old-fashioned emergency application called an SU2 or SU4, but there is a gap between their doing that and full legal aid being granted during which they cannot do anything, because they will not be paid. What is being done about that? Life goes on for people who are in litigation.

Fourthly, do you think that there is room, subject to the European convention on human rights, for special rules for special kinds of actions such as domestic violence actions and fatal accident inquiries? I note that on page 19 of Professor Stephen's booklet he identifies the major source of civil legal aid increases as the cost of family and matrimonial actions, which amount to 10.9 per cent of increases. That will not necessarily be a financial figure, because matrimonial actions often include recruitment. Are you considering alternatives that would cut costs, particularly in matrimonial and family actions, where it may be possible to explore other methods of litigation?

Finally, what is the relationship between your committee and the Scottish Legal Aid Board, particularly with regard to what it calls policies? How are those policy decisions arrived at? I will leave the other issues to my colleagues.

The Convener: Questions to our witnesses today, with the possible exception of Professor Stephen, do not have to be confined to legal aid. I appreciate that legal aid is a big issue, but the Law Society may, and probably does, have a view on a range of issues in the justice system. Members should not feel constrained by the fact that the first questions were about legal aid.

Christine Grahame: I could not miss the opportunity, convener.

Martin McAllister: We were asked first whether there was any evidence of solicitors no longer being prepared to do civil work. We often hear anecdotal evidence that so-and-so has given up because he is not making enough money from legal aid, but it is too early to say whether there is real evidence of that. In some areas, particularly the more rural areas, where people are attracted by more remunerative work, there may be difficulties, but in many firms throughout Scotland there is cross-subsidy. Legal firms do a range of work and regard it as appropriate and proper that they should do legal aid work. Although there is no evidence that people are being denied access to justice, it is possible that, because in the past eight or nine years there has been only one small increase in rates of pay, younger people going into the profession may choose to practise in more remunerative areas. That is a real danger.

The next question related to whether the Legal Aid Board applies more stringent tests of probable cause. I will ask Gerard Brown to answer that.

Gerard Brown: It is not obvious that more stringent tests are being applied. We are trying to work closely with the board. A new chief executive and a new chairperson were appointed recently. We have tried actively to develop constructive discussion with them. One of the issues that we are examining is whether probable cause has been defined too tightly. We are also examining, on behalf of the profession, whether applications are being framed in a way that does not crystallise the issues. There may be lessons to be learned on both sides.

Martin McAllister: That relates also to the previous question about SLAB's policies. We work with the board at many levels, and in the past year or so we have had constructive dialogue with it. We have a liaison committee that meets four times a year, as well as various working groups. The board consults us at an earlier stage than it did a couple of years ago, so the relationship is developing.

The policies that you mentioned can be frustrating because they come out of mid-air, and a solicitor—who might have been conducting his business for 10 years—might be faced with the board saying suddenly that, because of its policy, his methods are no longer correct. The board has recognised our concerns on that matter and we hope that we can work with the board more in future to address the issue earlier.

10:30

Your next question concerned emergency situations covered by SU2—for example, a woman who needs urgent assistance in a matrimonial case—and there is a real problem in the gap that you mentioned. We have talked about some kind of emergency duty scheme, which would involve solicitors and would mirror the criminal duty scheme. Someone could get assistance quickly to take the heat out of the situation; an interim order could be issued, followed by a hearing in court. The dust could then settle before the application for legal aid was made, which would mean that the initial position would be protected. Although such a scheme needs some work, it is certainly a way forward.

Michael Clancy (Law Society of Scotland): On policy formulation, it is useful to get an idea of where such formulation operates within the board. As the board is a statutory organisation and is limited by the terms of the Legal Aid (Scotland) Act 1986, it must operate within the framework of law. In the past year and a half or two years, we have noticed a heightened awareness by the board of the nature of operating within such a framework. Sometimes, in the past, interpretation of the regulations might have been rather free, but the board has realised that certain interpretations are not appropriate for this day and age when judicial review is a more common occurrence. What appears to be a policy change is actually a recalibration of the interpretation of the law.

In our negotiations with the board, we have also discussed the tripartite working group, which was set up after the last election and has operated fruitfully to increase contact among the board, the Scottish Executive and the Law Society of Scotland. It has been a useful forum for thrashing out some—but not all—policy issues; if the Law Society of Scotland had input to all the board's policy issues, it would supplant the role of the board and the Executive. However, the working group is a forum where we can exchange views at official level with occasional board member input.

Christine Grahame (South of Scotland) (SNP): So that is a change.

Michael Clancy: A very positive change.

Gerard Brown: A big problem for a solicitor who is dealing with someone who appears on a Monday morning with a major domestic issue is that they must assess quickly a notional contribution—which might be £800—and if they do not seek that payment, there is a risk that all the

work might be undertaken without payment being made. Martin McAllister's suggestion of a fast-track system that is free to all, no matter the income, might have some mileage in protecting individuals.

Our work has not been carried out in isolation. The Law Society of Scotland has set up a civil justice forum that is similar to the criminal justice forum and works by inviting individuals to investigate the system's efficiencies. Perhaps the civil justice forum should be taken over by the Executive to examine the efficiency of the civil justice system. I was diligently reading the 1993 report last night—I hope that I get a certificate of professional development for all this work—and it is quite clear that there was talk, even then, of improving the system's efficiency. We are seven years down the road, and we are still grappling with the problem—with some success.

The Convener: I want to ask slightly more general questions. We are in danger of going into too much detail on legal aid and forgetting that this should be a more general budget scrutiny exercise; we have expressed our wish to come back to the specifics of legal aid in future.

Gerard Brown's previous comments were useful. As outlined on page 66 of "Investing in You", the purpose of legal aid is

"To ensure access to legal aid for those people who could not otherwise afford it, and the provision of an efficient and effective service to everyone who qualifies".

If you could divide that purpose between criminal and civil justice, would you say that it is being achieved overall; in one area and not the other; or what?

Gerard Brown: Professor Frank Stephen might want to talk about the general spending per head of population across the whole legal aid budget.

As far as criminal legal aid is concerned, there is a grant in summary procedure by the board and solemn procedure by the courts. Furthermore, the effectiveness of fixed fees is being monitored by the Executive and the Scottish Legal Aid Board. The one concern about fixed fees is that they are all swings and no roundabouts, and difficult cases are liable to fall off. We have raised that concern with the board and are considering how to address the problem. We are also investigating the idea of trying to prevent unrepresented people coming into the system when lawyers are not prepared to do the work because of the fixed fees.

There has been no increase in criminal legal aid fees for nine years. Fixed fees were set on 1 April last year and there has been no increase, even in line with inflation; that issue that should be examined. The Law Society of Scotland is investigating both civil and criminal legal aid and will make representations soon to the First Minister and the board.

We have highlighted a number of anomalies with civil legal aid. I do not think—nor do the members of the Law Society of Scotland—that the figures that have been quoted indicate that people are not getting access to justice. For example, Martin McAllister quoted the lower level net figure of £2,723, which means that many students would not receive legal aid. The upper limit is £8,891. Some people take the view that the figures should be reconsidered to allow more people to have access to justice. Perhaps Professor Stephen can give us some idea whether we should examine the percentage of the population who are getting access now but were not before. Civil legal aid presents a major problem that should be addressed carefully and urgently.

The Convener: That takes me on to the objective, mentioned on page 67 of "Investing in You", to

"Develop proposals on civil legal aid"

which is followed by the target in this area

"to introduce pilot schemes on different forms of access to legal services by 31 March 2001".

Are you aware of plans for any such pilots? Given that objective, do you have any comments about that target?

Martin McAllister: We do not have specific information about the proposed pilots, but I have a couple of comments to make. First, legal aid must be demand-led; it cannot be capped. Secondly, as members may be aware, community legal services have been introduced south of the border and there has been quite a dramatic shake-up of the civil system. The Scottish system is completely different. In Scotland, the perceived problems in the legal aid system a couple of years ago were with summary criminal proceedings. In England, my understanding is that the problems were with civil proceedings. That is what the Lord Chancellor has tried to remedy. Professor Frank Stephen may have something to say about that.

The Convener: We will hear the Law Society's comments on the targets and objectives first and then ask Professor Stephen to come in.

So the Law Society of Scotland is not aware of any pilot schemes?

Michael Clancy: Not specifically, but we responded to the Executive's proposals in "Access to Justice - Beyond the Year 2000", which contained a lot of information about ideas.

The Convener: I got no answer last week about what is happening with that document.

Gerard Brown: The only thing that we can think of is that the community legal service concept may

be piloted. The society also sometimes works hand in hand with citizens advice bureaux, local legal clinics and law centres. Members of the society are involved.

The Convener: So you are not aware of anything concrete that you could imagine as being part of that target?

Michael Clancy: We have not yet received notification of any pilots. However, discussions are on-going and I know that discussions about the community legal service are pending. Over the past few weeks, we have been trying to arrange a meeting between the Executive, SLAB and ourselves to discuss the issue. I imagine that we will hear more about concrete proposals then.

The Convener: The second objective is

"To settle all criminal legal aid accounts promptly."

The target states

"From 25 October 1999, SLAB will pay all criminal legal aid accounts within 30 calendar days of receipt, if supported by appropriate documentation. Where abatements are being made, payment will be made on offer."

What is your reaction to that?

Gerard Brown: I was up collecting mine before I came here. Last year, there was a major problem. Michael Clancy received a response from the Scottish Legal Aid Board about the reasons for the problems.

Michael Clancy: About this time last year, we received a lot of representations from solicitors throughout Scotland saying that there had been a noticeable slow-down in payment by the board. We raised the issue with SLAB. On 4 May last year, the chairman wrote to Philip Dry, the then president of the Law Society, confirming that the average time delay between receipt of account and payment was a little longer than the normal standard. That was due to a number of factors, including a rise in the volume of receipts and the loss of some key staff.

Things improved quite noticeably over the course of the year, when the proposal of paying all accounts within 30 days was floated. That was in late September or thereabouts—I may have the wrong month, but it is close enough. From that date on, we did not receive as many representations about slow-downs in payment.

As recently as 20 March, I exchanged correspondence with the chief executive of SLAB. He stated in a letter that, over the year to date, 74.2 per cent of civil accounts had been turned around within four weeks, against a target of 83 per cent. Around 69 per cent of advice and assistance accounts had been turned around within two weeks, against a target of 90 per cent, although it was worth noting that in the year to date, 85 per cent of advice and assistance accounts had been paid within four weeks. He said that, during December and January, SLAB had faced additional pressures in meeting turnaround times because of public holidays and, of course, the flu epidemic, which had caused people to be off. That impacted on a number of organisations.

By and large, the backlog is being cleared. The understanding at 20 March was that the backlog would be cleared by the middle of April. Representations to us indicate that there are only spasmodic problems. The board seems to be meeting its responsibilities.

10:45

The Convener: Is it your impression that the situation has been resolved?

Gerard Brown: The situation appears to have been resolved. There is still an issue with abatements, but there is a joint working group to try to sort that out.

Michael Clancy: It is a question of monitoring the situation and continuing to receive representations from the profession.

The Convener: Professor Stephen, you have remained commendably quiet until now. We welcome your input on the whole issue of legal aid. Pauline McNeill and Phil Gallie have some further questions about legal aid.

Phil Gallie (South of Scotland) (Con): My question is not about legal aid.

The Convener: Okay. Pauline McNeill's questions are about legal aid, so I will take her before we move off that subject. First, I invite Professor Stephen to make some introductory remarks.

Professor Frank Stephen (University of Strathclyde): If I may, I will first go back to the issue that was raised by Mrs Macmillan. I come to the issue from a slightly different perspective from members of the Law Society. In essence, I examine the data and try to understand what it tells us. SLAB's annual reports for the past decade show that the proportion of applications that were granted civil legal aid and then abandoned after offer more or less doubled between the beginning of the 1990s and the date of the most recent annual report.

There are problems in getting detailed information about why people refuse grants of legal aid. However, it is quite clear that despite the fact that the number of applications has fallen and that the proportion of applications granted has also gone down slightly, there has been quite a

significant increase in the proportion of granted applications that are being abandoned after offer. We might infer from that that the reason is the contributions, but the data does not tell us that. Nevertheless, almost twice the proportion of people who have been granted civil legal aid are abandoning their cases or not taking up the offer.

The figure appears to have risen from around 1992-93 and 1993-94. At the moment, the proportion is running at around 11 per cent. In 1990-91, which may be an aberrant year, the proportion was 2.1 per cent and in 1989-90 it was 6.7 per cent. Something has changed, which is affecting the number of offers of civil legal aid that are not taken up, but I cannot offer any advice about the source of that change.

Pauline McNeill (Glasgow Kelvin) (Lab): I want to stick with the theme of access to justice, which will be a major issue for the Justice and Home Affairs Committee from today. I want to ask a couple of things about legal aid, then to broaden the discussion out.

I have been convinced for a long time of the drive to get public expenditure down, which has been a major theme in legal aid spending. I do not therefore need to be convinced about the figures; I am clear why they are as they are. However, we face a problem if we want to make a case to the Executive for having a broader look at how we can open out the legal aid rules, because the subject is such a minefield.

I am concerned about what you say and I would like to hear more about the impact on women and children. I am sure that the committee would want to consider that aspect further. However, from my personal experience in civil law, there are many other issues that people will argue are just as important, for example when a person is not represented by a trade union in a case of personal injury. Civil law is sometimes forgotten about, because it does not seem as important as criminal law.

I want to pin you down on a couple of areas of policy where some adjustments could be made to improve access to justice. I have asked ministers a specific question about the rules on why certain benefits are not applied as a deduction, but I am still not clear. Again, I have experience of women who have applied for harassment orders, but have had to make a significant contribution because neither child benefit nor incapacity benefit is applied as a deduction.

Access to justice might be a sensitive subject to the Law Society, but at the end of the day, the issue is affordability. In a legal aid system, we might be able to deal with those who are poorest, yet there are often people who are caught in the middle, who will never get the benefit of legal aid. Those people might tell the committee that going to a solicitor is a minefield because they do not know what they will have to pay at the end of the day. That puts people off. Access to justice is not simply about people thinking that legal aid does not make a big enough contribution and perhaps the Law Society should examine some of the practices—

The Convener: Pauline, this is meant to be an exercise in scrutinising the Scottish Executive's expenditure. Any discussion with the Law Society about lawyers' fees for private work is an entirely different issue. You must stick to discussing the money that the Law Society gets from the Executive, which is legal aid.

Pauline McNeill: I will finish on this point. In the context of what we are discussing, I am not happy that the whole issue of access to justice revolves around legal aid. I would be pleased to hear your comments on that.

The Convener: That is not for this exercise, and I would ask the witnesses to respond to those aspects that relate to legal aid.

Martin McAllister: Certainly, we share Pauline McNeill's concern about the benefits that are not allowed as deductions. It is not only benefits—the scheme was set up 30 years ago and certain deductions were allowed while others were not. That needs to be revisited. Things that were considered luxuries 30 years ago may not be considered as such now. Reconsidering that area could increase access to justice, because there might be more take-up of legal aid offers.

In general terms of access to justice, the Law Society has set up the Scottish legal trust, which is designed to help those people who have a case, but who fall out of the legal aid basket. There is also Compensure, which is an insurance scheme and, under speculative actions, people can share the risk with the solicitor. Are members aware of Dial a Law?

The Convener: I do not want to go down that road, Mr McAllister, because it is not germane to today's business. It may be something to which we want to return.

Professor Stephen: I want to draw the committee's attention to some elements of the legal aid system that are not widely appreciated.

I wrote a paper based on some research that was financed by the Law Society and I pointed out that per capita expenditure on legal aid in Scotland is almost identical to that in England. That is one of the few areas of public expenditure where there is no clear difference between England and Scotland. However, there is a difference in the distribution of expenditure on criminal and civil legal aid. I have characterised the Scottish legal

aid system as being predominantly a system of criminal legal aid. In Scotland, criminal cases account for 62 per cent of legal aid expenditure, whereas in England and Wales it is 48 per cent. In England and Wales, there is much more even-handedness in the expenditure on criminal and civil cases.

The policy perception south of the border is that there are problems in the growth of expenditure on civil legal aid, whereas in Scotland the focus has been on criminal legal aid. The remedies that have been proposed south of the border are solutions to a different set of problems to those experienced in Scotland. The Scottish system focuses most of its expenditure on one particular area of criminal legal aid—summary cases in the sheriff court that do not lead to trial. Such cases represent about 32 per cent of all legal aid expenditure in Scotland.

The Convener: Is it true that you have identified one particular aspect of the rules as the reason for the increasing amount that is spent on criminal legal aid?

Professor Stephen: I am not sure whether it is correct to say that I identified an area. Having identified that 32 per cent of expenditure went on summary cases in sheriff courts where no trial took place, and that that also accounted for 49 per cent of the increase in expenditure in the first half of the decade, I spent some time considering the incentives. I was struck by the difference between the regulations that apply in Scotland and those that apply in England and Wales, according to my understanding. However, I must point out that I am an economist, not a lawyer. In Scotland, criminal legal aid is not granted if there is a guilty plea, whereas in England and Wales full legal aid is still available even if there is a guilty plea.

The Convener: In effect, you are saying that guilty pleas in Scotland are being delayed in order to get legal aid, so that the person can get a decent plea in mitigation.

Professor Stephen: That was the inference that I drew. Research that was carried out at the University of Edinburgh suggests that accused persons are quite sophisticated in how they—as opposed to their agents—play the rules to get a plea in mitigation.

The Convener: It could end up being cheaper simply to give legal aid to the early plea.

Michael Clancy: The impact of the European convention on human rights will be a substantial policy issue. When it comes into effect in October, the ECHR may make some of the objectives and targets in "Investing in You" redundant. We were told that there was to be a £10 million saving as a result of the introduction of fixed payments and that that would be applied, in part, to convention cases.

Since the convention was brought in last year in relation to Scottish matters, the impact has been greater than one might have expected. After October, the convention will apply to the whole raft of administrative law that is currently the preserve of Westminster—benefits cases, employment tribunal cases and all cases in reserved areas. Under article 6, there is no right to legal aid when we talk of those administrative matters, but in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing. That may mean that people will take up the point of there being no provision of legal aid in, for example, employment tribunal cases.

Although the employment tribunal structure is reserved to Westminster and therefore under the control of the Lord Chancellor, there could be an impact on the Scottish Executive's budget. Dealing with Whitehall, and discussing that impact, will be a big policy question for the Executive. We have been thinking about this question, and—if it is any consolation to you—I do not have an answer to it.

11:00

Gerard Brown: I am very concerned about this issue. There was a reduction in the legal aid payment fund last year and I think that there will be a reduction this year.

The Convener: It is an on-going reduction. If you look at the table, the fund seems to be declining consistently.

Gerard Brown: Table 5.24?

The Convener: Yes, the one that gives the figures in real-terms, which is the more accurate way of looking at it.

Gerard Brown: It is important, in devolution and human rights issues, to identify where the money is going. It would be helpful—for us, I presume for the board, and for this committee—to know how much has been spent at the end of this year on devolution issues since the set-up of the Parliament. For policy purposes, you have to know that in order to anticipate future costs.

Pauline McNeill asked about where the money would come from. If you do not have the expected £3 million spend on devolution issues, and if there is a downturn in the legal aid fund because of savings in other areas, that is where the money comes from for, for example, the duty scheme for women—or men—who have to protect their children or their house, or deal with any other aspect of their domestic problems.

The Convener: As no one has any more questions on legal aid, we will move on.

Phil Gallie: Last week, we heard from representatives of the Crown Office that they were

absolutely satisfied with their level of funding, that they had an adequate number of procurators fiscal, that the procurator fiscal service had no problems with resources, that courts were adequately financed, and that all was well. However, I hear from people whom you represent—and I know that other colleagues have heard the same—that they do not feel that all is well at all. We hear from people in the police service and from people going through court processes that there are problems in those services. There often seems to a lack of time for procurators fiscal to deal adequately with cases. What do you feel about the level of funding for the Crown Office and the courts?

Gerard Brown: Often, one deals with anecdotal evidence from different branches of the profession about trying to get in contact with a fiscal to discuss a case, or about waiting for correspondence from a fiscal's office or from the Crown Office. As I see it, there is no criticism at all of any individuals who work in the procurator fiscal service. However, there may be systemic problems concerning the way in which they deal with the work. Those problems may involve difficulties in arranging to reply to correspondence or to calls, or in arranging meetings. However, that does not apply across the board. It seems to apply in pockets in certain jurisdictions. For example, it may apply in Glasgow but not in other, smaller, jurisdictions.

The Law Society of Scotland recently received a letter from the Deputy First Minister in which he wrote that he would be convening a meeting of the criminal justice forum. The issue that you have raised should be considered at that first meeting. The criminal justice forum consists—with the exception of myself—of the great and the good; the Law Society is proposing that there should be several criminal justice forums.

There are six sheriffdoms in Scotland, each with local problems. We should be able to get information on those local problems from the local participants in the criminal justice system—from Victim Support, from the procurator fiscal service, from defence lawyers and others. That would allow us to get information on the points that you have heard from constituents and members of the legal profession.

Phil Gallie: So you are saying that the Law Society has heard no evidence from its members of problems in the procurator fiscal service across Scotland.

I would like to raise another point, based on what you have just said. In the health service, much is said about post-code delivery. What you have said seems to indicate that there may be post-code delivery of justice.

Gerard Brown: What does that mean?

Phil Gallie: You said that there were problems in Glasgow—people waiting for justice in Glasgow may have to wait longer than people in Fife, for example.

Gerard Brown: No. It is like a balloon full of water: if you to try to do something in one part of it, the balloon bulges on the other side. In Glasgow, for example, the time between a plea of not guilty and the trial is very short, whereas in Tayside they are fixing trials for 2001. Why should that be? Is it because there are not enough sheriffs? Is it because there are not enough clerks?

As we have discussed before, legal aid is at the tail end of all of this. If the criminal justice system is more efficient, it benefits the public and the profession. We want it to be more efficient, we want swifter access to people in custody, and we want swifter statements from the police. We want to work towards getting all those things.

Phil Gallie: So you are happy with the suggested levels of Crown Office funding?

Gerard Brown: I would not say that I am happy; I am sitting on the fence. I am not being complacent; I am not happy.

Michael Clancy: It takes a lot to make him happy.

Gerard Brown: It also takes a big fence. [*Laughter.*] We are not complacent about the issue; we are keeping an eye on it.

Phil Gallie: It has been suggested that £0.9 million should be put aside to deal with issues connected with ECHR and to prepare the justice system and the courts for it. It does not seem that there is too much money for on-going requirements, yet every day your colleagues seem to come up with examples, arising from the ECHR, of injustice in the Scottish system. Should there not be a concentrated effort in this area? Does the budget provide for such an effort being made?

Martin McAllister: Not that I think you were, but it is not fair to criticise the legal profession for doing things that lead to judgments that might cause difficulties.

Phil Gallie: The job of the lawyer is to exploit the law to the benefit of their client.

Martin McAllister: I think that the lawyer's job is to examine the law and act on a point where it is felt that there is one. Some effects of the adoption of the ECHR could be anticipated, others could not. Any country that has adopted the convention has experienced a period of difficulty that has lasted for about three or four years.

Michael Clancy referred to representation before tribunals. We can talk about that, but we do not

know what the impact will be and we will not know what the law is until an aggrieved person takes a case to an employment tribunal. The judges will interpret the convention and decide on the law at that point.

Michael Clancy: We are aware that there was a lot of pre-implementation preparation. The courts, the judges and the prosecution service were pretty well served by the judicial studies board and others in the Crown Office who were learned in convention rights and jurisprudence. Dr Alastair Brown, in the Crown Office, is renowned for his expertise in this area and was closely involved in the educative process. The institutional framework had access to a lot of high-quality information at a relatively early stage. If anything, it was the defence solicitors who were slower in getting to grips with the full import of the convention.

Phil Gallie: I recognise that we could widen the discussion but I am talking about the budget figures. The document says that £0.9 million has been spent on preparations for the convention. Your members have quite rightly identified a number of serious loopholes. I can see nothing in these budget statements that suggests that future problems have been catered for. Should that not be a priority? How much would have to be spent to ensure preparedness?

The Convener: In fairness to Michael Clancy, I remind members that he raised that issue and said that what has been spent in this area, and what is likely to be needed in the future, needs to be identified. The money will have to come from somewhere and the problem is not going to go away.

Michael Clancy: It definitely is not going to go away. The process is on-going. If £0.9 million has been spent in the past year, we can predict that there will be expenditure of that order in the future.

Phil Gallie: Thanks. That is the point that I am trying to get at. The document does not cater for such spending.

The Convener: It is not given a separate heading, certainly.

Phil Gallie: The Crown Office budget is going down, so I doubt that it is being provided for.

Gerard Brown: That is an important point. Do the regulations that allow to be raised what are called devolution issues—they are in fact human rights issues—reflect the policy intentions and do they cover the situations that are arising? I do not think that they do. We raised those issues with the Executive some time ago and are working with it to examine and resolve them. If a citizen has an issue that has been sanctioned as a devolution issue by a judge or sheriff, he should be able to ventilate it and get legal aid cover for it.

The Convener: As of 3 October, it will not just be devolution issues that are involved.

Maureen Macmillan: I wish to ask about the physical facilities in courts. There is a beautiful sheriff court in Edinburgh, which I visited, but the situation is not the same elsewhere the country. Do you think that refurbishing and, in some cases rebuilding, court buildings, particularly in rural areas, should be a priority for the Executive? I am thinking of the comfort of witnesses more than that of solicitors. Witnesses are often stressed and need somewhere to sit quietly without being bothered by witnesses for the other side.

11:15

Martin McAllister: The priority is that a community should have its own court. An old building with poor facilities is better than no court at all. Members may know that there was a proposal recently to reduce the availability of courts in the Borders. Thankfully, that proposal was not implemented. Certainly courts should be places where people are comfortable. Coming to give evidence can be a traumatic time. Witnesses should be catered for and their needs should be paramount.

In my experience, Victorian courts—ironically—are better places in which to work than courts that were built in the 1960s and 1970s, but those courts are a legacy that we will have to deal with for years.

Christine Grahame: I agree with what you said about rural courts and courts in the Borders. It has been brought to my attention that Peebles sheriff court may still be threatened with closure. Have you any information about that?

Michael Clancy: No one has expressed that to us.

Martin McAllister: The problem with rural courts is linked to transport in rural areas—people have difficulties getting to court.

Christine Grahame: I agree. I had understood that Peebles sheriff court had been reprieved, but was then informed—I cannot disclose the source—that the court might still be under the sword of Damocles.

The Convener: Have the witnesses read the Crown Office and procurator fiscal service strategic plan? Do you think that the objectives that are set out on page 6 are appropriate? Are they achieving any of those objectives? I know that that is a tall order. I refer in particular to the operational targets such as whether they are serving indictments within the appropriate time.

Christine Grahame: Mr Gallie mentioned the Crown Office's satisfaction that its budget is

sufficient. Some of these objectives are high targets. It is hoped that they will reached within budget. Squeezing the balloon—I mean the balloon to which Mr Brown referred, rather than Mr Brown—at one end could have an impact on the fiscal service. If there are delays in courts, there are resource implications that impact on other targets.

Gerard Brown: Targets are great things to have. In chapter 5, table 5.3 refers to targets for the criminal injuries compensation scheme. Would the committee and the Executive like to know whether those targets are ever met? We do not seem to have those data. Table 5.5 gives targets for the community-based supervision of offenders. It might be interesting to know whether the target for probation orders and community service orders is being met. One might also want to find out whether they are complied with and, if they are not, when they are brought back to court. They cannot be effective if a breach of probation or community service takes place on 1 January 1998 and the person is not brought to court until January 2001.

The Convener: It would therefore be useful to have the previous year's objectives and targets and the outcomes for that year, as well as the targets for this year. There is no reason why we cannot ask for that information to be provided. No doubt you, too, would be interested in that information.

Gerard Brown: Presumably, the Crown Office can provide you with statistics on the percentage of cases that are now dealt with by the imposition of fiscal fines and the percentage of cases that are diverted from prosecution, compared with the proportion four or five years ago. Our information is that there has been a huge increase in the number of cases of fiscal fines and diversion from prosecution. There are probably good reasons for that, but data on that would be helpful so that you could make an assessment of the funding that will be required in future. If those proportions increase as they have done, less money might be required for criminal legal aid and more will be available for civil legal aid.

Professor Stephen: There is a point about the effect of the efficiency of the court service and the fiscal service on the legal aid budget. A factor that is recorded in chapter 6 of the report of my research is that the growth in expenditure was in itself a function of the volume of cases. As the volume of cases built up in sheriff courts and there were delays in the system, legal aid expenditure rose because of cases that were not heard or were delayed or in which there were problems in agreeing evidence. The efficiency of the fiscal service or the court service has implications for the legal aid bill because agents, witnesses and others can become involved in unnecessary diversion of work, which increases the bill. A statistical factor that became apparent in the statistical analysis was that the growth of work in the 1990s had a cumulative effect on the bill for legal aid because of delays and court congestion.

The Convener: I thank the witnesses for attending and answering our questions. No doubt we will see some, if not all, of you in future on other subjects.

Before we move off this item, we have been asked to identify key areas that we wish to raise with the minister next week, so that he can be sure that he has all the relevant officials with him. Can we get some ideas from around the table? People will not necessarily be held to things, but can we at least get some idea of which areas we wish to discuss with the minister.

We will wish to take up some of the legal aid issues that we have been discussing, so we will indicate that that is on the agenda. Phil will wish to raise the issue of the fiscal service and the variability of court delivery.

Phil Gallie: And the European convention on human rights.

The Convener: And ECHR. Are there other—

Maureen Macmillan: The targets.

The Convener: And the targets. We should indicate clearly that, although we are grateful for the list of objectives and targets, we would like to know last year's objectives and targets and whether they have been met.

Christine Grahame: On legal aid, we should look at the report on the gap in emergency support for women in situations of domestic violence and at the need for a special kind of duty solicitor rota in civil work.

The Convener: I do not want us to get too bogged down in the detail.

Christine Grahame: Civil legal aid would relate more specifically to the bill that we are trying to pursue.

The Convener: I am conscious that if we end up spending so much time on legal aid alone, we will be neglecting other areas.

Scott Barrie (Dunfermline West) (Lab): Criminal justice, social work and victim support.

Pauline McNeill: I reserve the right to come back on this next week, if necessary. I asked a question about the time delays in the civil courts. I would like to do some research on that, because I am not sure whether the answer that we received last week is accurate.

The Convener: No problem.

Phil Gallie: There is the issue of police funding. We have not had any police witnesses yet. It would be helpful—

The Convener: I am aware that the longer this goes on, the more questions arise. One of the difficulties is that we have not received the information that we asked for at last week's meeting—that would have been useful for our exercise this morning.

We need to tell the Executive that we had hoped to receive the information quickly after last week's meeting. If the budget scrutiny exercise is to be effective, the Executive has to provide the information that we require as quickly as possible. It must not go away from a committee meeting and stick members' requests at the bottom of a heap of other requests.

Petitions

The Convener: Item 2 concerns the various petitions that are before us. I am aware that members of the public and, in some cases, the petitioners themselves are here today. We have to consider carefully how we proceed on a number of petitions. In a couple of cases, we have already done some work, so that may be a matter of making progress with that work.

We start by discussing petitions PE29 and PE55 together, because they relate to roughly the same area. Everybody will have had a note from the clerk on those two petitions. We have already been doing some work in this area and have written to the Department of the Environment, Transport and the Regions and the Lord Advocate. What do people suggest as the most appropriate way forward?

Phil Gallie: We have been round the houses with the Lord Advocate on the Dekker petition. He is stating that he is not prepared to allow the procurators to come clean about why they are not taking the issue forward. I suppose that—with reluctance—we shall have to accept that.

However, the Dekkers could benefit from paying attention to Tricia Donegan's submission and two of her requests. The Lord Advocate expresses concern in his response about the impounding of the car. He says that he has put down guidelines, but I wonder whether that goes far enough and whether there should be some move towards ensuring that in all cases where there is a death, the vehicle involved is impounded until all relevant court hearings are completed. That would not just be a guideline; it would be a definite condition relating to such accidents.

The other point is that the families of road traffic victims should have a right to demand a fatal accident inquiry. I worked in industry for many years. If we had a death on site, irrespective of how that death came about, there would be a fatal accident inquiry—there was no question about it. Deaths on the road can be related to industry—for example, if a van driver or a lorry driver is involved. It would be reasonable to allow the families of victims to request an inquiry and, if that request is made, for that inquiry to be mandatory.

11:30

Gordon Jackson: I have read again Mr and Mrs Dekker's submission in response to the Lord Advocate. I agree with Phil—I am not sure what we can do with this. I do not accept that there is a policy to downgrade section 1 of the Road Traffic Act 1991 on offences causing death. The Lord Advocate is right about that, although that does

not mean that individual matters are always dealt with correctly.

Certain things might be worth bringing to the attention of the Lord Advocate again. For example, I am interested in what has been said about victims' families not being properly contacted. If there is a lack there, something should be done about it.

I am interested in the other petition that Phil mentioned, on the impounding of the motor vehicle. I am not overly impressed by the Lord Advocate's letter on that. Reading between the lines, we can see that he seems to suggest that the fault lies with a silly sheriff who got it wrong. That is not likely to be the case. I have no idea who the sheriff was but I suspect that, in the circumstances, the decision was probably not wrong.

The Lord Advocate says that he cannot appeal that, but he can now appeal a decision in principle. If he thought that the decision was wrong and that the principle should be established that it was wrong, he can deal with that. Simply to blame the sheriff for getting things wrong does not hugely impress me.

I do not quite follow what the Lord Advocate means when he says that his new procedure is that the car should not be released until criminal proceedings are being contemplated. The accused is told that the car is no longer needed and that they should have it examined. What actually happened was not very different from that. I am not clear what the Lord Advocate suggests is the difference; the accused was told that he might wish to instruct an expert to examine the vehicle, that he should have that expert make immediate contact and that he might receive legal advice. He knew by that time that proceedings were being contemplated. I am at a loss to understand what real change the Lord Advocate is suggesting. Like Phil, I think that he has to go further.

I am not persuaded that in every case the vehicle has to be impounded until proceedings are terminated. I appreciate that money is not important here, but the vehicle may belong to an innocent third party and may be worth a substantial sum of money. Reading between the lines, we know that the vehicle was worth virtually nothing: it was an A-registration Escort, or something of that nature.

There must be some system whereby the Lord Advocate keeps the vehicle in place until he has reason to be totally satisfied that inspection has been carried out or refused. For example, if he receives a letter back from the person saying "Thank you very much; I have now inspected the vehicle", or, "I no longer want to inspect the vehicle", he cannot release it simply on the basis that he suggests on page 5 of his letter; he must be more satisfied than that that the issue has been resolved. I do not want to say something inappropriate but, when there is a death, there may be occasions on which the body will not be released for burial until everyone has done what they need to do. The Lord Advocate must do better than his letter suggests.

I am not persuaded by what Phil Gallie says about the fatal accident inquiry. I do not think that that is practical. The situation of people at work is already regulated by statute: for any death at work, there must be a fatal accident inquiry. In many cases of death on the road, it is possible to understand what happened. There are hundreds of deaths on the road—which is a terrible tragedy—for which it is not appropriate to have a fatal accident inquiry, although relatives will always want one. I have reservations about the practicality of saying that a fatal accident inquiry must be carried out every time a relative asks for one—that is going too far.

On every occasion, a senior procurator fiscal should sit down and discuss the matter with relatives. The lack of communication is one of the problems. There must be greater explanation and discussion, and people must feel that they have been more involved in the process. However, the idea that the final decision will always rest with the relative would bind the system too much and would be unworkable.

The Convener: At the outset, I should have welcomed Cathie Craigie to this meeting. She has a constituency interest in the case of Mr and Mrs Dekker. I know that she would like to speak on the matter, but Christine Grahame has indicated her interest and will speak first.

Christine Grahame: I do not agree with Phil Gallie that, following a road traffic accident, there should be a mandatory fatal accident inquiry if a relative asks for it. Like Gordon Jackson, I do not think that that would be practical or even necessary in all circumstances. I would like to know the policy of the Crown Office on fatal accident inquiries in the event of road traffic accidents, and what principles it applies. That information would be useful, although I do not know whether it is contained in the plethora of papers that we have received.

My second point relates to the preservation of evidence. That made no difference to the petitioner because, as a third party, they were not aware that evidence was about to be destroyed that would constitute their interest in the case. Should there not be an obligation on the Crown Office to intimate that the vehicle is available for inspection to third parties who may be involved in subsequent civil proceedings? Otherwise, someone may not realise that they can make a

civil claim until much further down the road, when the evidence is gone but they might want an independent report into the state of the vehicle—for instance, the state of its brakes.

My third point arises out of my ignorance of criminal law, and refers to the Lord Advocate's response to Tricia Donegan's petition. The paragraph of that letter that struck me says that

"it is not possible under the Criminal Procedure (Scotland) Act 1995 for the Crown to appeal against the acquittal of an accused who has been prosecuted on indictment."

I do not know why or whether that should be the case.

Gordon Jackson: An appeal cannot be made on an acquittal. Until recently, the Lord Advocate could not appeal the point of principle on an acquittal. Now he can appeal the point of principle to establish what the law should be, although that will not change the outcome. However, I cannot remember when that provision was introduced.

Christine Grahame: That was what I was curious about. I did not know about that corner of the law.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Thank you, convener, for giving me the opportunity to speak to the committee today. Mr and Mrs Dekker, the main signatories of petition PE29, are my constituents.

As committee members are knowledgeable about the case, I shall not go into it in any detail. However, by way of introduction, I would say that the signatories of the petition, like other residents of the Cumbernauld and Kilsyth area, are at a loss to explain why this matter was not brought to court as a case of dangerous driving. I understand that the committee is not an appeal body, but I ask whether there is any way in which it could further investigate this issue. The committee's remit is to consider and report on matters that relate to the administration of civil and criminal justice; it should investigate the claim that was made in the Dekker family's evidence that the Crown Office has a policy of downgrading driving offences.

In his letter to the convener of 5 January, the Lord Advocate does not accept that point, as Gordon Jackson said. However, he states that the fact that such a perception exists

"is in itself a matter of concern and should not lightly be dismissed."

I, too, think that it is a matter of concern. The view is held throughout Scotland that there is a policy of downgrading—it is not only the Dekker family who believe that. I accept that the Lord Advocate gave his opinion and responded to the committee in good faith. However, the fact that the perception exists means that this committee has a duty to investigate the matter. I would not want to prescribe the way in which the committee should pursue the investigation; I ask simply that it takes further advice on whether the Lord Advocate can be brought to give evidence and whether statistical information can be gathered.

The Lord Advocate's letter also made a point about the involvement of the families, which Gordon Jackson and Phil Gallie mentioned. Although the Lord Advocate is of the opinion that families are involved in the process, that does not seem to be happening in every case. We must realise that families need to be involved and should be able to find out as much as they want to know. I ask the committee to consider that aspect of the Lord Advocate's letter.

Pauline McNeill: What concerns me about the Dekker and Donegan petitions is that, although the circumstances and issues are different, they have a common thread.

The Dekker case was not tested in court as it should have been; similarly, the Donegan case was not tested in front of a jury. The running theme is that the legal mechanics have blocked those cases by not allowing either a jury or, in the Dekker case, a judge to consider the circumstances before a decision was reached. The overriding principle of our legal system is meant to be that someone sits in judgment, independently to make a decision that is based on the facts and circumstances. The theme of these two petitions is that that was never allowed to happen.

I realise that our options are reduced, but I would like the committee to keep the Dekker case on the table. The Dekkers have still not had an answer to the question why their case was not tested in front of a sheriff or jury.

I am at a loss to understand the Donegan case. The Lord Advocate's letter suggests that the Crown Office was never founding on the car. If anyone was founding on the need for that production, it would have been the defence, which was given the opportunity to examine the car but did not take it. I would have thought that an inference could have been drawn from the fact that the defence did not take up the opportunity to examine the car. Focusing on the car is a red herring. We know from other road traffic cases that there is a common theme: people accused under such circumstances often claim a mechanical defect. I do not understand why that was not tested before a jury.

I am concerned that, in both cases, neither a jury nor a sheriff got a chance to examine the circumstances and to come to a decision based on that examination. I am certain that, whatever the outcome, the families would have felt an awful lot better had they at least gone through the court

system in order to get an answer.

11:45

Gordon Jackson: It is important to clarify the distinction between the two cases. The Donegan case was an error—in my judgment, a mistake was made. It does not matter who made it. It was either made in releasing the car or in allowing the car to be destroyed. Alternatively, a sheriff made a wrong decision and the matter should have gone before a jury, as everyone intended. Unpalatable as it may seem, such mistakes happen in any system. That is what happened in this case: something went wrong.

The Dekker case is different. It did not go before a jury because the Lord Advocate, having looked at all the evidence, decided not to launch a prosecution. That is his inalienable right. There cannot be a legal system in which he is not the person who makes that decision. That does not mean that every decision will be correct, or that everyone will agree with it, but there cannot be a system in which an aggrieved person—a person who feels that they have been assaulted, or a relative—has the right to say that their case must go before a jury or be prosecuted. That is so ingrained in our system that, although the Lord Advocate sits in our Parliament, he cannot be questioned on his decisions. His protection is specified in statute, under the Scotland Act 1998. We may want to change that.

The present review of the criminal justice system in Northern Ireland has suggested that the equivalent legislation there should be changed and that the emphasis should be the other way round. As a body, the Parliament could make that change if we felt it appropriate. However, in the end, a decision will be a matter for the Lord Advocate. The Dekker case did not go before a jury for the proper reason—a decision had been made. The Donegan case did not go before a jury because a mistake was made. The cases are quite distinct.

Phil Gallie: What Gordon Jackson is saying represents the view of people who are steeped in the Scottish legal fraternity. There is an acceptance that the Lord Advocate is infallible.

Gordon Jackson: No—I have spent my life saying that he is not.

Phil Gallie: Well, if the Lord Advocate is the sole arbiter, and if no one can question his decision, that must be the case—he must, in effect, be seen as infallible. He makes a decision and does not have to explain it, which puts him beyond any independent analysis of the merits of that decision.

That is why I have favoured a second step which, in this case, would—perhaps impractically, I accept—lead down the fatal accident inquiry route. Without a doubt, justice is something that people must feel comfortable with. They must be able to believe in it and live with it. The people who have suffered as a consequence of the events in the two cases that have been mentioned cannot have any faith in our justice system.

I sympathise with Gordon Jackson on the Donegan case. The Lord Advocate now acknowledges that there was a mistake. The first thing that we must do is to ensure that such a mistake never happens again. That is why I suggest as an acceptable solution that vehicles be impounded or a written statement be signed by all sides of the argument saying that everybody has had their chance and the vehicle can be released. However, I must question the Lord Advocate's right to make a decision without scrutiny. Regardless of whether the Parliament queries the matter in the longer term, surely we are here to discuss and think about it today.

The Convener: We have to make a decision on how to proceed. We have reached an impasse on the present situation with regard to the Lord Advocate. He says that there is not a policy about how such cases are prosecuted. The perception of many people is that there must be a policy, otherwise what is happening would not be happening. I think that we will not get any further now, because the Lord Advocate says that there is not a policy.

We have to decide how to proceed on the cases that we have discussed and whether we think anything further can usefully be done. Some important points have been made. One—about the Crown Office giving at least some reasons for its decisions about, for example, not proceeding with cases, or otherwise—has been made before in a different context. We mentioned that during our consideration of freedom of information. It is an issue that we can return to—we have every right to do so. Whether that can be done in the context of these two petitions is a different matter entirely.

While I have sympathy with the reasons for the request that families of road traffic victims have a right to demand a fatal accident inquiry, I would have to point out that either everybody will have the right to a fatal accident inquiry or they will not. If we were to say that that right is automatic for one category of people but not for another, we would effectively be saying something about a death—that one death does not justify a fatal accident inquiry whereas another does. Granting an automatic right for one category of people effectively means that we think that there should automatically be an FAI in respect of all deaths.

If we examined that proposition, we would have a responsibility to examine carefully the

implications for the whole system. I do not think that anybody has begun to quantify what it would mean. I am not just talking in pounds, shillings and pence—money is not the issue—but in terms of court time and the vast number of knock-on effects. I am not sure that we can consider the issue in the context of these petitions—it covers a much bigger area.

There is real concern about the perception of a policy developing at the Crown Office, notwithstanding the denial of the Lord Advocate, so I suggest that we suspend consideration of both these petitions until we get the results of the research being done at the Department of the Environment, Transport and the Regions on sentencing and road traffic death cases. The results of that research are to be published in the autumn and it would be foolish of us to start an inquiry that would replicate less effectively work that is presently being done by officials elsewhere.

I suggest that we keep these items on the agenda until the autumn, when we will have the results from the DETR. It will do in much more detail what we—I suspect not as effectively—would be trying to do. We would then return to the issue of road traffic accidents. Let us be fair about this: that should not just include accidents that cause a death—very serious injury can also be devastating. We could then consider whether we want to examine road traffic more fully, always keeping in mind that our agenda is already jam-packed.

Do any members have strong views about that?

Christine Grahame: I agree with much of what you have said but, with regard to the preservation of evidence, we could write to the Lord Advocate—as you said, convener, we cannot see terrific distinctions between what actually took place and what he has said in his guidance—and raise my point about third parties. That is what the petitioners would have needed. They were not parties to the criminal proceedings. We could still deal with the preservation of evidence and detach it from road traffic accidents in general and fatal accident inquiries.

The Convener: That is a much narrower point. I am happy with that.

Phil Gallie: Could we concentrate on Gordon Jackson's point about the appeal and question the Lord Advocate on it?

Gordon Jackson: I must say on the record that the current provisions may not have been in force at the time.

The Convener: We could ask for clarification on that.

Phil Gallie: It would be of comfort if we received a letter saying, "Now it would be okay. The aim is to solve the problem."

The Convener: But we need to put on record the fact that our justice system operates on the basis that when someone is acquitted, that is it as far as they are concerned—end of story. There is a good reason for that: it is so that prosecution does not become persecution, where people are hounded year after year and are re-tried, no matter how often they are found to be not guilty. That would be a different kind of justice system, which would lead to enormous injustice.

Phil Gallie: I wish to make it clear that I cannot give my all-embracing support to that statement.

The Convener: That is fine. You can note your dissent, but I feel strongly that that is not an issue that we should pursue.

Gordon Jackson: Phil feels strongly about this issue, as do other people, but if we are to look at the accountability of the Lord Advocate—I hope that I do not sound patronising—we cannot reach a view on that based on what we have been discussing. We would need a full, separate inquiry with evidence from all kinds of people, because any change to current practice would be a sea change in our legal system. I have my view and others have theirs. I may turn out to be wrong, but we would have to have a separate inquiry. We could not address this issue on the basis of one case or one petition.

The Convener: There were one or two e-mails on PE29 and, by inference, on PE55. RoadPeace is based in London and is the national organisation for road crash victims. It wants to give evidence to us on this matter. We will send it a holding letter saying that we will wait until the Department of the Environment, Transport and the Regions produces its research before we decide how to address this matter. We also had an e-mail from an individual, Steve Stradling, who has done research on driver attitudes and behaviour at the University of Manchester and Napier University. I will ask the clerks to forward that e-mail to committee members and to Cathie Craigie as a matter of courtesy. We had a brief e-mail from Mr and Mrs Dekker yesterday with regard to today's proceedings.

We have another three petitions on the agenda and we have to deal with the draft report on prisons, so I suggest that we take five minutes to go through one or two of the other petitions, and those that we cannot deal with today will be put on the agenda for next week's meeting.

The next petition is from James and Anne Bollan. We can deal with this one briefly because we have already decided that we want to look at legal aid and access to justice. In those circumstances, the issues that the petitioners raise would be better wrapped into that broader inquiry.

Does anyone take a different view?

Members: No.

The Convener: We will let the petitioners know that their petition is still live, but that there is little point in our trying to deal with it separately when we have already decided to look at legal aid.

There is a petition from a group called Concern for Justice, about which I have some concerns. I asked the clerk to do a fairly detailed background note to this petition because it arises out of a long-running theological dispute in the Free Church of Scotland that I am loth for this committee to get involved in. On the face of it, the petition is not about that theological dispute, but it arises out of an incident that was part of that dispute. I am concerned about that. First, the Justice and Home Affairs Committee is not the place where we want to get involved in such issues. Secondly, it is a specific case and we have been clear that we do not want to re-hash particular cases. We are not another appeal court. We have had to say that to a lot of people. Thirdly, the petition calls on Parliament to look at what sheriffs or judges say in court about cases or individuals and whether they should be in some way answerable for their comments.

I have read the petition. There are some difficulties. One of the problems is that in any case, whether civil or criminal, by definition, evidence will not be believed. Witnesses will be regarded as not credible or not reliable. A decision will be made that effectively casts enormous doubt on a side of the case or a group of witnesses. If we go down the line the petition proposes, I am not sure that we will not get into enormously difficult territory, because every time a witness is indicated as not reliable or not credible, the danger is that sheriffs or judges will be opened up to some kind of scrutiny on that issue.

12:00

Pauline McNeill: I share your concerns about this petition. As you know, a couple of us on this committee are members of the Public Petitions Committee. I raised my concerns when I first saw it, without even knowing the background to it. We should send a message to people who think they can use the Parliament's committees as a way of having a trial reheard. There is a danger that the petitioners are trying to draw us into a tit-for-tat exchange on a theological discussion, and I want no part of it. We should end this petition today and dismiss it.

If the issue that we are being asked to look at is whether sheriffs or judges should have absolute privilege in court, for me that also ends the petition, because sheriffs and judges must have absolute privilege so that they can do their job. Very often, cases will turn on the judge's view of a witness's credibility. That is a principle of law that I am not prepared to concede.

The fact that the people who are involved in this case are not named and that there is an organisation that seems to turn solely on this particular court case also concerns me. When I first saw the document from Concern for Justice, I could not see any other issue or circumstance that came under the banner of the organisation. I am for dismissing this petition forthwith.

Christine Grahame: I wholly endorse what Pauline McNeill has said. I, too, am a member of the Public Petitions Committee. It is essential that judges have privileged status, whether they are sheriffs or are in the Court of Session. If they behave in an untoward fashion or overstep the mark, there are disciplinary proceedings that can be enacted. It is par for the course for a sheriff to say, "I am afraid that I do not find your evidence credible." It comes down to that. Witnesses are on oath and the sheriff may well say that. I am with Pauline on this. The petition has to be dismissed.

The second point I wish to make—Pauline McNeill may wish to associate herself with it—is that the Public Petitions Committee is to consider what it deals with and how it operates. This kind of petition may well be an issue that is raised. A principle has to be at issue in a petition: we do not want the Justice and Home Affairs Committee and the Public Petitions Committee being set up as another court of appeal. Do you agree, Pauline?

Pauline McNeill: Yes.

Christine Grahame: We will review this matter.

Gordon Jackson: Even though I am sitting here silently, I should declare an interest. I wrote a professional opinion on the case some years ago, although not for any of the parties on the petition.

I agree that we should write back saying that we recognise that these people may well be aggrieved. There is more to this than a theological dispute. People who are writing to us are genuinely aggrieved. I make no comment on whether they have a right to be aggrieved, but we should write back to say that we cannot tamper with the freedom of sheriffs and judges to announce their decisions. Otherwise, the system simply cannot operate. We cannot go into what is behind the privileges of sheriffs and judges, even if we do not always agree with them.

The Convener: We frequently do not.

Phil Gallie: In the matter referred to in this petition, the people who were named never got the chance to make any comments at all to the sheriff. They were simply criticised by the sheriff without his having heard them. Is not that wrong? That is the principle behind the petition. I can understand

a sheriff hearing evidence and saying that it is not credible—he is entitled to make that judgment—but the fact that the individuals in question never had a chance to present a case is a matter for concern. I find it difficult to understand how anyone could make a judgment in such circumstances.

The Convener: In fairness, we must remember what a criminal trial is about. This matter arose out of a criminal trial. The accused must make a case for his defence and the prosecution must prove a case against him. In that sense, nobody else is answering any case at that criminal trial. It is often the case that many names will be bandied about and referred to during a trial, but none of those people—witnesses or anybody else—is there to answer a case. Only the accused and the prosecution have to do that.

As far as I can see, nothing happened in this case that does not happen frequently in criminal courts. The difference in this case is that there was public and media interest in the trial and in the detail of the sheriff's judgment. If we start to say what a sheriff can or cannot say, we will effectively prevent a sheriff from explaining the reasons for his decisions.

We have just gone through a period of saying that we are not happy because the Lord Advocate will not explain his reasons for decisions. We will get into difficult territory if we say that we do not want to hear explanations for various types of decisions by sheriffs. We are on dangerous ground and I cannot see how we can investigate this issue, even at face value. Tampering with the privilege of judges will create endless problems.

Christine Grahame: There would also be an impact on MSPs. Nobody has a right of reply in the chamber other than MSPs, and we assume the honour and good conduct of MSPs and suppose that their statements are made in good faith. You are right to say that we are opening up an enormous can of worms about privileged situations, which would extend to us as well. I say that not as a matter of self-interest, but as an observation.

Phil Gallie: I understand all that. To some extent, the onus is on the prosecution to ensure that its witnesses or anyone else who is named is informed. I do not want to interfere with a sheriff's rights; I accept what you say about that. However, I am concerned that the prosecution may not have advanced its case in a way that could be considered fair to everyone.

The Convener: We cannot discuss sheriffs' rights without going into details of a specific case. That is the problem.

Scott Barrie: That is exactly the point that I wanted to make. Although the people involved say that they do not want to go over the case again, an investigation would rely on the supporting evidence. To discuss it, we would have to go into what happened in court. That rules out a discussion. We are not here to provide another opportunity for people to appeal against a perceived injustice.

The Convener: To deal with the case we would have to ask the Crown Office to deliver the court papers to us. The committee cannot get involved in such a situation.

Gordon Jackson: The Crown Office would probably not allow it.

The Convener: That is right. As Gordon says, we could probably not do it anyway. I cannot see how we can take the matter further. I therefore suggest that we regretfully advise the petitioners that we feel there is no prospect of our being able to deal with the issues that they raise.

We cannot deal with the petition from Mrs Eileen McBride today. It raises serious issues, including the European convention on human rights, which Phil Gallie is always concerned about. I would prefer to give that petition more time at another meeting.

We will now move on to the draft report on the Scottish Prison Service. As agreed, this item will be taken in private, so the official reporters are excused—no doubt to their great relief.

12:09

Meeting continued in private until 12:33.

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