JUSTICE AND HOME AFFAIRS COMMITTEE

Tuesday 12 December 2000
(*Morning*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
37th Meeting 2000, Session 1

CONVENER

*Alasdair Morgan (Galloway and Upper Nithsdale) (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 ALSO ATTENDED:

Mr Jim Wallace (Deputy First Minister and Minister for Justice)

WITNESSES

Ms Carol Kelly (Scottish Criminal Cases Review Commission)
Professor Sheila McLean (Scottish Criminal Cases Review Commission)

CLERKS TO THE COMMITTEE

Andrew Mylne
Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Fiona Groves

LOCATION

The Chamber

Scottish Parliament

Justice and Home Affairs Committee

Tuesday 12 December 2000

(*Morning*)

[THE CONVENER *opened the meeting at 10:00*]

Scottish Criminal Cases Review Commission

The Convener (Alasdair Morgan): Let us make a start, ladies and gentlemen. Item 1 on the agenda is evidence on the Scottish Criminal Cases Review Commission. With us are Professor Sheila McLean, chairperson of the commission; Carol Kelly, chief executive; and Jackie Bergen, director of administration. A paper from Sheila McLean has been circulated. She does not wish to say anything to supplement that paper, so—unusually—we will move straight to questions. I welcome that.

I will start by asking Sheila McLean about the number of cases that the commission receives. I have read the appendix that shows how the backlog is developing. It provides some interesting arithmetic about how the commission projects changes in the backlog, depending on whether caseworkers deal with an average of one case or 1.5 cases a month. To what extent does the figure depend on a prediction or certainty about the rate at which you will receive new cases? Have you concerns about the commission's level of resourcing?

Professor Sheila McLean (Scottish Criminal Cases Review Commission): If you do not mind, convener, I will ask Carol Kelly to answer that question as well. To try to predict roughly the number of staff that we would need, we looked backwards at how we managed cases and the progress that we made. We also looked forwards. As the committee knows, we have appointed three new legal officers, so the commission has a staff of seven. We did that to meet increased demand. We have tried hard to avoid developing a substantial backlog. To an extent, we made a judgment and to an extent, we speculated so that we could come up with a number of cases that we hoped we would be able to progress. As Alasdair Morgan rightly said, we must speculate to some extent, because the time that is spent on a case depends largely on that case's complexity. We made an informed judgment about how long we hoped that we would take to complete cases.

The committee will know from the documentation that we provided that our policy is that no case will be in a backlog for longer than an absolute maximum of nine months. At the moment, we can keep to that policy.

Ms Carol Kelly (Scottish Criminal Cases Review Commission): We based the number of cases that we expected to receive on the number that we have received since the commission was established. That figure averaged out at between eight and nine cases a month. It seemed reasonable—certainly during the commission's early days—to assume that we would continue to receive cases at roughly that rate. Since we made the calculations, they have proved to be correct. When the commission's profile becomes higher, it is possible that the number will increase. On the other hand, the number of cases might decrease as time goes on and older cases pass through the system and are concluded.

The Convener: What constraints does funding from the Executive place the commission under? You say that you have appointed three new caseworkers. Must you approach the Executive and argue for an increased budget to fund those posts?

Professor McLean: We must obtain authority from the Executive to make additional appointments. Where possible, the Executive expects us to meet additional costs from the budget that we have been allocated, but when additional funding is needed, we must make a case for that.

Phil Gallie (South of Scotland) (Con): I note that the powers of the commission allow it to

"request the Lord Advocate or any other person to undertake enquiries or obtain statements".

What access does the commission have to the reports of procurators fiscal? Sometimes, the person who is appealing might incriminate a third party, against whom no charges had been brought. Do you have access to such information from procurators fiscal?

Professor McLean: Normally, we request documentation centrally via the Crown Office—at least in all solemn cases. We are working with the law officers on a protocol on how we should proceed in future. Normally, the Crown Office collects the information from the local and regional procurators fiscal. The committee might know that we tested in court the legislative provisions on the amount of information that we were entitled to receive. Lord Clarke's judgment was clear—we are entitled to receive all information that is held in connection with the cases that we are investigating. We anticipate that all such information would be filtered and sent to us through the Crown Office.

Phil Gallie: If that is the case, can the commission publish its findings, or is the information reserved for the appellant?

Professor McLean: Are you talking about publishing names?

Phil Gallie: If the commission received information that led to reasoning about why an individual was not taken to task through the procurator fiscal system and why charges were dropped, could you reveal that to the public?

Professor McLean: I am not sure whether we have jurisdiction to do that. In examining the case load, we can ask the Lord Advocate or the Crown Office to investigate any suspicions that we have that criminal activity has taken place, if that is what Phil Gallie refers to. I do not think that the Crown Office's policy decisions are part of our jurisdiction. The commission is bound strictly by confidentiality rules, which prevent us from disclosing information that we receive as part of a case.

Phil Gallie: I recognise that the issue is not really part of the commission's remit, but I will draw a parallel. I imagine that, in some of the commission's investigations, a third party might be considered to be the most likely person to have committed a crime for which the person whose case you are reviewing was convicted. That third party might have been discharged from a court. Do you see any need for an extension of the commission's powers to allow consideration of such a discharge?

Professor McLean: That would change the commission's work fundamentally. As members know, we are concerned only with people who have been convicted. Such an extension would make the commission another Crown Office, which we do not need because we already have one. We would not view that as a positive step.

Phil Gallie: I understand that response, but I think that the commission will come across such issues time and again. However, it is early days.

The board includes only one lay person. Given the importance of public perception, do you think that there is room to involve more lay persons with the experts on the board?

Professor McLean: As Phil Gallie knows, one third of the people on the board are required to be legally qualified and—of the total—two thirds must have some knowledge of the criminal justice system. The remaining third can be lay people. One person on the board does not have a law degree, if that is what Phil Gallie means by the word "lay". Some of us who have law degrees regard ourselves as lay people because we have not practised law. The mix on the board is not as simple as it might appear at first. When I was involved in interviewing people to become members of the commission, I took the view that it was likely that we would be confronted with some complex legal problems. To that end we have, for example, ensured that all our legal officers, who perform the work of investigation, have some legal training.

I take Phil Gallie's point about the importance of lay representation on all such boards. None the less, there is value in having people on the board who do not practise law. At least two of us have never practised law; we are legal academics who understand some of the complexities of the cases that the commission receives. I take Phil Gallie's point. If we increase the number of commissioners, we may look for people who are more "lay" than the current members. However, we were not clear, especially in the early stages, about what we would confront. It has been valuable to have commission members who understand the complexities of the case load. However, that does not mean that lay people cannot do that.

Phil Gallie: I note that two board members are allocated to oversee each case. Is that task terribly time consuming? Can people who have a part-time interest give sufficient effort, which would be appropriate to the complexity of a case?

Professor McLean: Commission members' work is time consuming. I congratulate the commission's members on the dedication and commitment that they have shown to working with the case load. As committee members may have seen from the paper that I prepared, we are reviewing our procedures because we feel that the arrangement might be too cumbersome and we want to ensure that we are financially accountable.

We will simplify the procedures, but during the first year—while we were all learning on the job, if you like—it was felt that input from the commissioners to the legal officers was important. Our legal officers are now experienced. Our chief executive has a wealth of experience in criminal law and is taking an active role in managing the case load. That makes a difference to the input that is required from the commissioners. We hope to put in place new procedures in January, which we expect will streamline matters. The commissioners will not be less involved and I do not imagine that they will require to spend less time on a case. However, in the interests of accountability, the procedure will be more streamlined.

Christine Grahame (South of Scotland) (SNP): I have a question that may be answered by the statistics at the back of Sheila McLean's paper, but unfortunately I received that paper only this morning. My notes say that many applications to the commission are inadmissible because other procedures have not been exhausted. Is the

number of such applications given at the back of the paper? I cannot see it—I have probably missed it.

Ms Kelly: The commission has refused to deal with six cases because an appeal was outstanding or the appeal procedures had still to be exhausted.

Christine Grahame: Is there a mechanism for sifting such cases? Does the system for advising applicants before they approach the commission lack something that would mean that the commission could avoid having to deal with such cases?

Professor McLean: It is difficult to say. As Christine Grahame will have seen from the figures—we managed to put them together only yesterday—that just under half of those who apply to the commission are legally represented. That number is high compared with the English equivalent. Of course, one would anticipate that such people were better informed about procedures.

Christine Grahame: We hope that they would.

Professor McLean: Yes. I am not sure what else can be done. When we receive an application, we assume that we have an obligation to deal with it, either by returning to the applicant to inform them that they should complete the appeals process before approaching us, or by putting the case to the board, if there are special circumstances. We have taken some cases in which we were satisfied that there were special circumstances—for example, when somebody tried to appeal but could not obtain legal representation. It might be important that we receive such cases, because we can point the applicants in the appropriate direction.

Ms Kelly: I will expand on the point about legal representation, which is well taken. It would assist the commission considerably if applications were more focused in the first instance, and if the legal profession had more input. Recently, we wrote to every firm of solicitors in Scotland that does criminal work. We explained the commission's role and offered to provide them with information, seminars and so on at our offices. We have had discussions with the Scottish Legal Aid Board about the provision of advice and assistance on work that is to be carried out by solicitors to establish whether there is a case for sending an application to the commission.

Christine Grahame: Are you saying that such advice and assistance is not available at the moment? I thought that it would be.

Ms Kelly: Advice and assistance is available, but the commission's experience of applications was that there seemed to be confusion about whether further advice and assistance was available when an application reached the commission. That led to general confusion within the profession regarding the position on applications to the commission—that matter required to be clarified. I hope that that has happened as a result of recent discussions with the Scottish Legal Aid Board. We will certainly inform the profession of the position regarding the provision of advice and assistance prior to an application to the board and we will encourage the legal profession to assist applicants prior to the submission of an application.

10:15

Christine Grahame: Will advice and assistance continue until physical representation by an agent takes place? Can a solicitor, in pursuing a response to an application that is before the commission, continue with advice and assistance?

Ms Kelly: Do you mean after the application has been made to the commission?

Christine Grahame: Yes—are there further communications?

Ms Kelly: It appears that the Scottish Legal Aid Board feels that, because the commission is able to carry out the necessary investigations, that should not be done by the legal profession with input from the legal aid fund. As I understand it, legal advice and assistance are available for a solicitor who is consulting an applicant to ascertain whether there was any response to a particular point that had been raised, but not in relation to the investigation and review of the case itself.

Christine Grahame: This is a daft lassie question, but is any appeal or review of your decision available? If somebody has already been to you in relation to a review of a conviction and you have made a decision, can that person return in relation to that same matter, or would it be barred?

Ms Kelly: When you ask whether there is an appeal against our decision—

Christine Grahame: On the first decision you have made on whether the matter should be taken any further, can an applicant appeal against the decision or have it reviewed in any way, or is that the end of the matter?

Professor McLean: As Christine Grahame is aware, there is always the possibility that public bodies will be judicially reviewed. For example, if we failed procedurally, there is a way in which that could be reviewed.

Christine Grahame: There is the general review procedure.

Professor McLean: There is no direct appeal, but people can come back to the commission—

there have already been two cases in which people have done that.

Christine Grahame: If the commission made a determination in a case, and something else came to light, would there be any bar to reopening the case?

Professor McLean: Absolutely none. We send detailed letters to applicants. When we notify them that we do not intend to refer their case back to the appeal court, the first letter that they get will invite them to respond to our preliminary decision within 21 days of the date of the letter. In a number of cases, we have extended that time because people have indicated that they needed more time to respond—we are always prepared to do that. However, when the final decision letter goes out, we let people know that, if something comes up in future that they feel would make a difference to their case, they are welcome to reapply.

Christine Grahame: Are you flexible in that? Are there any statutory or time limits?

Professor McLean: No.

Pauline McNeill (Glasgow Kelvin) (Lab): At what stage in the process can an applicant apply to the commission? Can they do so before or after they appeal to the High Court?

Professor McLean: We assume that applicants have exhausted the legal process before they come to us. They would normally come to us after they have attempted to appeal, or after they have appealed unsuccessfully.

Pauline McNeill: Can you consider evidence and whether the law has been applied? Can you consider both aspects to the case?

Professor McLean: Sorry—I did not catch that.

Pauline McNeill: Can you consider evidence and the legal aspects of a case?

Professor McLean: Yes—the legal officers do the bulk of that work. We have a budget for investigation. As Carol Kelly said, that ties in with responsibilities being shared between legal aid supplying the funding and the commission doing the investigative work. Our legal officers interview witnesses and—where they consider it to be necessary—they consider every piece of evidence. It is an inquiring job, as well as one in which one sits back and contemplates the law.

Pauline McNeill: If the commission is considering the evidence in a case—precognition statements and advice from experts—is not that more time consuming than consideration of whether the law is being applied?

Professor McLean: It can be very time consuming, depending on the complexity of the case that we are dealing with. In some cases, we have large volumes of evidence that need to be gone through.

Pauline McNeill: Are you happy that the process of appointment is sufficiently independent of the Executive?

Professor McLean: Do you mean in relation to appointments to the commission?

Pauline McNeill: Yes.

Professor McLean: Yes—it is sufficiently independent.

Pauline McNeill: The good old European convention on human rights.

I have visited the commission and was impressed with the set up. Have you had feedback on public confidence in the correction of miscarriages of justice since the commission came into being?

Professor McLean: We get feedback only from the occasional applicant who contacts us after we have dealt with a case although, as Pauline McNeil knows, our job is finished when we make the referral decision. The only other feedback that we get comes through the media. Some of that has been not especially positive but, by and large, coverage of what we have done has been reasonable.

People will always think that we could be doing more, and more quickly. At the press conference at which the commission was launched, we made it clear that we would not sacrifice thoroughness for the sake of speed. We are moving cases through the system very efficiently at the moment.

Pauline McNeill: Does the commission set the time scale for dealing with a case?

Professor McLean: We have an internal time scale system—it is part of the case monitoring programme. Carol Kelly might want to expand on that, but she keeps tight control over how cases are being progressed.

Pauline McNeill: I would like to know about that.

Ms Kelly: We have priority criteria, which members might have seen set out in our annual report. The most important criterion relates to whether an applicant is in custody. In fact, that criterion is often the only one that is of any relevance in an application. On one occasion, we prioritised a case because the applicant was very unwell and there was a question mark over his future health.

The priority criterion for applicants who are at liberty is that the case will not remain in the backlog for more than nine months. So far, we

have managed to achieve that. We do not have any written criteria regarding applications where the applicant is in custody, but we have been working informally to try to ensure that such cases are allocated to a legal officer within six months of receipt of the application by the commission. We have substantially improved on that aim—we are allocating cases that came to the commission in September.

The Convener: To pick up on what Professor McLean said about press coverage, how would you summarise the coverage of your operation thus far?

Professor McLean: By and large, it has been intelligent and balanced. There is the odd piece of coverage that I feel was not particularly balanced, but that is what happens. Some of our decisions have received considerably less press interest than we thought they might, but that is not necessarily a bad thing. On the whole, we have not been subjected to any particular problems—I do not know whether Carol Kelly agrees—and people report factually what the commission has done.

The commission's decision in a case is obviously critical along the route of a case, but the most critical decision in the long run is the court of appeal's decision which is, as I said, beyond our remit.

The Convener: One of the commission's aims is to increase public confidence in the justice system. That is obviously a long-term aim, but how will you measure whether you have succeeded?

Professor McLean: It is difficult to say. As members know, when the commission was set up, we made a considerable effort to ensure that we were widely known. We felt that that was important. We had a video made, which we sent to all public libraries, prisons and various other organisations. We prepared information leaflets and flyers. Some members of the commission have given talks in various places, from bar associations to prisons. We wrote to all the bar associations, offering our services as speakers. Carol Kelly is doing something similar with the legal firms.

We have done our best to ensure that people know that we exist and what we do. To be honest, I imagine that the best measure of the extent to which public confidence in the criminal justice system is maintained is the quality of the work that we refer to the court and of the work that we do in cases that we do not refer. In other words, I am not sure that we would be able to measure our success especially scientifically, but it matters that we produce good quality work.

In the first case that was referred to the court of appeal, we were delighted that the Lord Justice-General made a point of commending the work that had gone into the preparation of the case. That is one way in which we can enhance public confidence.

Maureen Macmillan (Highlands and Islands) (Lab): I will go back to the beginning of the process. I was surprised at the statistics about the lack of involvement by solicitors—less than half are involved. I suppose that some applicants might be quite disenchanted with the legal profession, if they feel that they have been wrongly convicted. Is there a role for advice agencies, if an applicant feels that they do not want any more to do with the legal profession? How does the process start? Do people write to the commission or do they fill in a form? What does the form look like? Do you interview them or is that done through an intermediary?

Professor McLean: Applicants can get in touch with the commission either by phoning, as some do, or by writing to us. When applicants contact us, they usually deal directly with Mrs Jackie Bergen. An information pack, including an application form, is sent to them. Applicants can fill in the form themselves, or a friend or their solicitor—if they have one—can help them. When that is done, they send the form back to the commission, when it goes into the pot of cases, if you like. When it is ready for allocation, Carol Kelly takes over.

Our legal officers speak to applicants, either because they request it or because we think that it is necessary for investigation of the case. The officers will go to Peterhead or wherever the applicant is. Depending on the nature of the case, the officers might interview witnesses—we have protocols about ensuring the safety of our staff. The legal officers have gone as far as London to interview witnesses. When a case reaches us, it is thoroughly investigated and nothing is taken for granted.

Maureen Macmillan: I would like to know about the involvement of advice agencies. Do you have contact with the citizens advice bureaux? They might be a point of contact for people who are not in custody; if they do not want to go to a solicitor, they might go to a CAB or another advice agency.

Professor McLean: We have sent to citizens advice bureaux and other organisations all the information that we have available, so that they know that we exist. About 75 per cent of our applicants are in custody, so CABx might not be especially helpful for them. However, we recognise the potential role that the bureaux can play.

Maureen Macmillan: Do you deal directly with applicants? I have heard of cases in which relatives wrote to the commission about

miscarriages of justice. Do you deal only with applicants, or would you deem it to be appropriate to deal with relatives?

10:30

Professor McLean: There have been some cases in which it was a relative or friend who contacted us. It is not a requirement for applications to be received only from the applicant. However, we would want to clarify with the applicant that they were content, that the case was investigated by us. We would automatically do that if someone else alerted us to a problem.

The commission can generate its own cases. If, in the course of investigating a case, we have reason to believe that there may have been a miscarriage of justice with respect to another person, nothing prevents us approaching that person and saying that we will consider investigating their case also. The most common phenomenon by a long way is for the applicant—the convicted person himself or herself—to contact us directly.

Christine Grahame: Could a third party—for example, one of those journalists about whom we are all so ambivalent—refer a matter to you, just saying, "I think you ought to be looking at this"?

Professor McLean: Yes.

Christine Grahame: Do you ask the 25 per cent of the applicants who are not in custody—the number is quite low, so this question may not be very relevant—where they learned about you, for the purpose of monitoring how successful you are? They might have contacted you through CABx or lawyers, or they might have found you in the "Yellow Pages".

Professor McLean: Such questions are not directly asked.

Christine Grahame: I was taken aback by how slow the legal profession was to become aware of you in your early days. It is early days not only for you, but for the relevant legislation: the Crime and Punishment (Scotland) Act 1997. It is when legislation is tried that we find out whether it fits properly and does its job as it ought to. What problems have you encountered that will require not-too-difficult changes in legislation or regulations?

Ms Kelly: The main difficulty that we found with the legislation is the "interpretation of section 194K of the Criminal Procedure (Scotland) Act 1995, as inserted by the 1997 act" which relates to disclosure of information. There seems to be a contradiction in the wording in that section, and we are currently considering that matter. Within the Scottish Criminal Cases Review Commission is a legislative changes working group, consisting of two commissioners, a legal officer and me. We are considering the matter of that section as well as other aspects of our own and other legislation.

The other matter that we are considering is the difference between the legislation in England—which governs the English Criminal Cases Review Commission—and our own. The issue entirely relates to disclosure. At present, there is no provision for someone who provides us with information to say at the time that they do not want certain information to be disclosed. As a result, we would have to get that person's consent, and if that was not forthcoming, we would have to make an application to the court.

We are actively considering those questions, but have not as yet come to any conclusions about which system is preferable or about the best way forward.

Christine Grahame: I am perhaps getting dramatic about this, but when you mentioned disclosure, were you alluding to the fact that a party that was disclosing information, whether in documentary or oral form, would be imperilled?

Ms Kelly: That is indeed of obvious concern.

The Convener: In section 6 of "Scottish Criminal Cases Review Commission: First Annual Report and Accounts for the period 1 April 1999 to 31 March 2000", you mention quite a few bits of legislation that you think need amending. Do they need urgent attention, or can we simply reach them in the fulness of time—which, when it comes to legislation, can often mean decades?

Professor McLean: I am not sure about Carol Kelly's view on this, but we were able to resolve one or two of the problems that we encountered in the first year, either by taking counsel's opinion or, in one case, by going to court. We are able to function as things stand, but the legislative committee that Carol mentioned is urgently considering the need for legislative amendments. There are real ambiguities in the current legislation that need to be resolved. For the moment, because we have established and maintained good relationships with the outside agencies with whom we work, there are fewer problems than there might have been in a different environment.

Phil Gallie: I did not see anything in your briefing paper about levels of budget. Could you remind us how much the exercise costs?

Ms Kelly: This year, the budget for 2000-01 was £650,000. We were able to agree additional funding of £50,000 for the purpose of employing three extra legal officers, making the revised total provision for this year £700,000. I can supply you with a breakdown of that if you wish.

Phil Gallie: No, I am happy with that—the ballpark figure is fine, thank you.

Christine Grahame: I return to the question of disclosure and to the problems that you have with the current legislation. I understand that there have been communications on that subject with the Executive. Has the Executive informed you when it will give you a firm response? Once it responds, amending legislation, policy guidelines or whatever is required can be put in place.

Ms Kelly: My understanding is that the Executive is waiting for us to come to it with our specific proposals and comments. We have not discussed any time scale, but we will be considering the situation over the next six months to a year.

The Convener: Parliaments always seem to be examining quangos, to justify whether they are necessary. You might say that you have dealt with X cases in Y months, and you have set yourselves efficiency targets in that context. However, that does not tell us whether the commission is worth while per se. You could take the other view: that justice is beyond price, and that the commission's existence is justified if one person who had been wrongly convicted has a successful appeal. Is there a more objective way—perhaps in the future, it being early days yet—by which, looking back in 10 years' time, we will conclude that setting up the commission was a good idea, and that we want it to continue?

Professor McLean: The obvious test is to do with the notional one person who had been wrongly convicted having a successful appeal, as you suggested, convener. In that case, we will have earned our place in the criminal justice system. However, that will not do as an answer. The intangible—but, we hope, real—outcome of the commission's existence in the criminal justice system will be a firm faith on the part of the people of Scotland, first that they have a system that is accountable and which will take cases as far as we are prepared to take them, and, secondly, that they are comfortable and confident with the way in which we investigate and present cases.

The question about how to measure that brings us back to the point about press coverage and about how we evaluate what the community thinks about us—I am not clear on that. We can set targets internally, to show that we are dealing with our work load efficiently and effectively. That is the only objective way that I can think of to measure our success.

Ms Kelly: There is also the question of cases dealt with by the Scottish Office. We have referred four cases, and, since our briefing paper was prepared, we have taken a decision to refer a further one. Two of the cases were dealt with by the Scottish Office and, as I understand, were refused by it. That may further indicate our role in the criminal justice system.

Professor McLean: I think that we would all agree that our work cannot be measured by the number of cases that we refer. If we did that, we would be presuming that a substantial number of cases in the system involved a miscarriage of justice. Simple numbers will not help. Our work is difficult to evaluate. Whether we refer 20 cases or none next year will not tell anybody anything about the quality of the work.

Christine Grahame: In due course, you must make an impact if cases that are referred to you and that relate to the criminal justice system itself are successful. We hope that mistakes will not be repeated—if they are on the Crown side, not the defence side. In fairness, that is also intangible. In due course, you would do yourselves out of a job if the system worked properly.

The Convener: There is perhaps a case for a commission to look after victims who do not feel that they have been properly dealt with. I am not sure if you would care to comment on that.

Professor McLean: I think that I will keep clear of the victim issue.

Phil Gallie: That point was behind my opening remarks about the procurator fiscal service. It is a valid point, and is perhaps something that we could come to terms with, although that falls outwith the scope of the commission.

The Convener: There might be a problem with regard to press perception—that the commission is viewed simply as another avenue for appeal and another way by which the accused person can get off their charge. You said that most of the press coverage has been fair, but were there negative aspects about your not being effective enough in getting somebody off a charge, or were you viewed as being too effective?

Professor McLean: Where coverage was negative, it was usually because there was a perception that innocent people were still in prison, or that we had taken too long to get cases moving through the system. However, I repeat that the coverage has, by and large, been very responsible, and people seem to understand it.

We make ourselves accessible to the press. We will not discuss individual cases, for obvious reasons, but Mrs Bergen in particular handles a lot of press inquiries on a daily basis. We try to make ourselves available for points of information, as opposed to discussion about individual cases. It also helps if people understand what we are trying to do.

The Convener: If members of the committee have no further questions, I thank Professor McLean and her colleagues for their attendance and for the information that they sent us.

Diligence Working Group

The Convener: Item 2 on the agenda relates to the letter sent to me by Angus MacKay about

"the Cross Party Parliamentary Working Group on a Diligence Against Moveable Property to replace Poinding and Warrant Sale",

which is not the snappiest title that I have ever come across. Basically, Angus is asking us if we will appoint a replacement or representative from this committee to that working group. I do not want to get into the history of the matter, because, frankly, I do not think that whether Christine Grahame was initially asked by Roseanna Cunningham, the former convener, to go on the group as a representative of the committee is relevant. There is a difference of opinion, to say the least, about that.

The point is that we now have a letter from Angus MacKay asking us to appoint a representative to that working group. Members will have seen my comments on the matter: I do not think that it would be particularly sensible for us to make an appointment. I do not believe that this committee would necessarily have one mind on every item that was brought before that working group. It would therefore be difficult for any member to represent the committee. While I think that it is quite allowable for any member of this committee to wish to be on the group—in fact, one of our members is already on the group—it has to be clear that they are there on their own account, not as a representative of the committee. However, it is up to the committee to decide.

Christine Grahame: I want it to be put on record that, as far as I was concerned, I was on the working group for the Scottish National Party. It was a case of either Michael Matheson or I going on the group, and I was available to do so. When I withdrew from the working group, for reasons that I will not go into again—you know about them, convener—I made it plain that I was there with my SNP hat on. I had my justice hat on only as an individual member of the Justice and Home Affairs Committee. I did not speak on behalf of the committee, nor, as far as I understand it, did Euan Robson, who was there for the Liberal Democrats. Obviously, there have been crossed wires. I am not saying that Angus MacKay is fibbing, but he may have thought that I was there as a committee member. That was certainly not my understanding.

I concur with what the convener said. Having been at the meetings, I do not see how anybody could speak for the committee ad hoc as discussions go along—that would be most improper. I certainly never tried to do that, because I did not have the authority to do so.

10:45

Phil Gallie: I disagree with the convener's comments about the snappy name. If you look at the letters, you could have a committee called DAMP, though as I am not a Tory wet, I would not particularly want to be on it.

I was not aware that Christine Grahame was on the working group, representing the Justice and Home Affairs Committee. The fact that she was not aware of that either says a lot. Her actions were those of a politician and not of a member of the committee.

We would be failing if we got involved in the working group. We will get our chance to debate the outcomes when the proposals come to the committee at a later date. I urge every party to get involved in the committee. It should be an all-party group, though it is not for me to say. The arguments should be put forward and the Justice and Home Affairs Committee will get to judge the outcomes at a later date.

Pauline McNeill: I am glad that Christine Grahame has clarified her position, as I was a bit worried when I read the convener's memo that we were going to have to have somebody on the committee on the working group.

I now agree that it would make more sense for the working group to be a cross-party group, but this committee does have an interest in how the work of the group is progressing. We need to find some way of receiving interim reports. I do not want to be presented with a report at the end of the process in which I have had no involvement and then be asked to judge whether we should legislate. Can we find a halfway house, to ensure that the Justice and Home Affairs Committee receives a written report from the minister or the working group?

The Convener: We can certainly write to the minister to ask for regular updates on the conclusions reached by the working group. I have no problem with that.

Are we agreed that we do not want to appoint a representative to the working group?

Pauline McNeill: I think that the convener should write back to the minister on the basis of what has been said this morning. I would like the minister to clarify why he wants a member of the Justice and Home Affairs Committee on the working group and not party representatives.

The Convener: I have already had correspondence with the minister. This is the second letter that I have received. I am not sure that I will clarify anything any further. It is up to each party to decide whether it wants to have members on the group to make it a cross-party group. It is up to this committee to decide whether

it wants to have a committee representative on the working group. I gather that the feeling is that we do not.

Pauline McNeill: My feeling is that we do not want a representative at this stage, but I am not prepared to agree that that is a final decision.

The Convener: The answer to everything is always "Not at this stage". Nothing binds our successors, especially given that we may metamorphose into two committees in the not-too-distant future, each of which will be able to take its own decisions.

If we are agreed that we do not want to appoint a representative at the moment, would any individual member like to be on the group? I am willing to write to Angus MacKay to say that such-and-such a member would like to serve on the group in an individual capacity.

Christine Grahame: I want to clarify the matter. The group is called a cross-party parliamentary working group, not a cross-committee group or anything like that. Members of other political parties are on the group; David McLetchie and Euan Robson are on it, for example. The other parties are represented—only the SNP and the Scottish Socialist Party are not. The working group is quite big and fills a whole table. It could get too big; it will be an assembly.

As the other parties are represented, we need some clarity about what the group is—it was meant to be a cross-party group, which appeared to be the case when Tommy Sheridan and I were both there. We came off the group for our own political reasons as members of political parties. There is no clarity about what the group is supposed to be. I do not understand why we would want to put any more people on the group—other parties have two representatives. From what I understood of the stage 3 debate, the working group's final recommendations—I may have to check the *Official Report* on this—must be determined unanimously. Voting will therefore be another problem. We will need to check what was said in the stage 3 debate.

Phil Gallie: Two other committees have representatives on the working group. It seems strange that a committee should appoint someone to take decisions and vote on issues whose views may not align with the view of the committee as a whole. How can someone represent the committee if that is the case? If, as Pauline McNeill suggested, the idea is that someone goes along and keeps a watching brief, that is a different situation altogether. Christine Grahame might be able to tell us whether other committee representatives participated in votes.

Christine Grahame: There are minutes of the meetings. If we want to monitor, perhaps it would be satisfactory to ask that minutes be provided to the Justice and Home Affairs Committee. That would keep us in touch.

The Convener: I have prepared committee minutes before, and they are not necessarily designed to convey information.

Christine Grahame: Perhaps that is just our group.

The Convener: A member of the Justice and Home Affairs Committee, Euan Robson, is already on the group. Members may feel that that is a satisfactory state of affairs and that he can be the liaison and pass information on to the committee. However, as I said, I am quite happy to write to the minister to say that we would like to be updated on a regular basis.

Pauline McNeill: We need to put some of this on the record. It is still confusing. We have agreed that it does not seem logical to nominate a committee member to a cross-party group, but that it would seem logical for the Justice and Home Affairs Committee to be appraised of where the group is on its work, because it will, presumably, be the lead committee. If an alternative is drawn up that requires legislation, which then comes to this committee under the normal process, we will take evidence. How does our sitting on a committee that predetermines legislation square with taking evidence on it? We need to clear up the confusion. We do not want to give up our right to question what the working group comes up with in the normal way.

The Convener: My note made the point that the fact that we would have to sit in judgment on the proposals produced by a working group on which we have a representative puts us in an invidious position.

Christine Grahame: I reject your suggestion, convener, that Euan Robson could act as a liaison. That would be unfair to Euan. He is there on behalf of the Liberal Democrats. It would not be proper for him not to be allowed to be relaxed about what he says in what are fairly informal discussions and for him to have to report back to us.

The Convener: That is fair enough, although I was not asking him clipe on the working group to the committee.

Christine Grahame: The thought of cliping never came into my head.

The Convener: Are members happy that I should write to the minister, explaining that we do not want to appoint a representative of the committee to the group for the reasons that have been outlined, but that we would like to be kept informed on a regular basis of any conclusions that the working group reaches?

Members *indicated agreement.*

The Convener: We now have a slight hiatus. The minister has not yet arrived for item 3, so members will have the unusual luxury of a coffee break.

10:54

Meeting adjourned.

11:04

On resuming—

Subordinate Legislation

The Convener: Members will have received copies of comments from the Law Society of Scotland and the Federation of Small Businesses on this item.

We have two motions to discuss: S1M-1398, in the name of Jim Wallace, and S1M-1422, in the name of Phil Gallie. Although they have to be moved and disposed of separately, I intend to debate them together, as they both relate to the same subject.

I call the minister to speak to and move his motion.

The Deputy First Minister and Minister for Justice (Mr Jim Wallace): In introducing the motion, I would like to set the context by clearing up a misconception that seems to exist about legal aid and tribunals generally.

Legal aid in the specific form of advice and assistance from a solicitor is already available for employment tribunals, as it is for any matter of Scots law, provided that the applicant meets the relevant financial criteria. Such advice is granted by a solicitor independently without reference to the Scottish Legal Aid Board. For some people, a contribution may be due. That contribution ranges from £7 to £104, depending on the person's disposable income and capital. Advice from a solicitor at public expense is already available to help someone formulate his or her case before an employment tribunal and to advise him or her about how to proceed, both before and after a hearing. However, that does not cover representation at the tribunal itself. Rather, it provides help right up to the doors of the tribunal.

I am aware of recent challenges under the Scotland Act 1998 in relation to the provision of legal aid for proceedings in employment tribunals and I am obviously well aware of the Executive's commitments under the European convention on human rights. In those circumstances, we have thought carefully about the way ahead. Although the European convention on human rights does not require the provision of legal aid for civil matters, there has been at least one judgment in ECHR case law that suggests that, in certain circumstances, legal aid may be appropriate.

I have therefore come to the conclusion that it would be right in certain circumstances to allow representation before employment tribunals at the taxpayer's expense—hence these regulations. The change is not just a response to recent

developments; I believe that it is justified on its own merits. The cost is expected to be modest, at about £200,000 each year. The regulations before the committee today are intended to achieve that aim.

The regulations will allow people on low incomes to get full legal representation at employment tribunals when the case in question is too complicated for the individual concerned to present his or her case effectively. That might be because difficult legal issues are involved, or because the person concerned has a poor knowledge of English or suffers from a physical or mental handicap. Representation will be provided in the form called assistance by way of representation—usually known in the trade as ABWOR.

There are two sets of regulations. One set—the Advice and Assistance (Scotland) Amendment (No 2) Regulations 2000 (SSI 2000/399), which I recently signed—comprises negative regulations. They will allow a solicitor to ignore any employment tribunal award in assessing whether to apply clawback of legal expenses. That matches the same provisions from the employment appeal tribunal. Unless negatived, those regulations should come into effect on 15 January 2001.

I was somewhat puzzled and disappointed to see Phil Gallie's proposal that the committee might vote to annul the regulations. Taken with the affirmative regulations, they mark a step forward, at a very modest cost to the taxpayer, on access to justice in Scotland. I do not believe that they would lead to frivolous claims, as some have suggested, because the final decision on whether to allow representation lies with the Scottish Legal Aid Board. The committee should therefore reject Phil Gallie's motion as being against the interests of those who have to raise tribunal cases.

The other set of regulations are affirmative regulations. If approved, they too will come into force on 15 January. Taken together, the regulations will improve access to justice for people whose cases are complex and who would otherwise find difficulty in presenting them to an employment tribunal. The only financial test to apply will be the same one that applies when a solicitor first grants advice and assistance.

I shall describe how the system will work in practice. First, the solicitor will grant advice to the client, provided that the client meets the financial test and the issue is a matter of Scots law. Then he or she may enter into negotiations with the client's employer. If a settlement is not possible and the case needs to go before an employment tribunal, the solicitor will then have to consider whether representation is needed. If the solicitor concludes that it is needed, he or she will apply to the Scottish Legal Aid Board to approve a grant of ABWOR.

The board will consider the application on the basis of the criteria set out in regulations 13.2 and 13.3 of the ABWOR regulations. First, the case must be arguable. I do not think that anyone can reasonably question that, and it is clear that the taxpayer should not be expected to fund spurious or frivolous cases. Secondly, the board must judge whether it would be reasonable to make ABWOR available. That mirrors the existing tests in the regulations for assistance by way of representation. Thirdly, the case must be too complex for the applicant to present it to a minimum standard of effectiveness in person.

The regulations set out factors that the board should take into account in deciding complexity: where the case involves a procedural difficulty, a substantial question of law, or complex or difficult evidence; or where the applicant is unable to understand the proceedings because of his age, inadequate knowledge of English, mental illness, or mental or physical disability. Where those conditions are satisfied, assistance by way of representation will be approved and the taxpayer will fund legal representation at the tribunal.

Those tests should ensure that representation will be made available for the cases in which it is needed. It is important to involve the board in those cases. When he or she grants advice and assistance, the solicitor does not know whether the client has a reasonable case to pursue or whether the employer might come to a settlement. The board will take account of those factors. If it did not, cases without merit might proceed at public expense. Providing for the board to assess applications will also ensure that cases are treated consistently across Scotland.

I should add that tests before granting ABWOR are not unique to employment tribunals. There are already additional tests in the regulations, such as those covering summary criminal proceedings, which are set out in regulations 6 and 7 of the 1997 ABWOR regulations. Clients on working families tax credit who are granted advice without a contribution will also receive ABWOR without any further financial tests.

I believe that these regulations mark a step forward in improving access to justice in Scotland. I understand that the Law Society of Scotland has raised two points with the committee. The first is whether ABWOR covers travelling time and expenses by solicitors; the second is whether representation is available if a Scottish case is heard outside Scotland. Neither of these sets of regulations affects the basic rules that already govern the payment of fees and outlays to solicitors who provide advice and assistance or ABWOR. Strictly speaking, the interpretation of

those regulations is for the Scottish Legal Aid Board and should be raised with it. I cannot fetter—or, indeed, instruct—how the board interprets the regulations.

Advice and assistance can be provided by a solicitor only on matters of Scots law. ABWOR can therefore be provided only on a matter of Scots law. It would be for the solicitor to apply to the board for increases in authorised expenditure to cover work that he or she wishes to undertake. If that involves travelling, it is envisaged that the solicitor would want to tell the board about the anticipated travelling time and outlays. Where a cross-border issue arises, I can envisage that the board would have to satisfy itself that the matter in issue is a matter of Scots law.

The assessment of the reasonableness of such requests remains a matter wholly within the discretion of the board. Ultimately, the board will be asked to consider an account of fees and outlays submitted by the solicitor. The assessment of what can be paid out of the fund in any specific case lies within the board's discretion. No new fees have been created. The board will assess the reasonableness of detailed fees claimed by a solicitor according to existing fees for ABWOR. The solicitor will also be entitled to charge outlays. The board will have to consider whether a fee for travelling time and an outlay for travel—a train ticket or car mileage, for example—has been actually, necessarily and reasonably incurred, due regard being had to economy.

I believe that the regulations are good news for those who are unfortunate enough to have to raise a complex matter before an employment tribunal. I believe that they make a worthwhile addition to our legal aid system and I commend them to the committee.

I move,

That the Justice and Home Affairs Committee recommends that the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2001 be approved.

Phil Gallie: First, I say to the minister that if he reviews some of his comments, he will find that I constantly disappoint him. I must say that I boast about that frequently.

I want to give as my main reason for voting against the affirmative instrument and moving against the negative instrument the fact that the proposal is premature. There is a need for a full review of the tribunal system as it is not working properly. Its procedures, practices and effects have to be examined. The legal aid arguments should be addressed at that point. I will move against the negative instrument in the hope that there will be no need for it if the committee takes on board my comments.

11:15

One major reason why I feel that we should not bring the lawyers in to the employment tribunal situation is that I do not believe that the procedures of the employment tribunals are regulated to an extent that lends itself to legal involvement. If we were to involve the lawyers to a further extent than they are already involved, we would have to change employment tribunal procedures to ensure that—at the very least—records of what is said and decided are kept in full. At the moment, a tribunal sits with a chairman and two supporters—usually one from the trade union side and one from the business side. They do not take detailed notes of the proceedings. It is the practice of Scotland's legal fraternity to ensure that anything that is said in court is properly recorded. On that basis alone there is a problem.

I find the existing level of legal involvement to be appropriately balanced. I think that around 21.7 per cent of employers use legal support and just marginally fewer of those who are appealing do so—I think that the figure is 20.9 per cent. There is another element: one of the reasons for being a member of a trade union is to ensure that one's situation as an employee is protected when there is conflict with the employer. To a degree, the proposal would weaken the trade union position. Trade unions have the right to appoint solicitors on behalf of the people whom they represent. They have undertaken to do that and I think that it is valuable. I used to be an engineer and was a member of the Electrical Power Engineers Association. One of the main reasons for my being a member of the union was that I recognised the fact that, under some circumstances, there might be a need for me to justify some actions that I had taken in the course of my employment. Happily, I never needed that support, but I always knew that it existed. I knew that the union would look after my interests if I needed it to.

We tend to consider this issue with big business in mind. I have to concede that it appears unfair that big business can afford senior legal figures to represent its case against an employee. However, at the other end of the spectrum is the small business sector, which could be seriously disadvantaged if the proposal were adopted. I draw the minister's attention to the letter from the Federation of Small Businesses, which complains that it has not been consulted on this issue. That is a shame. It is important that consultation should take place. We have heard many words from ministers about businesses getting tied up in red tape. The proposal could be seen as being a further measure along red-tape lines. The letter from the Federation of Small Businesses should be taken into account.

There are other priorities in relation to legal aid

that we should be addressing. I am particularly concerned about civil legal aid but I do not want to pre-empt discussions on legal aid in this committee. There is an issue of cost as well. I recognise that the cost would be limited and I recognise that the proposal is limited. At the same time, I must confess that my priorities lie outside the employment tribunal situation.

I ask the minister to consider seriously the matter that I raise. I realise that there might be a cross-border requirement and that the Department of Trade and Industry might have to conduct an overall review of employment tribunals. I suggest to the minister that, before he goes ahead with the proposal, he should consider its wider implications.

Christine Grahame: Will Phil Gallie clarify which of the statutory instruments he is moving against?

Phil Gallie: I will be moving against the negative instrument and voting against the affirmative instrument.

Christine Grahame: I do not agree with much of what Phil Gallie said about employment tribunals. Employment law has become extremely complex and the procedures have become less relaxed than they were when they started out. I am pleased to see a move towards the provision of legal representation for applicants. I do not think that the move goes far enough, however, and I have concerns about the tests, which go beyond the usual tests for applications for advice and assistance for legal aid, ABWOR or whatever.

Regulation 5 of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2001 suggests the insertion of a new paragraph (2) in regulation 13 of the 1997 regulations. Proposed new paragraph (2)(c) provides:

"The Board shall only approve the provision of assistance by way of representation in relation to the proceedings described in regulation 3(1) where it is satisfied that . . .

(c) the case is too complex to allow the applicant to present it to a minimum standard of effectiveness in person."

I do not like the sound of "minimum standard", which suggests a poor test indeed. "Reasonable standard" might have been better.

New paragraph (3)(a) provides that:

"the determination of the issue may involve procedural difficulty or consideration of a substantial question of law, or of evidence of a complex or difficult nature".

New paragraph (3)(b) lists other relevant factors to do with the nature of the applicant. Those are stringent tests. From my experience and recent correspondence in *The Scotsman*, I am aware that many employers are represented on employment tribunals. They are not represented only by specialists, although one or two firms in each of our cities are specialists in this complex area. However, the applicant is not always represented and does not always have the benefit of a trade union—

Phil Gallie: May I intervene?

Christine Grahame: I want to finish my question to the minister first.

I suspect that one of the questions on the application form will be to do with whether the applicant has any other means of representation. That will mean that, if an applicant has a trade union that can represent them, they will not get advice and assistance in the first place. We are talking about people who have no one to speak for them. Some people end up going to the tribunal with someone from a citizens advice bureau or another civic organisation.

In a letter to *The Scotsman*, Peter Hunter, the director of the Scottish Low Pay Unit, says that where neither party is represented in tribunal proceedings, the employee succeeds in 58.9 per cent of cases but when the employer engages a solicitor against an unrepresented applicant, the employee succeeds in only 33 per cent of cases. That does not surprise me. Another letter to *The Scotsman*, from Des Loughney, the secretary of the Edinburgh Trade Union Council, says that

"Employers have an unfair advantage in a tribunal application. They can afford a solicitor and most applicants cannot. As a result, most applications (65 per cent) are unsuccessful when an unrepresented applicant is confronted by an employer represented by a solicitor."

Phil Gallie: Will you take an intervention?

Christine Grahame: I do not think that we do interventions in committees.

The Convener: There is a debate going on, so members can take an intervention.

Phil Gallie: If this is a first, I am delighted.

Around 21.7 per cent of employers and 20.8 per cent of employees use legal support. There is not an imbalance.

Christine Grahame: I would think that it depends on the nature of the case. I do not know about the figures.

Phil Gallie: They come from the Employment Tribunal Service.

Christine Grahame: My point is that applicants and employers without money should be entitled to apply for representation. There has to be a balance on representation and I do not think that the regulations provide it. With regard to the test in the regulations, I believe that there are European convention on human rights issues for the

Executive.

Phil Gallie raised concerns about how employment tribunals have evolved. I would like clarification of the rule about expenses. I think that it is only in exceptional circumstances that an award of expenses can be made. That has a knock-on effect on the second statutory instrument that we are discussing, which relates to the recovery of costs to the board. I have no problem with costs being recovered from the principal sum when there is no provision for expenses. Perhaps, however, we should think about there being a more discretionary award of expenses in employment tribunals. That would also work in settlements, as anyone who is involved in that area is aware that there is a duty to the board for costs. That would assist employers because if they are successful, there is no award of expenses in their favour—it is my understanding that there is no provision for even a percentage of costs to be awarded.

Employment law has become much more legalistic and less informal and the small claims procedure is going the same way, but that is another issue.

I have no problems with the matter of frivolous claims. There is a sifting process in employment tribunal systems that goes through preliminary hearings. Perhaps the minister could clarify that matter and assure me that that has not changed. I want the minister to address the test of whether the matter is too complex to ensure a minimum standard of effectiveness if the applicant were to appear in person. That is not a test that anyone else has to pass when applying for advice, assistance or legal aid. I would also like the minister to say something about the expenses rules on employment tribunals and applications by respondents to the board for advice and assistance—I am thinking of the small plumbers and so on who do not have large assets and will have to represent themselves.

Pauline McNeill: There is an issue—albeit a reserved one—about the process of tribunals and about how complex they have become. That is what I did for a living, more or less, in my career. I constantly had to remind the chair of the tribunal that the procedure was supposed to be simple enough for people to understand, but lawyers quote case law and refer to cases in Europe and so on. An ordinary person with no legal background is at a disadvantage when they apply to an industrial tribunal. I welcome the regulations as they go some way towards addressing that problem, although we have obligations arising from the ECHR.

I will address some of Phil Gallie's points. A large number of employees are not represented by a trade union. Furthermore, trade unions do not always offer solicitors to their members. We should bear that in mind.

It is for other people to argue if they feel that there is an imbalance in relation to small businesses. That point has already been made. However, to take account of the differences in resources, the law says that small businesses do not necessarily have to settle in the same way as big businesses have to.

I want the minister to address the issue that Christine Grahame has drawn to his attention. New paragraph (3)(a), which regulation 5 suggests should be inserted in principal regulation 13, says that

"the determination of the issue may involve procedural difficulty".

The test is therefore not absolute. I would be concerned if the test were applied only when the board felt that there was a substantially complex issue. That might mean that only a tiny number of cases were being assisted. How does the minister envision the test being applied?

11:30

The Convener: Before I call the minister to reply—no other members have indicated that they wish to speak at this point—I will make one or two points of my own. First, in the documentation that you have supplied, minister, I believe that you refer to the estimated annual cost as £200,000. Could you clarify how that figure has been arrived at? Has it been calculated on the basis of analysis of previous cases over a recent year—of whether people may have been eligible for assistance?

My second point was raised with me by the Federation of Small Businesses: that of consultation. The FSB is saying that there has been no consultation with it on the statutory instruments. While we might accept that we feel a legal obligation under the European convention on human rights to introduce the regulations, I do not believe that there is any necessity for them to be introduced on 15 January. Some later date that allowed for consultation with the FSB and other interested bodies might have made the situation more acceptable. In fact, I was told by the FSB that it did not necessarily have any objections to the instruments; it simply wishes that its members had had a chance to talk over their implications with the Executive.

Was there no consultation? If not, why not? Who exactly was consulted on the draft regulations? I understand that there was no open consultation and that even the closet consultation was not very wide ranging. I am not even sure whether the Employment Tribunal Service was consulted.

Mr Wallace: I will start with the points that you

have raised, convener, first as to why our cost estimate is £200,000. That estimate is based—this can only be a best guesstimate—on having 300 cases a year that qualify at about £600 per case. Time will tell whether that is correct, but it is the best estimate that could be made. Even if the budget was double the present amount, the financial implications could still certainly be met from the justice department's budget and from the resources that we make available to the Scottish Legal Aid Board.

As for consultation, I can confirm that the Federation of Small Businesses was not consulted. Perhaps that was an oversight, but I do not think that there has previously been any consultation on legal aid changes: there is no history of the FSB being consulted with regard to such changes. That is probably because legal aid is available to natural persons, but has never been available to businesses or partnerships. Therefore, it did not feature on the radar screen.

The regulations were brought in quite quickly because there was an assessment that, as things stood, there was vulnerability to challenge under the European convention on human rights. Indeed, there have been a number of cases. When I met the committee earlier in the session, I said that a number of cases have now been brought on that point. On further consideration of the issues raised by those cases, we believed it important to make provision. That is why we have taken these measures with some urgency.

Phil Gallie said that the measures are premature and that a full review of the tribunal system is needed. I think that Pauline McNeill agreed that there is such a need, but she said, quite properly, that it is a reserved matter and that it is not possible for Scottish ministers to overhaul the tribunal system. That answer applies, too, to a point that Christine Grahame made.

Phil Gallie: Is it the case that the proceedings of employment tribunals south of the border are recorded, although north of the border they are not?

Mr Wallace: I cannot answer that question now, but I will find out the answer.

The fact that the tribunal system is reserved also explains why it is not possible to introduce discretionary expenses. I will say more about expenses at employment tribunals in a moment. We are faced with the circumstances that exist in Scotland and are trying to address a shortcoming in relation to legal assistance for applicants before a tribunal.

The Convener: I do not think that we are arguing about whether the ECHR requires change to the current system. Surely the question is what that change should be. The FSB is saying that it would like to be consulted on the precise nature of the changes that are being introduced but is not necessarily arguing that there should be no changes.

Mr Wallace: I will outline the nature of the changes that we have made. I said in my opening remarks that although, generally, the European convention on human rights does not require the availability of civil legal aid, in the case of Airey v Ireland, the European Court of Human Rights found that, in a particular set of circumstances, civil legal aid should have been made available and set out tests. The judgment in that case gives indicators as to the circumstances in which some form of legal assistance should be made available in civil cases.

The manner in which we have drafted the regulations reflects the nature of the tests that were set out in the Airey case. That explains why the regulations refer to cases that are arguable or too complex or in which it is reasonable that assistance by way of representation be made available, and to features that may relate to the person rather than to the case.

I will address a point that was made and on which Pauline McNeill may want to come back. New paragraph (2) gives the circumstances in which the board "shall" only approve the provision of assistance and new paragraph (3) states what the factors that should be taken into account by the board in determining whether new paragraph (2)(c) applies "shall" include. I think that Pauline McNeill said that the word "may" was used. In fact it is a requirement that the board should be satisfied about those circumstances and factors.

Christine Grahame: I have not read the case to which you referred. Is the expression

"the case is too complex to allow the applicant to present it to a minimum standard of effectiveness in person"

in new paragraph (2)(c) lifted straight from that case?

Mr Wallace: It is not a direct lift. It is an interpretation of the circumstances in which civil legal assistance should be given that were outlined in the Airey case.

Christine Grahame: I would also like clarification of the term "minimum standard". Usually, the word "reasonable" is used.

Mr Wallace: I do not think that the word "minimum" appears in the Airey judgment. At the end of the day, these will be matters for the board to interpret, and its decision would be subject to judicial review if it were felt that the interpretation was not proper. This measure reflects the point that both Christine Grahame and Pauline McNeill made about the increasing complexity of cases. The complexity of a particular procedure, of

evidence or of important legal points, and the increasing use of case law may well lead to circumstances in which the applicant would be able to make a good case under these regulations for legal assistance by way of representation. As I indicated, we expect that there will be some complexity in at least 300 cases a year, which is no small number.

Christine Grahame: On that point, minister, £600 a case seems a terribly low figure. I take it that that will include fees, outlays, witness costs, the lot. Is that correct and is the fund finite? If one applies halfway through the year and the £200,000 is no longer available, will that be that?

Mr Wallace: No. As I indicated, our figures may be out; the total may be double that amount.

Christine Grahame: What if the total is 10 times that amount?

Mr Wallace: The resources will be available. As Christine Grahame knows, civil legal aid is demand-led. If there is a huge increase in the demands on the legal aid budget, we will have to consider other competing pressures. As things stand, we do not anticipate any difficulty in being able to fund the claims that will be made as a result of these provisions.

Christine Grahame: Do you agree that £600 is an extremely modest figure? Gordon Jackson would not appear for that amount of money.

Mr Wallace: It bears comparison with other ABWOR cases. I agree with Phil Gallie's comment that it is important to remember that we are talking principally about those tribunals where the original concept was that they should involve a degree of informality, that they should not become unduly formalised and that their procedures should be comparatively straightforward.

We may have drifted away from that concept but, as a general rule, it should not be necessary for persons who appear before those tribunals to have legal representation. That principle would benefit the vast majority of applicants who appear before those tribunals. However, we must try to strike a balance, as cases exist where the issues are too complex. Even in those cases, we have applied roughly the costs of other ABWOR cases—I hate the word ABWOR, but it is shorter than saying assistance by way of representation.

I can only say that, by extending legal aid in this way, we are taking a completely novel route and therefore our figures must be estimates. However, they are honest estimates and we have made them as best we can. While we will monitor the situation, as I said, our estimates could be out by some distance. Despite that, we will still have the resources to fund the extension.

Christine Grahame: I appreciate that this is a reserved matter, but now that we are talking about European legislation as well as UK legislation, do you think that representations should be made on changes to the award of expenses in employment tribunals? The complexities are enormous—employment law may be as complex as commercial law. Do you think that we should move in the direction of awarding expenses in employment tribunals?

Mr Wallace: Just before I come on to that particular point, I will take the opportunity of making some general comments about expenses in employment tribunals.

As Christine Grahame pointed out, employment tribunals have no power to award expenses, unlike sheriff courts, for example. Expenses do not follow success in tribunal cases and, accordingly, parties must meet their own costs. In the case of someone who is legally aided, the solicitor is required to recover his costs in the first instance from any winnings and only then can the balance be claimed from the legal aid fund. That means that anyone who receives legal aid and is successful in a tribunal would have their award reduced by the cost of legal aid, which might wipe out their entire award. We have brought in the regulations that are subject to negative procedure so that the successful, legally aided tribunal applicant is able to keep the award and will not have to pay expenses. I hope that the committee thinks that that is a fair way of proceeding.

I would not want to make an immediate judgment because, as I said earlier, if we are trying to retain some degree of informality and make tribunals generally accessible, the ability to make discretionary awards of expenses—particularly if there was a presumption that expenses would follow success—might deter people from pursuing employment claims to a tribunal. Many factors would have to be taken into account before we went down that road. It may well be that the time is right for a general examination of the tribunal system. However, as I have indicated, that is not a matter for Scottish ministers, although it is a matter that Westminster may wish to consider.

11:45

Pauline McNeill: Can we debate the issue of the three tests—whether the case is arguable, reasonable and too complex—and the factors to be taken into account. You talk about the test that is set out in new paragraph (2)(c):

"the case is too complex to allow the applicant to present it to a minimum standard of effectiveness"

and the factors to be taken into account when determining whether the case is too complex, as set out in new paragraph (3), including that

"the determination of the issue may involve procedural difficulty or consideration of a substantial question of law".

I would not want it to be the case that the determination of whether a case is too complex for the applicant to present would rest on whether it is a substantial question of law. Consider a sex discrimination case that would be heard by an employment tribunal, which would be extremely complex for most people to understand. However, it might not turn on a substantial question of law, but might turn on the evidence. I would like your assurance that you accept that the reason for the wording of the regulation—

"the determination of the issue may involve procedural difficulty"—

is that assistance would not be decided simply on a substantial question of law. Do you appreciate my concern?

Mr Wallace: Yes. Ultimately, it is for the Legal Aid Board to interpret the criteria, subject to judicial review. The regulations set out the kind of considerations that the Legal Aid Board should take into account. It could be that the matter under consideration is a substantial question of law, but it could also be one of procedural difficulty. It is not cumulative—any one of the criteria could apply in a particular case. There is a fair scope for assistance for representation to be granted. Pauline McNeill might be more concerned if the regulations attempted to narrow that definition, for example, if there had to be a combination of all three criteria.

Pauline McNeill: I understand that it does not have to be all three. I would be happier if the paragraph said a "question of law" rather than a "substantial question of law".

Mr Wallace: I could accept that, because almost any case involves the consideration of a question of law. The question might be a simple point. I would not accept that that in itself merited assistance by way of representation. There has to be a step up before someone would qualify for ABWOR. The vast majority of cases involve a question of law.

Gordon Jackson (Glasgow Govan) (Lab): Every case has a question of law. Every case that goes before a tribunal must include a question of law.

Mr Wallace: Yes, the question is whether the law applies in any given case.

Gordon Jackson: The question is whether the evidence that is led justifies granting the remedy that is sought. Every case includes a question of law, albeit the question of law is so obvious that no one wants to talk about it.

Mr Wallace: I was stopping just short of that, in case there were circumstances in which the argument did not rest on a point of law, but I think that Mr Jackson is probably right. The general point that I made still applies: almost every case would qualify, but that is certainly not the intention.

Christine Grahame: Would it be relevant to state on a legal aid application that the respondent should be legally represented?

Mr Wallace: That would not be relevant to the specific criteria that are laid down, but, as Christine Grahame will see, new paragraph (2)(b) of the regulations states that the provision of assistance will be approved if

"it is reasonable in the particular circumstances of the case that assistance by way of representation be made available".

In particular circumstances—not in all circumstances—the Legal Aid Board may take that factor into account, but that is a matter for the Legal Aid Board. When the circumstances of a case become apparent, it may be obvious whether that would be relevant. However, it does not automatically follow that, in every case in which the employer's side has legal representation, the applicant would qualify for assistance by way of representation.

Christine Grahame: You do not think that the applicant would be disadvantaged if the employer had legal representation and they had not?

Mr Wallace: I know from experience that, in the case of a party litigant, the disadvantage is on the side of those who are legally represented. Such tribunals proceed more often by an inquisitorial rather than an adversarial route. They are intended to maintain some degree of informality, so that, in the vast majority of cases, the applicant can present a case in their own way.

I commend both sets of regulations to the committee, which helpfully advance the provision of legal assistance in Scotland, and not only as a requirement of the European convention on human rights. In the context of the second set of regulations, which are subject to a negative procedure, if the applicant has been successful and legal assistance has been made available, the proceeds of that success should not be taken away from them in circumstances in which the tribunal cannot award expenses against the unsuccessful party.

Phil Gallie: I am disappointed to hear the minister say that he will press ahead, especially having heard the convener's and Christine Grahame's comments. Christine made a good case concerning the poor employer—she referred to someone who runs a small business—who does not have much cash and is not in the position to provide legal support. The minister said that legal aid has never been available to business, but it has never before been available in the employer

tribunal situation either. Nevertheless, if there were the political will, those things could be achieved.

Alasdair Morgan made a point about the time element. Although many will regard the minister's motivation as being sound and well intentioned for the future, Alasdair's comment about taking more time to consider the issues is relevant. We should certainly examine the wider implications and the minister would be well advised to do so.

The minister gave his estimate of the case costs—£600 a case—but Gordon Jackson suggested that that figure is considerably lower than the cost that he would anticipate. Many complicated cases go to industrial tribunals, which do not involve appearances for one or two days, or even for a week. The investigations sometimes continue for many months and require a number of hearings, and the costs that are involved can be substantial.

I think that the minister himself referred to the fact that employment issues are becoming more legalistic. That is unfortunate given the comments that he made about the inquisitorial nature of the industrial tribunals and the philosophy from which they come. The fact that the chairman is there with a neutral view and an informed legal mind and is partnered on either side by people from both sides of the dispute is supposed to give a balanced view, one that is not necessarily based on the law but is based on opinion and the facts of the individual case. My fear is that if we involve the lawyers to a greater extent, that will be lost.

I can well recognise the Law Society's interest in the matter, as there is obviously good business here for lawyers. However, it is more important to consider what is good business practice rather than what will provide more business for the legal profession. I am obliged to move against the minister's motion. I would pull back from doing so if he were simply to change the time scale to allow other issues to be considered. He could still achieve his objectives by doing so, but he could also take account of the valid points that have been raised.

The Convener: The question is, that S1M-1398, in the name of Jim Wallace, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Barrie, Scott (Dunfermline West) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
MacLean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)

AGAINST

Gallie, Phil (South of Scotland) (Con)
McIntosh, Mrs Lyndsay (Central Scotland) (Con)

ABSTENTIONS

Grahame, Christine (South of Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 2, Abstentions 1.

Motion agreed to.

That the Justice and Home Affairs Committee recommends that the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2001 be approved.

The Convener: We now move to motion S1M-1422.

Phil Gallie: I move,

That the Justice and Home Affairs Committee recommends that nothing further be done under the Advice and Assistance (Scotland) Amendment (No 2) Regulations 2000 (SSI 2000/399).

Christine Grahame: Lyndsay McIntosh has just pointed out to me a useful piece of information. We should draw to the attention of the committee the fact—

The Convener: We are now debating the motion against the negative instrument. Is that what you want to talk about?

Christine Grahame: It relates to expense, which was raised by the minister. I was unaware that Stephen Byers is considering changes to employment tribunals and that a consultation process on that is under way. My point is relevant to the instrument. As the minister did not refer to that point and I was not aware of it, we should make him aware of it.

The Convener: He knows now.

The question is, that motion S1M-1422, in the name of Phil Gallie, be agreed to. Are we agreed?

Phil Gallie: No.

Gordon Jackson: This is your motion, Phil.

Phil Gallie: Sorry. Thank you, Gordon. I meant to say yes.

Gordon Jackson: Concentrate, man.

The Convener: I suspect that not everyone is agreed. Are we all agreed?

Members: No.

The Convener: There will be a division.

FOR

Gallie, Phil (South of Scotland) (Con)
McIntosh, Mrs Lyndsay (Central Scotland) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab
Grahame, Christine (South of Scotland) (SNP)
Jackson, Gordon (Glasgow Govan) (Lab)
MacLean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)

The Convener: The result of the division is: For 2, Against 6, Abstentions 0.

Motion disagreed to.

The Convener: We have to report to the Parliament on the affirmative resolution that we have just passed. Normally, this report would be formulaic—we agreed by e-mail a formula that was suggested at a recent meeting. In this case, however, we might want to add something about the nature of the consultation and the fact that some people were concerned that there had not been a period in which various organisations could be consulted on the instrument. We could insert words to the effect that we hope that, when instruments of this sort are introduced in future, due consideration will be given to consulting interested parties. Would members favour inserting something of that nature into the report?

Pauline McNeill: I would not mind. I do not accept that the Federation of Small Businesses should have been consulted. I do not think that that point is relevant. I am not opposed to saying that in future interested bodies should be consulted. However, it is not our responsibility to consult the federation on matters relating to applicants to tribunals. If we did that, we would have to consult a host of other people.

The Convener: I did not intend to mention a specific organisation—its name will appear in the *Official Report* of this meeting. I intended simply to make a general point.

Gordon Jackson: I am happy to criticise the Executive when I feel that it has not consulted, but on this occasion I do not want to do that. A limited extension—for some people, perhaps, too limited—was the minimum that could have been done to ensure compliance with the ECHR. When the Executive has to meet a minimum requirement, I do not think that it can be criticised for not consulting on that. If the Executive had decided to grant legal aid much more widely, it could have been criticised for not consulting on that. However, in this situation it would be a wee bit hard on the Executive to criticise it. I never thought that I would say those words.

12:00

Mrs Lyndsay McIntosh (Central Scotland) (Con): I quote from Stephen Byers's press release, which states:

"Draft amendments to employment tribunal rules of procedure are due to be published in the New Year and are due to come into force in early Spring 2001 depending on statutory consultation and Parliamentary approval. Regulations to implement the ACAS arbitration scheme are expected to be introduced shortly. The Small Business Service and other organisations were consulted".

I am concerned about the different approach that is being taken north and south of the border. Here similar organisations were not consulted.

Phil Gallie: I apologise to Gordon Jackson. I understand that he did not make a statement about costs. I am happy to lay claim to that statement—I still think that the proposal was under-costed.

I return to the point about consultation. I have some sympathy for the point that Pauline McNeill made. It is recorded in the *Official Report* of the debate on these statutory instruments that there was disquiet about the level of consultation. That, in itself, may or may not be seen as indictment of the Executive. That is one reason for debating statutory instruments and keeping a report of everything that is said, unlike in industrial tribunals, where no report of proceedings is kept.

The Convener: Are you arguing in favour of a formulaic report in this instance?

Phil Gallie: Yes.

Christine Grahame: Is it appropriate to refer to a minority concern about the severity of the test set out in new paragraph (2)(c) for persons applying for legal advice and assistance in these cases, as compared with that in other cases? The test is usually that granting legal aid would be reasonable in all the circumstances and would be in the public interest, and that the applicant has an arguable case. This instrument includes a further test under which the board must be satisfied that

"the case is too complex to allow the applicant to present it to a minimum standard of effectiveness in person."

I am concerned about that.

Gordon Jackson: It would be fair for us to note that concern. On this committee we have always had a policy of allowing members to express a minority view. That has meant that in our reports we have given people an honest picture of debates. If Phil Gallie or another member has had a disagreement with the rest of the committee, people reading the report have been able to see what the disagreement is. That is appropriate.

The Convener: We can obviously just refer to the *Official Report* in our report. There is nothing to stop the committee inserting other concerns in the report, but I would like us reach a consensus on what we insert.

Christine Grahame: We were concerned about it.

The Convener: Yes, I think that we agree that there were concerns. We can say in the report that there were concerns about the minimum conditions in which assistance would be granted. It would be equally valid to say that there were concerns about the degree of consultation that was undertaken.

Gordon Jackson: As long as we make it clear—I am sorry if I am repeating myself—that those were minority concerns and were the concerns not of the committee but of some members, I do not have any problem with what you suggest.

The Convener: I am happy with a statement that some members of the committee expressed concern.

As we will not meet again before the instrument comes into force, I will e-mail a draft report to members as soon as possible. People will be expected to reply, but, in the best legal tradition, failure to reply will be taken to signify consent.

Forward Programme

The Convener: The next item is consideration of future business, on which I circulated a paper among members. I thought that it might be appropriate for the committee to form a view on what action, if any, should be taken on various matters that have arisen recently. The first item is the Chhokar case. Various ways in which we might proceed are suggested. Do members have any views on that issue?

Gordon Jackson: There may be overlap with the work of the Equal Opportunities Committee. Kate MacLean may be able to tell us whether it would be better to leave this case to that committee.

Kate MacLean (Dundee West) (Lab): The Equal Opportunities Committee discussed this case at its most recent meeting, but could not agree a view on the action of the Lord Advocate. We discussed the matter some time ago, but were unable to do so fully because legal proceedings were taking place and the matter was sub judice. We agreed that Michael McMahon, who is the reporter on race issues, would present a report on the case to the committee next week.

There are two issues in relation to all the events of the Chhokar case. First, there is the issue of legal competence, which has been challenged. That is not within the remit of the Equal Opportunities Committee. Secondly, there have been accusations of racism, which are within the remit of that committee. I suspect that that is the area on which that committee will concentrate, if it decides to pursue the case. There is also the option of waiting until that committee can consider the conclusions of the two inquiries.

I suggest that this committee may wish to consider the matter of legal competence and that the other committee may wish to examine allegations of racism. It may be possible to set up a sub-committee consisting of members from each committee to look at the conclusions of the two inquiries. There are a few options, but the Equal Opportunities Committee is no further forward than the Justice and Home Affairs Committee.

Gordon Jackson: I agree that the issues of how the family was treated and racism generally are best left to the Equal Opportunities Committee. However, we do not have the competence—I do not mean that pejoratively—to examine legal competence until that inquiry is finished. I have asked many people who were involved in the case what they think about it and I know that nobody would take a stab at that unless they had access to a vast amount of information.

Until the Northern Ireland judge is finished, it

would be crazy for this committee to consider legal competence. If that judge reported that there was legal incompetence, it might be a different matter—whatever he says, it might be a different matter. However, I counsel the committee that it would not be a good idea to go down that path before the judge has examined the relevant papers.

Pauline McNeill: It would be wise to leave any examination until we hear what the inquiry finds. However, regardless of that, the committee should still consider the case. Even in the unlikely event that the inquiry finds that there is no case to answer, that would make sense.

Do you want to discuss other future business now, convener?

The Convener: No, I thought that we would get our arrangements for this first item out of the road first.

Christine Grahame: I agree with Kate MacLean, but it might be that the race factor impacted on legal competence. A white middle-class lad might not have experienced the same level of incompetence—we do not know. However, without deciding about the competence of legal procedures, I wanted to ask about the nature of the inquiry. We have never really had a chance to discuss that. We have heard the statement and asked questions and there has been a refusal to carry out a public inquiry. I would like the committee to discuss at an early stage the merits or otherwise of the form of the inquiry. That can be done through written submissions, which would form the basis of a discussion of the alternatives.

Given all that the Chhokar family have gone through—I am not making a political point here; my remarks are made as an individual—I feel that they deserve the public inquiry that they have asked for. Members might say that I am prejudicing the debate, but I can be persuaded otherwise. However, I want the committee to consider the nature of the inquiry, not the legal processes.

Kate MacLean: In the letter that I sent to Jim Wallace, I asked—although it was not specified in the letter—for Michael McMahon to have access to the terms of reference and the remit of the two inquiries. That would allow the committee to discuss the inquiries next week. If the issues of legal competence and race cross over, that would point to the possibility of setting up in future a sub-committee of the Justice and Home Affairs Committee and the Equal Opportunities Committee. I cannot pre-empt what the Equal Opportunities Committee will decide next week, but such a sub-committee might be more usefully set up once we have seen the conclusions of the two inquiries. At some point, I suspect that the Equal Opportunities Committee will wish to question the Lord Advocate about the inquiries, in particular about his decision to have two private inquiries. To save duplication, it might be worth arranging for both committees to take evidence at the same time, because of the probable crossover of issues that I have mentioned.

The Convener: The general feeling is that, although the two inquiries are private—about which some people disagree—a third inquiry at the same time would not be particularly helpful. Therefore, we should probably leave the matter to one side for the moment, with a view to returning to it either on our own or with the Equal Opportunities Committee. Parliamentary Bureau approval would be required for two committees to sit together.

Christine Grahame: Can I clarify that the proposal is that the Justice and Home Affairs Committee and the Equal Opportunities Committee sit together to investigate the propriety or otherwise of holding a public inquiry rather than holding the two inquiries that will take place?

The Convener: No. We should allow ourselves the flexibility to decide what to do when more information becomes available. I see no point in constraining the committee at the moment. Do members agree?

Gordon Jackson: I agree.

The Convener: There is another, big area that we could investigate at a future stage, which is the business of public inquiries per se, and how useful they are. It always appears that they will be more useful, but when one sees what they sometimes come out with and what they cost, one wonders whether they are. That, however, is a general issue, which is not necessarily to do with the Chhokar case.

Pauline McNeill: It might be useful for the convener to write to the Lord Advocate to ask where the inquiry is going. What information will be made available? There is a debate about whether to have a public inquiry or a private inquiry. I do not necessarily accept that what has been announced will go on entirely behind closed doors. However, I would like to explore what the Lord Advocate has decided about the extent to which information will be made available.

The Convener: The Lord Advocate has said that the conclusions of the inquiries will be made public, but that does not make it clear how much of the information will be made available.

Pauline McNeill: We need to push the door to see what else can be made available.

12:15

The Convener: Four items were raised. The second is the Chinook helicopter crash in 1994, which came to prominence again recently with the publication of a report by the Public Accounts Committee at Westminster. I thought that the bits of the report that were relevant were those that mentioned the RAF board of inquiry's process and the burden of proof that the board required. The Public Accounts Committee stated that the finding of the RAF board of inquiry did not satisfy the burden of proof that is required by that board's standards.

The committee also referred to the fatal accident inquiry that was held by the sheriff at Dunoon. The report states that the fatal accident inquiry requires a lesser burden of proof than the RAF board of inquiry. However, the fatal accident inquiry found that, on the balance of probability, it could not apportion blame or come up with a finding of gross negligence, which is what the RAF's board of inquiry came up with. The Public Accounts Committee also felt that the process of RAF boards of inquiry was open to criticism.

Does the committee feel that it is worth exploring the relationship between the Scottish justice system and the RAF's board of inquiry, which is essentially a reserved body, in the sense that it is set up by a ministry that is responsible to the Westminster Parliament, but whose remit overlaps into the Scottish justice system? Our remit does not allow us to examine or take evidence on the Chinook case—nor would we wish to. However, we might want to explore the business of boards of inquiry that are operated by reserved ministries and whose decisions can cut across decisions that are made by a Scottish court, as in this case. Do members feel that that is worth investigating?

Gordon Jackson: The Chinook case fascinates me—I would love to get my teeth into it to see what really happened. The problem with that case and with what the convener suggests is that I do not know how we would get our teeth into it. Who would give evidence? If we examined the system, we would want to query people from the Ministry of Defence, the board of inquiry and perhaps even Geoff Hoon. We could not get the sort of people that we would want to have a go at—if I may put it neutrally—to sit here. [*Laughter.*] I am not putting this very well. What I mean is that I am not sure how we would get into such an inquiry.

The Convener: If members feel that it is worth calling some of the mandarins or gold braid from the Ministry of Defence to answer questions about how they run their courts and boards of inquiry, we can ask. It will be interesting to find out what their response is. Either way, their response will tell us something.

Christine Grahame: Like Gordon Jackson, I am up for an inquiry, but I see the same problem about identifying what we would aim to do. What would be the inquiry's remit? What would be the question that we want an answer to? If somebody can help me with that, I will be content to go along with an inquiry, but I want to get a handle on the matter—I think that that is the colloquial way of saying it. What point do we want to make?

The Convener: Pauline, do you wish to comment?

Christine Grahame: I thought that you were going to answer my question, convener.

Pauline McNeill: The two standards of proof have two different results, in which—

The Convener: I was unwilling to spend too much time on the Chinook case until I heard the committee's reactions. If members think that there might be something for the committee to examine, I ask them to go away and come up with a potential inquiry remit to bring back to the committee. That might be the way forward.

Gordon Jackson: That is a matter for you, convener, but I do not want it to be said that I thought that there was something we could do in relation to the Chinook case. I have reservations about the usefulness of such work, particularly as we will come to other clearly domestic issues that we will be unable to find time to get through.

The Convener: On the other hand, a helicopter that crashes in the Mull of Kintyre is a fairly domestic matter.

Gordon Jackson: Well, it is and it is not. I am not trying to minimise the horror and the tragedy for those who were involved, but that does not mean that it is an issue that we could take up usefully. I am interested in the issue, but I do not know how to tackle it.

Kate MacLean: I also think that the subject is interesting, but I do not want the committee to take evidence on an issue about which we are not able to do anything. I imagine that every time that there is any kind of public inquiry or revisiting of the issue it is upsetting for the families involved. I would hate to trivialise the issue just because we are quite interested in it and want to consider it when we have no real idea of what is involved. If we are to receive a report on the matter, I would like to be clear about what the committee hopes to achieve.

The Convener: I agree. That was a good point.

We will move on to the third heading, which is on prisons in general and the costs of prisons. Members will note that Christine Grahame has written to me suggesting that we should take evidence from the chief executive of the Scottish

Prison Service about the difference in costs between Kilmarnock prison and the state prisons.

Given that the estates review might be published presently, could we simply write to the chief executive of the SPS at this stage? He is likely to come back before the committee when we have examined the estates review. Again, I am interested to hear what members have to say.

Christine Grahame: I would not be unhappy with that proposal, if we were to invite the chief executive to the committee early. However, we have been waiting for the estates review for six or seven months and I am angry about the way in which questions have been skirted around. There are many questions about Kilmarnock prison, not only from me but from members from all parties who are trying to get to the bottom of the matter of costs and so on, to compare Kilmarnock prison with state prisons.

However, if we must wait for several more months, I would like us to deal with the matter now, given that we did not deal with it the first time. I believe that Phil Gallie opened up the questions on Kilmarnock and costs and we did not get to the nub of the problem. We have not got there yet, and neither has the chief inspector of prisons. He said that he had been told that the cost at Kilmarnock prison was £11,000 per prisoner place, but that that figure was not comparable with state prisons. That was the full stop in his evidence and the committee got no further.

If the committee is about anything, it is about unearthing the facts and shining bright lights on them. I suspect that more private prisons are on the way—that is quite clear in advance of the production of the estates review. We want to be armed, so that we can compare apples with apples.

Phil Gallie: I go along with Christine Grahame's comments. It would be interesting to have a really good look into Kilmarnock prison, particularly given the policy changes that we believe are coming down the line. There would be much to learn from such a session, which might have some surprising outcomes.

The Convener: The estates review is definitely with the minister.

Pauline, I am not forcing you, but did you wish to say something?

Pauline McNeill: Christine Grahame is right about the estates review, which has been on-going. Equally, during our examination of the prison service, a sub-category of issues that we should consider kept cropping up.

On Kilmarnock prison, I would like to have an understanding of the costs of the prison service and I would like to find another way of understanding those costs before Tony Cameron comes before the committee. I would like him to be the last person in line, because there are issues that I would like to put to him about the differences between Kilmarnock and other prisons in relation to costs and other matters.

The Convener: It sounds as though we should get something in writing from Tony Cameron—and from anyone else we can think of—on the costs of those prisons, so that we have some evidence on which we can base further questioning.

Christine Grahame: Pauline McNeill is also saying that the order in which we take witnesses can be important. In taking evidence from witnesses, members have sometimes felt as though some—such as Mr Cameron—should have come at the end of the process, after we had gathered information to put to them. We require not only written information from Mr Cameron and the Scottish Prison Service; we must invite him to appear before the committee at the end of the evidence-taking process, when we can put to him what we have been told.

The Convener: Let us gather some more evidence. By our next meeting, the estates review may have been published.

The final item that I want the committee to address is a point from Gordon Jackson, concerning the ways in which child protection committees are run in various council areas.

Gordon Jackson: I sent a letter to committee members, but they might not have read it. I knew nothing about child protection committees until a senior police officer in Strathclyde police asked whether he could have an informal word with me about them. He expressed concerns about the way in which those committees operate throughout the country.

Strathclyde police are taking child protection seriously. They have, or will soon, set up a child protection department, which will be staffed by a senior officer and others. The child protection committee system is organised by each local authority, so there will be as many committees in the Strathclyde region as there are local authorities—which is about a dozen. A police officer will be on each of those child protection committees and all those officers will be trained by Strathclyde police.

However, all local authorities do things differently. Some local authorities take their jobs on those committees seriously, but others take the view that, because their involvement is voluntary, they do not need to bother much. Some will implement training programmes, and some will not. Some local committees have carefully set out procedures and guidelines on how to deal with

child protection issues and others do not, or they have different arrangements. Although child protection committees exist in all local authorities, there is no statutory framework for them.

I am told that there is a proper statutory framework in England—although I have not read it—but in Scotland, a set of guidelines is issued by the Executive. Local authorities regard those only as guidelines: some take them seriously and some take them less seriously. Even the local authorities that take the guidelines seriously do things differently, which can cause real problems. Often, a child protection issue crosses borders. For example, a child may be taken into care in Ayrshire but, for various reasons, might have to be placed in Fife. The co-ordination of child protection is not as good as it might be.

I have great respect for the police officer who spoke to me about this matter. He was extremely genuine and concerned about the situation. The fact that he was so concerned about the way in which the system operates throughout the country was sufficient to convince me that it is an important issue. Scott Barrie has a background in this type of work—he may have some thoughts on the matter. He is the only person who responded to the e-mail that I sent to members.

Scott Barrie (Dunfermline West) (Lab): Yes. I sat on a child protection committee in Fife. Gordon Jackson is correct to say that the committees operate differently in different local authorities. However, I am not sure whether the committee could undertake an inquiry into the child protection committee system, because there are more issues than legal issues involved. Each local authority has different child protection procedures, which are drawn up in negotiation with key agencies, one of which is the health service. I am not sure what we would be trying to achieve through a committee inquiry.

There is a specific problem in the authorities that disaggregated during the most recent local government reorganisation. I am not talking only about Strathclyde—although that is the biggest such former authority—but about Tayside, the central region and the Lothians, where more than one authority ended up covering a police force area.

There are difficulties. For example, particular difficulties in the former Strathclyde area, will be exacerbated by reorganisation. I am not sure how an investigation of the legal aspects alone would be undertaken. The convener's note is right that the issue cuts across so many other remits that it might be worth while finding out whether any other committees have an interest. They could then return with ideas about how to take the issue forward. Obviously, I am interested in the subject and I would love the committee to investigate it, but a Justice and Home Affairs Committee inquiry would cover only the legal aspects.

12:30

Kate MacLean: I agree with Scott. It might be better for other committees to examine child protection issues, because they centre on the best interests of the child. Later, the Justice and Home Affairs Committee could ensure that the law fitted in with those interests. If we conducted an inquiry, we would be conducting the process the wrong way round.

Local authorities are all different. They have different structures and partnership arrangements with other agencies. To a body such as the police, which is heavily structured and is consistent throughout the Strathclyde region, such arrangements might not appear to be the best way of doing things. However, we must take into account the indigenous practices and structures of each local authority. I would be interested in examining the subject, but at the end of the process rather than at the start.

Gordon Jackson: I do not disagree with any of that. I was concerned about what I was told and I would like Parliament, in its broadest sense, to deal with the issue. The difficulty is that, when a subject crosses committee boundaries—such as the two issues that we discussed today—sometimes nobody deals with it. That worries me. Serious issues are not addressed because they fall into a gap. If the committee wants to say that it has considered the issue and that it will send the minutes of the meeting to the Health and Community Care Committee, the Social Inclusion, Housing and Voluntary Sector Committee or any other committee to ask whether there is interest in investigating the issue, I will be happy with that. I do not want the subject simply to fall into the hole because nobody will tackle it.

Scott Barrie: I wonder whether we could write to bodies such as the Association of Directors of Social Work and the Scottish Reporters Administration Service to ask for their views on whether the problem is huge throughout Scotland or whether it is more localised. If we had such information, it would be easier to take the issue forward.

The Convener: That is a good idea.

Christine Grahame: We could also write to the minister. As Gordon Jackson has raised the issue, we could ask whether the Executive has concerns. Subject to the replies that are received as a result of Scott Barrie's suggestion, an Executive response would also assist us in deciding the direction to take. I tend to think that the committee should not take the lead in investigating the issue. Perhaps it should go to the Education, Culture and

Sport Committee, whose remit includes children. I accept what Gordon Jackson said about issues falling into holes. I think that a letter to the minister and letters to the other organisations that have been suggested would be useful as a preliminary exposé of the problem.

Pauline McNeill: That is a sensible suggestion. However, we might have to go on a bit of a fishing expedition. I have heard comments similar to those that Gordon Jackson made at the beginning of the discussion. People have said that the children's panel system is not operating well. We need to explore the point at which the committee should stop. I do not see why the committee should not examine the subject, if no one else will.

Maureen Macmillan: I do not know whether we could liaise with the cross-party group on children. Are you on that group, Scott?

Scott Barrie: Yes.

Maureen Macmillan: How do cross-party groups fit in with committees? The cross-party group on children considers children's services in detail.

Scott Barrie: I will raise that issue at the next meeting of the cross-party group on children.

The Convener: We will write to the people and organisations that were suggested and bring their responses back.

We have reached the end of the meeting. The next meeting is not until Wednesday 17 January, so I wish everyone a merry Christmas and a happy new year. I will see members then—or perhaps not, because a motion is being debated on Thursday that might change the Parliament's committee structure somewhat.

Meeting closed at 12:34.

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