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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 8 March 2011

Session 3

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JUSTICE COMMITTEE
8th Meeting 2011, Session 3

CONVENER

*John Lamont (Roxburgh and Berwickshire) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)
*Dave Thompson (Highlands and Islands) (SNP)

COMMITTEE SUBSTITUTES

Claire Baker (Mid Scotland and Fife) (Lab)
David McLetchie (Edinburgh Pentlands) (Con)
Mike Pringle (Edinburgh South) (LD)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Jodie Blackstock (Justice)
Fergus Ewing (Minister for Community Safety)
James How (Scottish Government Directorate for Justice)
Claire Keggie (Accountant in Bankruptcy)
Alan McCreadie (Law Society of Scotland)
John McGovern (Glasgow Bar Association)
Raymond McMenamin (Law Society of Scotland)
Professor Alan Miller (Scottish Human Rights Commission)
David Stewart (Highlands and Islands) (Lab)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 8 March 2011

[The Convener *opened the meeting at 10:03*]

Decision on Taking Business in Private

The Convener (John Lamont): Good morning and welcome to this meeting of the Justice Committee. I remind everyone to turn off their telephones or other electrical devices.

Agenda item 1 is a decision on taking business in private. Do members agree to consider in private at the next meeting a draft report on the affirmative instruments that will be considered later in this meeting?

Members *indicated agreement.*

Commissioner for Victims and Witnesses (Scotland) Bill

10:03

The Convener: Item 2 is an evidence session on the Commissioner for Victims and Witnesses (Scotland) Bill.

The Commissioner for Victims and Witnesses (Scotland) Bill was introduced on 27 May last year by David Stewart MSP, and was one of four members' bills that were referred to the committee in early June. Two Scottish Government bills were referred to the committee after the summer recess. The committee was faced with so many bills that required to be considered before the end of the session that it was almost inevitable that it would not have time to carry out stage 1 inquiries into all of them. As a result of the difficult decisions that the committee had to make, Mr Stewart's bill was left behind at the end of the queue. The committee has already put on record its unhappiness at finding itself in that position. Mr Stewart has been invited to the meeting so that he at least has an opportunity to put on record his reasons for introducing his bill and to answer general questions about its provisions.

I welcome David Stewart, who is accompanied by Ruth McGill of the Parliament's non-Executive bills unit. I invite Mr Stewart to make a short opening statement. I will then invite members of the committee to ask questions.

David Stewart (Highlands and Islands) (Lab): I thank you very much for your kind introduction, convener, and I thank members of the committee for inviting me to speak in this legacy hearing.

As members would expect, I am a touch disappointed that this will be the last hurrah for my bill, at least in this parliamentary session, but I stress that I understand that that is not the committee's fault in any way. I hope that, post 5 May, more streamlined procedures will allow more members' bills to be considered in the next session.

The main objective of my bill is to promote and safeguard the interests of victims and witnesses and project them to the heart of the criminal justice system. The objective is to have a champion who ensures that the needs of victims and witnesses are met. Being pro-victim does not, of course, make me or anyone else anti-offender. I do not believe in any way that this is a zero-sum game.

The champion must have a high profile and be very difficult to ignore, and they must ensure that the needs of victims and witnesses are centre stage. In a sense, I think that I have seen the future. I have met the victims champion for

England and Wales, Sara Payne, on two occasions at Westminster over the past couple of years, and I have met Louise Casey, who is the Commissioner for Victims and Witnesses for England and Wales, in the Ministry of Justice. I have also taken part in a videoconference with one of the four victims commissioners for Northern Ireland.

My motivation has two important elements. First, I have been inspired by the valuable work that Victim Support Scotland and other voluntary organisations such as Scottish Women's Aid conduct throughout Scotland to support victims and witnesses. Indeed, it was Victim Support Scotland's manifesto commitment in 2007 to have a victims commissioner that inspired me to take the bill forward. There is also my experience in the voluntary sector, where I worked as an assistant director for a national charity for two years.

Secondly, I have been greatly affected by the experiences of constituents who have been forced into the criminal justice system through no fault of their own and have been left hurt, confused and angry. I will give one example. I recently saw a young woman constituent who had, with her daughter, been awakened in the middle of the night by the noise of petrol being poured through their letterbox. They escaped the inferno that the house became purely because neighbours found a ladder outside, and they were able to escape as the house literally went up in flames around them. They thought that the court was another ordeal—another cycle in their sense of humiliation—and that they were bit players in a drama in which they had no script.

It is true that the situation of victims and witnesses in Scotland has greatly improved as a result of a range of initiatives such as the victims strategy, the use of victim statements and the victim notification scheme. I recognise that, but the point is that, although improvements have been made, a great deal more needs to be done. A number of important and effective voluntary organisations work in the interests of victims and witnesses, but there is no one co-ordinating voice, and no one has the statutory power to examine failures. The gap is between victims and victims organisations, and the Government.

Can we say that every relevant authority is meeting the requirements of the existing legislation to protect victims and witnesses and that there is a good balance of power between those who work in the interests of victims and witnesses, and the criminal justice system? A commissioner would enhance the work of existing organisations and would take things a step further to ensure that the needs of victims and witnesses cannot be ignored or be simply an afterthought. They should be central to the justice system.

I mentioned the Commissioner for Victims and Witnesses for England and Wales, Louise Casey. In giving evidence to the House of Commons Justice Select Committee in November last year, she said that her role as victims commissioner was

"to challenge the whole of the Criminal Justice System to do right by victims and witnesses."

That is the intention of my bill.

The commissioner would be responsible for championing the rights of victims and raising awareness of their situation, and, of course, they would work with voluntary organisations, politicians, the police, the criminal justice system and civil servants to build a fairer and just system that puts victims' needs first. It is important that victims and witnesses are protected from uncaring bureaucracy that is often unintentionally hurtful and damaging at a time of great suffering. The convener, as a lawyer, will know well that witnesses suffer trauma, too. Some 40 per cent of witnesses are victims, and many offenders are victims as well, of course, but, alas, time does not allow me to explore that matter in detail.

The bill includes a range of functions that would give the commissioner the flexibility to consult victims and witnesses and the organisations that work with them, so as to prioritise areas of work. Furthermore, I believe that the role of the commissioner would be developed greatly by the appointee.

It is not for me to identify all the priority areas at the outset—the commissioner should decide what is most important. However, the bill would allow the commissioner to carry out a range of activity and to respond to current challenges.

My commitment to the bill has led me to introduce it at a time of great financial pressures for all public services. I recognise the current financial climate, but I believe that the appointment of the commissioner is an important one that can be secured in a cost-effective way. I have set out a structure that I think would minimise costs. There might even be scope to reduce the costs further if the commissioner had the opportunity to share premises and resources with an existing commission or commissioner.

I recognise recent legislative developments, and I have drafted the bill in line with the latest governance and accountability requirements for commissions and commissioners.

I have introduced the Commissioner for Victims and Witnesses (Scotland) Bill because it is essential that Scotland has an independent commissioner to champion the rights of victims and witnesses. The role of the commissioner is not to run services; it is not to duplicate the work of the

third sector; and it is not to be a competitor for funding. The proposed role is that of an independent champion, operating between victims, service providers and the Government, working outside but looking in. The commissioner is to be a voice; the role will provide a new road map for victims, reflecting the new European rights as covered by the Stockholm programme. It is a move to a system change so that, in Louise Casey's words, victims will no longer be

"the poor relation of the criminal justice system".

The Convener: Thank you for that helpful opening statement. I commend you for your efforts in getting the bill as far as you have done.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, Mr Stewart. Thank you for coming to speak with us this morning. You have ably summarised for the committee some of the issues that led you to introduce the bill, and you have covered the motivations behind it. Have your thoughts about the merits of the bill's provisions changed since it was introduced? Assuming that you are returned at the next election, would you be minded to reintroduce the bill following that election?

David Stewart: I will deal with the last question first. If re-elected, I am committed to reintroducing the bill. I understand that, if the content does not change substantially—that is partly an issue for the committee—I will not be required to carry out a new set of consultations in such circumstances, so I could do things a lot quicker.

Things have changed and matured since I first looked into the matter a number of years ago. How do I see the bill achieving its end objectives and doing more for victims? I am a little bit torn in my own mind about whether to adopt the England and Wales model, which involved having a champion, Sara Payne, who was in effect a ministerial appointment, with seconded staff from the civil service. Basically, they drew up the job description that led, a year later, to Louise Casey being appointed, as a quasi-minister and responsible to UK ministers.

Under my model, the commissioner would be an independent parliamentary appointment, in line with the other commissioners that we have. The office would be staffed by the commissioner, and they would have complete independence.

I am happy to do some further thinking about those two models before returning with the bill, hopefully, at stage 1 in the next session. The fundamental five or six functions that I would like to be undertaken by the person in post are not changed by that question, but those are two routes that could be taken. I would welcome the committee's views.

Bill Butler: Thank you—that is clear.

Dave Thompson (Highlands and Islands) (SNP): Good morning, Mr Stewart, and congratulations on taking the bill as far as you have. It is unfortunate that we have run out of time and that we were not able to complete our investigation into it.

In your introductory remarks, you mentioned that the commissioner would be an independent champion, challenging the whole of the criminal justice system. You said that the aim was to achieve a fairer, more just system. You spoke about a range of activities, with the commissioner having a wide-ranging remit. The bill provides for the commissioner's general function

"to promote and safeguard the interests of victims and witnesses."

Could you elaborate on exactly how the commissioner would carry that function out?

10:15

David Stewart: Following my experience in dealing with Louise Casey and Sara Payne, I think that the key point is to have an independent champion, whose work does not duplicate that of service providers—and the commissioner would not be a service provider. It should be someone who is outwith the system but who is in place as the champion for victims and witnesses, some of whom—as you will all have experienced in your casework—have had a terrible time in court.

The ability to investigate is important. Other bodies have a minor role in that regard, but if we consider the experience and the statistics from Scotland, we can see that there are very few substantial complaints from victims and witnesses. I would like there to be someone who is able to consider both investigations and complaints, and who can raise the profile of victims in Scotland.

There was a good analogy in Louise Casey's evidence to the Justice Committee at Westminster. She said that the experience of witnesses in court is much like that of David against Goliath. That is a good analogy as regards their spending and the power and rights that they have.

I stress that victims are in the same boat as witnesses, who also feel completely alienated by the legal system. I am not being naive about it. I am not suggesting that having one commissioner and a small team of staff will revolutionise the criminal justice system overnight—of course not; I am just saying that there is a gap in the market. Northern Ireland, the Republic of Ireland, England and Wales, Australia and Spain have all gone down this route. As you will be well aware, the proposal to have a commissioner is also in

keeping with the Stockholm declaration and with United Nations rights of victims.

I believe that there is a gap in the Scottish system. Although we have a good justice system in Scotland, powers to investigate, to do research and to examine complaints would be three key things that would make a difference for the Scottish legal system.

Dave Thompson: You mention the commissioner having a small staff. Do you have any views about how small or how large the staff complement would be in the commissioner's office?

David Stewart: We carefully considered the financial resolution, under which we are required to identify staff and costings. It is a difficult matter. There is a market rate for commissioners, which you will be aware of, and there are minimum things that can be done by way of research. I took quite a lot of advice from academics about the minimum budget that would be required for research, even if the commissioner worked in conjunction with Victim Support Scotland. The minimum credible budget is around £50,000. If you consider the market rate for commissioners and the minimum amount for research, you can appreciate how the budget could mount up.

If I am re-elected, I will again consider very carefully the functions of the commissioner and the spend that I have identified. I understand the committee's view that, in the current financial climate, the budget would have to be as tight and as small as possible. More could be done with regard to co-location with other commissioners, perhaps with synergy on administration and finance. That would be a way to cut costs. I do not want there to be some mammoth bureaucracy; I would like the organisation to operate outwith the system, and not as a service provider. I strongly believe that there is a gap in the market, and that we could do a lot more for victims and witnesses by having the post of commissioner and the postholder in place.

Stewart Maxwell (West of Scotland) (SNP): When you were answering questions from Mr Thompson, you said that the commissioner would be a champion for victims and witnesses. That is laudable, and we would all agree with the principle of that. In practical terms, what would they do? What does being a champion for victims and witnesses mean?

David Stewart: You have probably identified six key functions, both from the bill and from my opening remarks, and I ensured that there was no real overlap or duplication between them. I stress again that the commissioner would not be a service provider. They are filling the gap between victims and victims organisations, and the Government.

I have already identified, first, the power to carry out investigations and, secondly, the power to consider research. The third one is the complaints role. Another role is to be a filter for legislation. My idea is that, when a Government, of whatever political colour, is considering introducing new legislation affecting victims, it should ask the commissioner for their views on whether or not that legislation would be appropriate for victims and witnesses. That would be a gatekeeper role.

The other role for the commissioner would be to work closely with organisations such as Victim Support Scotland, identifying best practice and ensuring that that is a national standard for victims. I know that that has been considered in England and Wales. It is important for us to lay out clear best practice for dealing with victims in Scotland, including through training. We have some way to go to identify best practice and ensure that it is adopted across all of Scotland.

Stewart Maxwell: I certainly agree that the situation is not perfect. Yesterday, I had a meeting with Victim Support Scotland in Renfrewshire, so I understand some of the comments that you make. However, I am not entirely convinced about the existence of the gap that you are talking about, although I will leave others to deal with that.

David Stewart: I stress that the proposal is not something that I have just dreamed up. The key point is that the proposal came from Victim Support Scotland's manifesto, and I have looked at best practice across Europe.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Various organisations already provide dedicated services and support for victims and witnesses in Scotland. Indeed, in your opening statement, you said that you were inspired by organisations such as Victim Support Scotland and Scottish Women's Aid. Is there a possibility that much of the work that it is envisaged that the commissioner would do is already being done and that, if we were to appoint a commissioner, as your bill suggests, that might dilute some of the work that is already being undertaken by the organisations that support victims?

David Stewart: No. Clearly, we are never going to have a perfect system of criminal justice. I live in the real world and I understand that. The key point is that the model that I am suggesting has been proposed by the voluntary organisations themselves. It is not a competitor or a challenger; it is a body that will stand outwith the system to fill the gap between victims and victims organisations, and the Government, which is an important role.

There has been a big debate about whether, in every policy area, we should be focusing on the service providers or the service consumers. However, that is a wider debate for another day.

My view involves a consideration of the system as a whole. In some areas, there is system failure. It is important that we have someone who is not tied into the Government—which is why I have tended towards the parliamentary model rather than the ministerial model—and who has the independence of mind to say that, whatever Government we have in the United Kingdom or Scotland, things are not working right. I have often used an example that was given to me by Sara Payne, which is that the treatment of rape victims in the court system is appalling. I believe that a commissioner who saw the trauma and tragedy that women face in court, and the low conviction rate, would realise that that is an area into which they could conduct a massive investigation and point the Government in the direction of ways of ensuring better treatment of victims and witnesses, through legislation and other means.

One of the key points is that we should not necessarily have a universal service for everyone against whom an offence has been committed, whether they have reported it or not. As Louise Casey said to me, we should not have the same service for someone whose lawnmower has been stolen as we have for someone whose son has been murdered, which is the case in England.

Cathie Craigie: Some constituents of mine who have been victims of crime have expressed concern about the fact that someone who has been found guilty of the offence has served less time in prison than the victims thought that they would and are back out on the streets without the victims knowing anything about it. Do you envisage the commissioner having a role at that end?

David Stewart: Most definitely. That is a good example of the kind of thing that the commissioner would be involved in, and concerns the creation of best practice. Constituents of mine who have been victims of crime have told me about the lack of communication on the part of the court—I am sure that members of the committee have heard the same concerns from their constituents.

This goes back to my analogy about David and Goliath. Victims and witnesses often feel that they are ignored in court—the lawyers around the table will have more experience of that than I have. They feel that they are going into a play but they do not know the script. Witnesses who turn up at court are constantly told to go elsewhere. On that point, Victim Support Scotland has identified a good piece of good practice in Dundee, where people are phoned and told when to turn up in court rather than having to sit around the court for hours and hours. There are also issues about proper separation between witnesses and victims, which I would stress as well.

We need more communication and more best practice. I envisage that the commissioner will, along with the organisations, identify what that best practice should be and shout loud to Governments of whatever political colour that that has to happen in order to ensure a better deal for victims and witnesses.

James Kelly (Glasgow Rutherglen) (Lab): You mentioned the support that a victims commissioner could give to rape victims. Are there any other areas that are not currently being addressed by those who work with victims that could be taken forward by a victims commissioner?

David Stewart: Most definitely. Members will have seen the Victim Support Scotland manifesto, which has a series of well-argued points. A couple of issues in particular must be considered. One is the role of compensation in court, as victims can often wait for ever to get that compensation. The issue of criminal injuries compensation is important in that regard—I know that it is a reserved issue, but I believe that it is administered in Glasgow. There are real issues to do with the complexity of the criminal injuries compensation form. I am reliably told that it is more than 60 pages long and is a nightmare to fill in. The scheme itself is good, but the problem is that it is surrounded by bureaucracy. The commissioner could highlight, along with colleagues in Westminster, the anomalies that face victims and witnesses, who end up being given the runaround by the criminal justice system.

James Kelly: You said that you had had discussions with Louise Casey, the commissioner in England and Wales, and one of the commissioners in Northern Ireland. What lessons have you learned from those discussions that might translate into good practice that could be implemented in Scotland?

David Stewart: The discussions have reinforced my impression that there is a need for Scotland to have a commissioner. Although devolution means that we can do things differently in Scotland, it is sometimes good to take on best practice from other countries.

I should issue a short health warning about the Northern Ireland situation. As you are probably aware, the Commission for Victims and Survivors in Northern Ireland has within its remit issues relating to the troubles as well, so it does not play a simple, straightforward role in relation to victims.

I have spent more time with Louise Casey and Sara Payne—I have had three quite intensive meetings with them. The key point that I have

picked up from Louise Casey is that the issue is not just about money and service delivery; it is about having a system change. The lawyers around the table will be aware that the Scottish and English legal systems are long established and extremely powerful and that, sometimes, victims can feel that they are small players in a big script. We need to ensure that victims and witnesses have a stronger voice.

Louise Casey said that, when she was first appointed, there were some worries and concerns from voluntary organisations in England and Wales that felt threatened by the establishment of her post and feared that they might lose resources as a result—they felt that dealing with victims was their job, thank you very much. However, I stress that nobody owns victims and witnesses, and the commissioner will have as valid a role as anyone else. I have made clear my support for Victim Support Scotland and Scottish Women's Aid. My point is that it should be for the commissioner and the Government to set the bar and for the voluntary organisations to carry out the work that is required. Do not get me wrong; they will have a role to play in contributing to the debate. I am merely making the point that nobody owns this issue. If there is a gap in the market, it is incumbent on politicians of every colour to come up with a solution. I believe that the solution is the commissioner.

Stewart Maxwell: I want to follow up on the issue of duplication that Cathie Craigie raised and which I touched on earlier.

I have read Victim Support Scotland's manifesto, and I discussed it at my meeting yesterday. You seemed to be suggesting that the commissioner would have a role in lobbying on behalf of victims—I am paraphrasing, obviously, but that is roughly what you were saying. Is that not exactly what that manifesto says that Victim Support Scotland is doing? Is that not what my meeting with Victim Support Scotland in Renfrewshire was about? Is that not what the national body is doing with the Cabinet Secretary for Justice and the Government?

On the point about issues such as the treatment of rape victims, there are organisations that not only help victims of rape through a very traumatic time but lobby on their behalf and conduct research—I am sure that there is no member of the committee who has not been approached by those organisations and discussed those matters with them.

I am still struggling to understand the difference between what a commissioner would do and what those other organisations already do. There is clearly overlap and, possibly, duplication.

10:30

David Stewart: I stress that the commissioner is a policy idea of Victim Support Scotland, which believes that it is a good idea. No existing body has the exclusive or all-encompassing power to carry out investigations into problems with the system that affect victims. The commissioner would have other functions, but the unique proposal is that they should have the power to conduct investigations, which no other body has the expertise to carry out. That would be the key function. That is the answer to the question.

Stewart Maxwell: Under your bill, would the commissioner have the power to investigate individual cases?

David Stewart: No. The reason for that is that I am keeping an eye on resources. If unlimited funds were available, that would be a good idea. Instead, the commissioner would investigate if there was a systems breakdown in the criminal justice system that affected victims or witnesses. For example, if there were a series of complaints from rape victims about their treatment during court cases, the commissioner would use their judgment and could carry out a major inquiry into the role of rape victims in the court system. The commissioner would get involved if there was a system failure. That would be an important part of the commissioner's job, but they would not be able to investigate every individual case that came before them, purely because of the resource implications.

Stewart Maxwell: There would be a general investigation if a system failure was identified or came to the fore.

David Stewart: Yes. Obviously, I expect the commissioner, which would be a high-powered post, to use their common sense and judgment. If they had a series of cases with a common theme in the Borders, the Highlands, the Lothians and Glasgow, I would expect them to use their insight and conduct an investigation. I stress that, like the Justice Committee, the commissioner would have the power to require witnesses to turn up and give evidence. If the commissioner was appointed by Parliament, I envisage that they would report to Parliament. I would expect that the Parliament would debate the report and that the Government would take action on the system failure. That is the route that I see for the commissioner.

Stewart Maxwell: Apart from the power to require witnesses to appear and the reporting to Parliament, could a slightly beefed up Victim Support Scotland not conduct or commission research if a particular issue came to the fore?

David Stewart: To conclude on your question about investigation, which is where we started, the key power that no other body has would be the

power to investigate complaints. No one else has the clout to do that.

On research, I anticipate that the commissioner would collaborate with groups such as Victim Support Scotland to fund joint research. It is important that Victim Support Scotland should still have the role on research. I cannot speak for Victim Support Scotland, but I do not think that it wants to have the power to investigate, as that is not its job—it is a delivery agent. My organisation would fill the gap that exists in Scotland between the Government and victims organisations. The power to carry out investigations is powerful and would make a real difference. That is the added value of the commissioner.

Robert Brown (Glasgow) (LD): I want to pursue Stewart Maxwell's point. The issues about rape and compensation in the courts that you have identified are already in the public domain and we are fairly well aware of the issues. We already have a body that has the potential to undertake inquiries and that has all the powers that you talk about: the Scottish Human Rights Commission. Why could that body not fulfil the role? Have you made representations to it about its work programme to test the potential for that? Is that not the most obvious way forward?

David Stewart: I know that Mr Brown was influential in ensuring that the Scottish Human Rights Commission came into being and, personally, I am a big fan of it. I have met Alan Miller, the chairman, on two occasions. I was well aware of the need to speak to other commissions and commissioners and to understand what they do. I am not in the game of duplication and creating additional bureaucracy or of taking away anything from existing bodies.

On a more practical point, it would be natural for the commissioner for victims and witnesses to co-locate and share services with the Scottish Human Rights Commission. I am enthusiastic about that. However, from speaking to the bodies in Northern Ireland and England and Wales, I believe that the most effective way forward is to have a specialist in victims and witnesses. That is a huge area in its own right, which is why it needs a separate body that is not part of the Scottish Human Rights Commission. The bill is not an attempt to water down, run down or take funding away from that commission. It is merely a practical point. The advice that I was given, after a lot of consultation, was that we need a separate body. That is why I want a commissioner for victims and witnesses. The approach works well in England, Northern Ireland and, I believe, the Republic of Ireland.

Robert Brown: The Scottish Human Rights Commission has a number of commissioners. Is it not possible to give one of the commissioners the particular role to fill the relatively narrow gap in the market that we seem to be identifying?

David Stewart: In my mind, the key issue is that it actually happens. I do not rule out further discussions with the Scottish Human Rights Commission to consider that specific point if I am re-elected. At the end of the day, if we had a commissioner with a role for victims, I would be happy, not just for me, but for victims and witnesses. I undertake to explore Mr Brown's point in more detail if I am re-elected on 5 May.

The Convener: As we have no further questions, I thank Mr Stewart for coming. The session has been helpful.

10:36

Meeting suspended.

10:39

On resuming—

Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

The Convener: Agenda item 3 is an evidence session on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which resulted from an emergency bill that was passed by the Parliament in the immediate aftermath of the Supreme Court decision in the case of Cadder v Her Majesty's Advocate. The decision to take evidence on the act was made following a suggestion by Robert Brown. Today's session with a panel of witnesses will be followed by a session next week with the Cabinet Secretary for Justice. Members have been circulated a letter from the Lord Advocate, which is paper J/S3/11/8/3, and a letter that the cabinet secretary sent to the United Kingdom Government, which is paper J/S3/11/8/2.

I welcome Professor Alan Miller, who is the chair of the Scottish Human Rights Commission; John McGovern, who is a former president of the Glasgow Bar Association; Raymond McMenamin, who is a member, and Alan McCreadie, who is the secretary, of the criminal law committee of the Law Society of Scotland; and Jodie Blackstock, who is a senior legal officer at Justice.

John Scott, who was also invited to attend on behalf of Justice, is unable to attend because of a court commitment and has sent his apologies. Justice and the Law Society have provided written submissions, which members will find in papers 20 and 21.

I invite members to ask questions of the panel.

Nigel Don (North East Scotland) (SNP): Good morning, colleagues. I start by asking a simple question. Regardless of the substance of what we enacted—although that is not entirely irrelevant, of course—do you believe that it was necessary for us to introduce and pass emergency legislation? I would like us to concentrate on the necessity or otherwise of using an emergency legislative procedure. Clearly, my colleagues will then pick up on some of the issues of substance. Who would like to start?

The Convener: I do not know what you think is the best way of doing this—whether you all want to speak on all the questions, or whether you will decide who is the best person to speak and leave it at that. There are quite a lot of questions to get through, so if you can either make your answers brief or decide among yourselves who the best person is to speak, that will probably be the best way to get through all the issues. I ask whoever thinks they are best able to respond to Nigel Don's question to fire away.

Professor Alan Miller (Scottish Human Rights Commission): I am happy to kick off. First, thank you for inviting the Scottish Human Rights Commission to take part in this important discussion.

It is a matter of regret that we are not discussing proposed primary legislation as part of the scrutiny that the Parliament and the Justice Committee usually provide of such important bills. To answer your question directly, I believe that there are lessons to be learned from the experience of the use of emergency legislation procedures. I do not think that Scotland was seen at its best in how it responded to the Cadder decision, or that it had to wait until the Cadder decision was made by the Supreme Court.

However, we are where we are. One lesson that I hope the new Parliament will use after the election is to look at its procedures and governance to see whether a more robust context can be developed whereby there is a clearer onus on the Government to satisfy the Parliament that we are dealing with a genuine emergency and that there is no alternative but to introduce legislation using emergency procedures, thereby bypassing the usual rigorous public consultation and informed scrutiny by MSPs. As I said, it is a matter of regret that we are not sitting here looking at proposed legislation.

Also, without going into the substantive matters—I know that Nigel Don deliberately asked his question before we do that—even if there were plausible reasons for some measures in a bill being treated as emergencies, the Government should be held to account for, and required to justify, why each and every measure in a bill warrants being introduced as part of emergency legislation. A number of commentators from a range of backgrounds have pointed out that there are things in the legislation that Cadder did not require and that what is in there as a result of Cadder might not be fit for purpose.

Nigel Don: Thank you, Professor. Before I let anybody else pick up on the general issue—I want to stick to the general issue if we possibly can—I have a further question for you. I recognise that there are some things in the act that did not need to be in emergency legislation; I do not think that that is in dispute. Given that we got there when we did—I accept your criticisms of how we got there—is there anything that we did on that day that needed to be done by emergency legislation?

Professor Miller: In my opinion, there was not.

Nigel Don: I put the question to the other members of the panel. Does any of you believe

that anything in the legislation needed to be done on that day?

10:45

Jodie Blackstock (Justice): I will answer for Justice. On behalf of Justice, I thank the committee for hearing from us today.

Our submission mentions a 2009 inquiry by the House of Lords Select Committee on the Constitution that considered whether legislation ought to be fast-tracked. The inquiry was the result of a number of pieces of legislation having gone through the Westminster Parliament quickly, in circumstances in which they perhaps ought not to have gone through so quickly. The recommendations of the select committee, which are set out in our submission, are similar to what the SHRC considers sensible. We concur with those recommendations for the next session of Parliament.

There ought to be a requirement for a ministerial statement that sets out why fast-tracking is necessary. Time ought to be built in for pre-legislative scrutiny by committees such as this one, which would consider the proposed legislation before time is even allocated to a debate.

There ought to be scrutiny of each element. It is a question not only of whether the general principle ought to be dealt with by way of emergency but whether each element ought to be in the legislation. The select committee recommended that there be a presumption in favour of a sunset clause and, if a sunset clause is not used, that there be justification for that. I commend the select committee's conclusions and suggest that members read the report because it is quite detailed.

Nigel Don: May I stop you there? I take your point. I have read your submission, but it is a matter of definition. If we need emergency legislation, we do not have time to do all those things. Clearly, it is a good idea—you will recognise that we do it all the time for most legislation.

My colleagues will pick up other issues. Does Mr McCreadie from the Law Society believe that anything in the act needed to be done by way of emergency legislation?

Alan McCreadie (Law Society of Scotland): I am not entirely sure whether there was anything in the act that had to be enacted under emergency procedure, particularly given the substance of the ruling in Cadder, which seemed to look at the admissibility of evidence that was obtained by a compulsorily detained suspect in a police station and the Lord Advocate's right to lead evidence that was obtained in that manner.

As I understand it, matters de facto conformed to the Lord Advocate's guidelines, and solicitors were in a position to get to suspects in police stations. There did not seem to be a need to rush to legislate.

Raymond McMenamin (Law Society of Scotland): The emergency approach seemed to have been premised on the basis that the existing legislation was not compliant with the European convention on human rights. That was raised in the emergency debate. I do not think that that was correct. The Criminal Procedure (Scotland) Act 1995—prior to the 2010 act that amended it—did not preclude police officers from allowing solicitors to have access to detained persons, to advise them or even to sit in on interviews. Section 14 of the 1995 act did not make any such restriction. To have introduced emergency legislation on the basis that the legislation that applied here in our law was not ECHR compliant was entirely wrong. The question therefore arises: what was the emergency?

Nigel Don: Indeed. I am wondering whether I could ask the question of Mr McGovern, as a practising lawyer. Can I describe you that way? You are not the only practising lawyer on the panel. From your position, do you have a different view?

John McGovern (Glasgow Bar Association): No. I do not. I extend my thanks to the committee for inviting the Glasgow Bar Association. I do not think that I am the only practising lawyer here—

Nigel Don: I was not suggesting that you are, but others are here wearing other hats.

John McGovern: I concur with everything that has been said by my colleagues.

After it became clear in the spring what the judgment in Cadder would be, after the Lord Advocate issued the interim guidelines and after listening to the debate in October that led to the legislation being passed, it was a source of some frustration to the GBA and to many solicitors throughout the country that although the legislation was technically passed through the emergency procedure, it was felt that it was perhaps anticipated, given what developed in the spring over Cadder. I think that I speak for many solicitors in saying that we felt that there was a lack of proper consultation of the profession in anticipation of the emergency legislation. That is a source of regret for us, but we have to move on.

Cathie Craigie: Nigel Don's line of questioning has taken me to where I wanted to go. The Lord Advocate issued interim guidelines in June 2010, and the revised guidelines were published in July

2010. During the debate on the emergency legislation, some members said that the guidelines were sufficient to meet the needs of the Cadder judgment. I want to know what the panel thinks about that, although I suspect that I know what the answer will be, having heard the comments so far. How robust would those guidelines be against any challenge?

The point that John McGovern made has been made to me by constituents: it was not an emergency, we knew that it was coming in the spring, and we should have used the springtime and early summer to consult on proper legislation and leave the word "emergency" out of it. Did the Government make an error of judgment in that regard? There are a couple of questions there, and I would be interested in your opinions.

Professor Miller: The interim guidelines were adequate on an interim basis. I take my colleagues' point that the issue was admissibility: the need to ensure the right to access to a lawyer for someone who is in detention in a police station so that the evidence could therefore be admissible in prosecutions. That was in place; I agree that there was a need for primary legislation to be introduced and for a statutory right for a suspect to have access to a solicitor once he or she had been detained.

However, there was time to get it right. I believe that the Lord Advocate's guidelines gave us the space in which to consult properly and to learn from other jurisdictions, rather than rushing to legislate in a way that doubled and then quadrupled the length of time for which a suspect could be detained by the police, without any evidential basis—other than anecdotal information—for arriving at 12 hours and 24 hours. I accept that there is a need for primary legislation, but we could have taken the time to get it right.

Cathie Craigie: Can you accept, however, that the back benchers and members of this committee who found themselves bounced into having to take decisions could accept the argument that the doubling from six to 12 hours was necessary in the interests of the suspect? For example, a suspect could be held somewhere to which it takes a bit more time to get a solicitor along, or where there are plenty of solicitors but they are all tied up in giving other people advice. I am not saying that that is necessarily why we all felt that we could support the legislation, but I accepted the argument that the cabinet secretary put forward.

Raymond McMenamin: Why not start at six hours? Six hours has been the period of time that has been in place since what is now section 14 in the 1995 act was introduced in the Criminal Justice (Scotland) Act 1980, following the Thomson committee. Why not start there and then consider increasing the time by six-hour increments if necessary, from six to 12 hours, and—perhaps exceptionally—from 12 to 18 hours, on the say-so of either a senior police officer or a sheriff?

As lawyers, our problem with simply imposing 12 then 24 hours is that it appears to be entirely random and not based on any study of what is required. I ask you to put yourself in the situation of a detained person who is young and possibly not terribly well educated and who is taken to a police station and told that they are to be detained. It is undoubtedly the case that they will be told, "You could be here for 24 hours." From that person's point of view, that is not a great scenario. The Law Society view is that a degree of moderation ought to have been applied to the imposition of extending the hours. The six-hour period would have been a good starting point.

The Convener: Two points arise. First, the clear practical issue for island communities is how long it takes for a solicitor to get to a police station to see a detained person. Secondly, the experience in England and Wales is of significantly longer detention periods. What are the panel's views on those points?

Raymond McMenamin: I take the point about island issues. Geographical difficulties may lead to exceptional circumstances in which longer detention times are needed, but why make it a blanket approach? Why take the same approach in the outer isles as in Glasgow, where there are lots of solicitors and, therefore, ample provision to get a solicitor to a police station well within 24 hours? Why not make things different in the outer isles? I see no need for a blanket approach to be taken.

The Convener: What about the experience of England and Wales?

Jodie Blackstock: As an English barrister, perhaps I should pick up on that. There is a 24-hour period before someone has to attend court, but reviews are built into that period. There has to be a review after six hours and every nine hours thereafter. There are welfare checks to ensure that the person who is being held is fit. That is done for all sorts of purposes, including to check whether the person should still be detained. The custody officer reviews the person's welfare and checks with the investigating officer what they are doing and whether the investigation is proceeding.

The Cabinet Secretary for Justice's assertion in the debate that Scotland is replicating the English system is not entirely correct. The process that I have described is built into the relevant English act. On receiving the information from the Crown when a case comes to court, the first thing for a defence lawyer to do is to check the custody record, including whether the reviews were carried

out correctly. If they were not, a challenge would be made that the detention was unlawful. The unfortunate result of having only a single debate in the Parliament was that it was not possible for that information to be put before the Parliament. A 12-hour period of detention without review is concerning for anyone, particularly any vulnerable persons who are detained. You are taking evidence next week from the Association of Chief Police Officers in Scotland. I hope that ACPOS will assure you that officers are being trained and advised that 12 hours should be kept as the maximum period and that there should be review throughout. That should be put on a statutory footing. It is most unfortunate that it was not put that way.

Professor Miller: We should not easily take the default position that those who live on the islands, or in remote parts of Scotland, should automatically be expected to spend longer in a police station because there is not the same administration of justice in those areas. Under the European convention on human rights, the state has an obligation to ensure that there is properly resourced and effective administration of justice; it has to provide equal access to justice for all members of its population. If there are inadequacies in access to lawyers in outlying areas, the state should identify the problem and see how it can address it. The state should ensure better access to legal advice in those areas and not take the default position that those who live in some parts of the country face longer periods of detention than those who live in other parts.

Cathie Craigie: Do you recall the argument on whether the guidance would have been robust enough to meet challenge along the lines of Cadder?

11:00

Jodie Blackstock: I appeared in the Supreme Court on behalf of Justice for our intervention in Cadder. The law lords made it clear that there ought to be a period of debate over the summer. Most unexpectedly, in that hearing they gave us a date of judgment, which allowed time for debate to take place. The Lord Advocate's guidance arose to ensure that there would not be devolution minutes in the interim. Our view was that there would not be challenges as a result of the guidance, if it were implemented fully. The guidance dealt with the issue, although there were other extraneous issues relating to length of detention and getting solicitors into police stations, as a result of remuneration and so on.

As a result of the Strasbourg decision, the Cadder case has two limbs. First, a right to advice and a right to representation in interview must be made available. Secondly, if that does not take place, has the fairness of the trial that goes ahead been prejudiced irretrievably? Those two issues must be looked at. The Supreme Court did not strike down the Cadder case; it came back to the Court of Session and a decision was made here on whether the case should go ahead.

The issue did not need to be placed on a statutory footing given that there was guidance in place. There was an omission from the 1995 act that was covered by guidance for the period in which Parliament and Government needed to debate the additional features that would ensue from giving effect to the right.

Robert Brown: I have a couple of questions about the consultation. If I may play devil's advocate, the Scottish Government might say that it could not do much openly with that between the period of the hearing on Cadder and the decision, because it might influence the court decision in some way and be seen as being derogatory to the court. Does Alan Miller, in particular, accept that? More particularly, would giving the Scottish Parliament two or four weeks, for example, to look at the issue in more detail have caused any problems? Was the Scottish Human Rights Commission consulted before the emergency legislation was introduced?

Professor Miller: No. As some members may or may not recall, we sent round a fairly frantic e-mail an hour or so before you went into the chamber to debate and vote on the legislation. That was regrettable. The Government could and should have opened up opportunities for a channel of communication with the SHRC—not necessarily to take every part of our advice, but to have heard more rounded advice before such a significant change to the criminal justice system was made overnight, especially on a human rights point. The SHRC was established by the Parliament and is recognised by the United Nations as an accredited institution, so we are in a good place to offer advice. I would certainly have done so.

It is a bit unfair to criticise only the present Government for creating this situation and introducing the emergency legislation. Since the early 1990s, I and others have pointed out to successive Scottish Administrations of all political colours that there was an anomaly that would not stand test, and that sooner or later there would be a case that would challenge it effectively. The issue was brought to the attention of successive Administrations, not just by me and others in Scotland but by the likes of the Council of Europe and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Not only was there not an emergency, but measures should have been put in place long in advance of the situation that arose. It is a bit disconcerting that 857 cases have not

proceeded. That need not have happened, had the justice system in Scotland taken a more outward-looking and more forward-looking approach.

Robert Brown: Would damage have been done and more cases added to the toll had there been a delay of two, three or four weeks to let the Parliament look at the matter a bit more?

Professor Miller: No, because we had the interim safety net of the Lord Advocate's guidelines. The police were allowing lawyers into police stations, so any evidence would have been admissible and cases would not have fallen.

Dave Thompson: I want to get back to the point about detentions. I am a Highlands and Islands MSP, and we are not just talking about islands but about places such as Wester Ross, the north Highlands and so on, where it can sometimes be difficult to get legal representation, especially over the weekend. I am sure that Professor Miller appreciates that a lot of cases take place over the weekend. There is definitely a need for allowing longer periods of detention so that people can get the representation that they must now get under the legislation.

The 12-hour period is a maximum period. If a solicitor can get there in 20 minutes, I am sure that that will happen. I am sure that in the central belt and the cities, representation will arrive very quickly, or there will be good reasons for it being delayed.

We have to look at the impact of the legislation on the real world in different parts of Scotland. With the best will in the world, Professor Miller, while it would be great to have unlimited resources and a fantastic criminal justice system in the Highlands and Islands that takes into account our geography and sparsity of population and all the rest of it, that is not going to happen, is it? The money is not going to be spent because it would be so expensive to provide exactly the same level of service in remote rural areas as can be provided in the middle of Glasgow. None of the political parties is going to commit to that kind of expenditure. We have to be realistic. We have to have the best system that we can get in the Highlands and Islands but, even at that, there will always be problems and difficulties.

Professor Miller: I understand completely the reality of what you have outlined. However, as a first step, any Government should investigate what smarter and less resource-intensive ways there are of providing access to and advice from a solicitor. Perhaps it could look at innovative means of consulting, such as by using information technology, that would not be necessary in urban areas to ensure a better-resourced and more equal level of access to legal advice for those who choose to live in remoter areas of the country. That will have some kind of price tag, but it might not be as big as we think. We should at least investigate smart ways of improving access to justice in such areas before we default to taking them as no-go areas and making people spend longer in detention than they might need to.

Dave Thompson: I fully accept that we need to use all the innovative methods that we can, and I am sure that there will be ways of doing that, even if it is simply by using phone contact and so on.

On the amount of time in detention that is necessary, previously a suspect would be interviewed with a tape recorder and our system would require corroboration, and so on. The police might be able to get information from an individual that would allow them to tie up a case relatively quickly. Now that individual has to be represented by a solicitor, and it can take a bit of time to get a solicitor, for whatever reason, whether it be in the Highlands and Islands or the central belt. In certain circumstances, the police might need extra time to gather the necessary evidence or to prevent an individual from arranging for the disposal of evidence. I am sure that we will hear from ACPOS about that at next week's committee meeting. There could be lots of other reasons why the police might need extra time if a solicitor has not arrived fairly quickly, but there might be a danger that a guilty party could get off because of the tighter timescale under the new system.

Jodie Blackstock: The gathering of evidence comes under a different section of the legislation, and the police can delay access to a solicitor if they need to make further inquiries. Unfortunately, only one section of the legislation has a reference to exceptional circumstances. There can be a delay of intimation without many safeguards being put in place at all, which is another issue that we have raised in our submission. Perhaps that would have been worthy of consideration during the debate. I do not think that, where there is a concern about evidence being destroyed, the gathering of evidence would be brought into any time extensions.

I am concerned that we are talking a lot about hypotheticals. We have had a lot of time since June, when the Lord Advocate's guidance came into force, to see its effect in practice. The Government was fully aware that there would be a judgment in October, and it ought to have been gathering information from the police on the effects of the guidance and its impact on their ability to investigate cases, and to have come to Parliament with empirical evidence showing all the reasons why time extensions were necessary. We are concerned by this 12-hour blanket period, because it allows the police to use the whole 12 hours. Of course, the guidance—

Dave Thompson: But surely the whole process would be speeded up if a solicitor were able to come along within 20 minutes to advise the client, deal with things and so on. In such circumstances, it is unlikely that the accused would be there for the whole 12 hours. Have I got that wrong?

Jodie Blackstock: No—and I hope that that would happen in most cases. However, the experience south of the border when the 24-hour period was introduced—and indeed, 20 years ago, when solicitors were allowed into police stations—was that there is a balancing act involving the police, who are doing their job in their own environment, are in control and will assert what needs to be done in the course of their investigation. Legislation may stipulate a 12-hour period for investigation, but there might be circumstances in which a solicitor's attendance at a police station will not make the slightest bit of difference to how long that period of detention lasts. Only when the case gets to court will the solicitor be able to make arguments about whether or not it really ought to have been that long.

There is also a question about the amount of information that the police have to give solicitors to allow them to make any representations at all. At the moment, there is no obligation on them to provide a single scrap of information to a solicitor who attends at a police station. All those things ought to have been dealt with in legislation.

Professor Miller: This discussion is very interesting, but the fact is that, because there is no evidence base, we are all in the dark. Because it was emergency legislation, there was simply no time to gather that evidence; it was simply based on anecdotes from ACPOS. However, we are where we are.

On the question whether we should try to get the evidence and then review whether the emergency legislation is needed in its current form or whether it should be repealed or amended, we now have the Carloway reference group, which the commission is trying to ensure has the ability to access data on how the police are actually using the detention powers. It should be able to provide in six or 12 months' time evidence for the Parliament's consideration and to show whether in fact the legislation got it right and what amendments or repeals might be necessary. We hope that the evidence is being gathered just now and can be properly analysed by all of us, after which a more informed decision can be made about having a detention period of six, 12 or 24 hours. However, as I have said, because it was emergency legislation, we are all scrabbling in the dark a bit.

Raymond McMenamin: Another practical consequence of the legislation is that we do not know what constitutes exceptional circumstances. No doubt that matter will come before the courts, but we certainly have to find out what they are. It might be better to ask ACPOS about that, but at the moment we have legislation that envisages exceptional circumstances but no one here knows what they are.

Dave Thompson: Is it not better to be safe than sorry? Was it not better to pass the legislation then commission the Carloway report to give us a bit of time to look at the matter, see whether any changes are needed and deal with them? Had the legislation not been passed and had there been cases in which it was clear that someone had managed to get off with a serious crime because the law had not been changed, I can just imagine the outcry about the Government not acting quickly enough to plug the gap. The way we have done it might not have been perfect or ideal, but at least the gap has been plugged and we now have a review that is due to report very soon. Things can change at that point. Was it not better to have approached the issue in that way rather than the other way, which would have just left the potential for real problems to arise?

11:15

Raymond McMenamin: As I understand it, the focus of the Cadder judgment and the legislation is the rights of an individual when they are detained as a suspect in relation to an alleged crime. It is important that, following on from ECHR, Cadder and the debates in Parliament on the issue, people in that situation know precisely what their rights are, but it appears from the legislation, which is vague and untried, that people do not know what their rights are in that regard.

Professor Miller: Again, I understand completely your safety-first approach to the matter. However, when a Parliament passes emergency legislation, it must have the highest regard to its effect on fundamental rights. The issue of the police's capacity to carry out further investigations into a case, which may then lead to an effective prosecution, was not an overnight emergency. The police have been investigating crimes day and daily, year on year, without needing to rush to Parliament to say, "We need emergency legislation, because six hours is not enough. We need 12 and 24 hours." That did not happen, so the driver did not come from the police. The police may have legitimate needs, but Parliament should not embark on emergency legislation without having proper evidence, because that is a slippery slope. What is the next piece of emergency legislation going to be about?

Dave Thompson: Previously, there was no need for a solicitor to be present, and that is the difference.

Cathie Craigie: On Dave Thompson's question, the point is that the panel's view is that there was no gap to be filled, because the interim guidance and the published guidance covered the situation and, had there been another challenge along the same lines as Cadder, there would have been the interim guidelines to fall back on. Is that right?

Professor Miller: Yes.

Raymond McMenamin: Yes.

Alan McCreadie: Yes.

Jodie Blackstock: Yes. If the Lord Advocate issues guidance, the police and procurators fiscal must follow it, and they were following it from the evidence that was available. If a suspect who was detained asked for a lawyer but did not receive one, that would be an example of a police officer not complying with the guidance, and a devolution minute would be raised as a result. However, as far as we are aware, there is no evidence to suggest that the police were not doing their jobs on a wide basis.

Cathie Craigie: But the panel can confirm that there was no gap to be filled, because there was guidance.

Professor Miller: Yes.

Raymond McMenamin: The guidance would have sufficed for a period to allow further consideration to take place, but that did not happen.

Stewart Maxwell: I am interested in this point. I do not want to be rude, but if we get five lawyers, we usually get five opinions. It is interesting that you are now guaranteeing that during the period when the guidance was in effect, we would not have been challenged, and that if we had been, we would have been able to defend that successfully. That is a guarantee, is it?

Raymond McMenamin: I could not give a guarantee—

Stewart Maxwell: So it is not a guarantee. I was careful to listen to the language that was used, which was that you thought that the position would have been sufficient. While it might have been sufficient, you cannot be absolutely sure that it would have been sufficient to resist a challenge without our passing emergency legislation.

Jodie Blackstock: The Cadder case was about what the police were not doing. It was a challenge about the Lord Advocate's acts, not about legislation. As we have heard, section 14 of the 1995 act needed to be amended in time as a result of the Cadder case. However, the challenge was about the Lord Advocate as head of the prosecution service and, therefore, everyone below her exercising their role. The guidance filled the gap by requiring police officers to make the right to access to a solicitor effective. Had the police not done so, that could have been challenged.

Stewart Maxwell: I understand that, but I also understand that the police and all the services were following the rules as they were laid down before Cadder, yet there was a challenge. The fact that they were following the rules at the time did not prevent a successful challenge.

Jodie Blackstock: The rule before the case did not require them to allow advice or representation.

Stewart Maxwell: I know that. This is the point that I want to come on to. I was interested in comments from various members of the panel about the amount of time that we had to resolve this issue. If I am quoting you correctly, Professor Miller, you said that you have been raising this issue since the early 1990s, it has all been known about for years, we have known that it has been coming and it could have been sorted long before now. Nobody has given their view on the seven very senior judges who ruled in the highest court in Scotland that things were all right—I paraphrase—and that we did not have to change. With all due respect, why should Parliament or Governments take your word for it as opposed to the word of the seven High Court judges?

John McGovern: Did not Lords Hope and Rodger deal with that issue in the Cadder judgment? Did they not deal with the seven-judge decision?

Stewart Maxwell: Eventually, but at the time what we had in place was the ruling from the seven judges, was it not?

Professor Miller: I think that Lord Hope—if not Lord Rodger—said that it was a surprise to them that this issue had not been raised before in Scotland, because there was this clear anomaly.

Stewart Maxwell: Yes, but I am interested in why you do not seem to have any particularly strong view on the fact that this judgment was in place prior to the United Kingdom Supreme Court judgment. You do not think that that has any relevance or import.

Professor Miller: What I said in answer to the first question was that lessons arise for all of us—Parliament, Government and the justice system—out of this episode. A lesson for everyone in the justice system is to be much more outward and forward looking than has, to some extent, been the culture until now. The McLean judgment perhaps crystallises the point that there was an inability to grasp what the European Court of Human Rights and the European convention on human rights required of the Scottish legal system.

We are a small country off the north-west of Europe. We have a distinctive legal system. You

can understand why there might be some insularity, but in today's world you cannot be insular; you have to be open and forward looking. Yes there is much to be proud of in our system, but we have to see ourselves as others see us. There is no doubt that this decision was waiting to happen.

Robert Brown: Can I just ask about the other side of the coin? In a sense, nobody can give any guarantees about who might challenge what—that is perfectly obvious—but we now have legislation. Is the legislation ECHR compliant or might it be challenged as a result of the rush to pass it and the deficiencies in it?

Professor Miller: Perhaps others will have better informed views on this than I have, but one of the victims of the rush to legislate is the police. I do not envy police officers in stations up and down the country who are having to make very difficult decisions about what are exceptional circumstances and in what circumstances they cannot allow the suspect access to a lawyer. What training, guidance, codes of practice and learning from other jurisdictions has there been to enable police officers properly to understand and apply the legislation? Is a telephone call in a particular case going to be equivalent to the practical and effective right of access to a lawyer to get advice and to have a lawyer present during the interview? Clearly not. Even when you give a suspect advice as a lawyer, what practice will there be to ensure that there is disclosure of information to the lawyer, which will ensure that informed advice can be given to the suspect?

Jodie Blackstock might add to this, but I think that in England when they introduced the Police and Criminal Evidence Act 1984 there were a couple of years when they had codes, training, interpretation and good practice, after which the police were better equipped to apply the law, which I hope meant that there were fewer successful challenges because of mistakes made by the police.

Robert Brown: Having had a month or two to look at it, do you think that there are deficiencies in the legislation that might lead to challenges? You touched on the telephone call issue.

Raymond McMenamin: One area that may give rise to challenge is the lack of provision for children and vulnerable individuals. There is nothing in the 2010 act that takes account of someone who falls into either of those categories being detained for up to 24 hours. It is not difficult to imagine challenges arising from that scenario.

Robert Brown: The Lord Advocate has, since Cadder, referred a number of cases to the Supreme Court for clarification. They cover issues such as admissions that have been made while an individual's house was being searched, documentation or real evidence that have been recovered as a result of admissions that were made, and information that has been given during roadside interviews or at an earlier stage than in the police station. Are there serious issues there? Do you think that there is the potential for problems to arise from all that? Might further legislation be needed in that regard?

John McGovern: There are serious issues. As someone who practises in Glasgow sheriff court every day, I am aware of numerous challenges based on the particular issues that Robert Brown raises. The devolution minutes issue, which did not arise two or three years ago, is now commonplace, largely because of the Cadder judgment, and the Salduz judgment before it.

Specifically on the legislation, there are issues arising from how the police are coping with suspects. They are using SARFs—solicitor access recording forms—but I am aware of one challenge to an interview that occurred after a suspect declined to exercise his right to legal advice prior to interview. He was interviewed in the absence of a solicitor, and the form for the decision that was made by the suspect has been challenged. We are in fairly serious uncharted waters, and there is a long way to go.

Robert Brown: We have a figure of 800-odd cases at present. We have not had much of a breakdown of that figure, but one imagines—from trying to view the matter in more general terms—that a reasonable percentage of those cases involve people who did commit the offences with which they are charged. There are worries, particularly with regard to rape cases and other such cases, that a number might go down the tubes. Have you any views on the eventual number of cases that might be a problem beyond Cadder? I presume that you cannot give out general information, but I would like to hear your views on the eventual number of cases and the extent to which there are problems beyond Cadder.

John McGovern: There is one issue that I have certainly not read about. The figure of 800 or so prosecutions has been mentioned, which seems to be the figure that is in the public domain. However, the public perhaps do not recognise that although prosecutions will continue at present, any interview that was undertaken with a suspect in the absence of a solicitor—a pre-Cadder type interview—will, by and large, not now be used by the prosecution. The prosecution may well continue on the basis of other evidence, but the point is that the decision may well weaken the prosecution's force. It does not seem, to my knowledge, that that issue is being highlighted.

Robert Brown: My final question will develop that particular point. I have heard suggestions that in a sense, the very fact of the ability to rely on admissions in the past—the court of seven judges and all that—has perhaps led to laziness in investigation and prosecution techniques. Can the panel comment on that from their experience?

In England, they have got round those problems, despite having the new arrangements in place for a number of years. They have managed to secure convictions, and they have not had the same difficulties. Although it is often said that there is no law of corroboration in England, in reality corroboration of some sort is offered in almost every English case because of the weight-of-evidence argument. Are there issues around investigations having allowed sloppy practices to creep in?

11:30

Raymond McMenamin: There are different practices in taking evidence of admissions. In a very basic situation, there might simply be a police officer writing things down in a notebook—although we now have electronic notebooks. In more serious cases, police officers might interview suspected persons, with or without a solicitor, and take a video or audio recording, which will be used in evidence or lodged for later trial proceedings. Those of us who have been in practice for some time can remember the very basic statements that police officers used to take and then read out in court from their notebooks. Generally speaking, it is hard to say what one should or should not do, but the more scrutiny police officers' practices in taking evidence come under, the better—often for the police as much as anyone else. The less tight or controlled the situation, the more open to challenge it is likely to be.

As I have said, it is difficult to say what the police should or should not do in any given situation, because various situations can arise. However, if we leave those things unscrutinised, we will in the future face problems that are similar to those that gave rise to the Cadder case.

Stewart Maxwell: The issue of suspects waiving rights of access to a solicitor has been touched on briefly. Is there evidence, from other jurisdictions where the period of detention has been extended, of a change in the number of people who have waived such rights? Has the number increased, decreased or stayed the same? After all, an underlying concern is that more people might be more likely to waive that right if they are told that they are going to be detained for an extended period.

Jodie Blackstock: In January, research about the situation in England over the past 20 years was published. It is still the case that officers can sometimes—inadvertently or not—advise that there might be a delay in getting out of a police station if the person in question chooses to wait for advice from a solicitor. It does inform views. I am trying to remember the figures: in the past nearly 30 years from 1986, when the right to advice was introduced, the number of people seeking such advice has increased steadily from something like 20 per cent to almost 80 per cent. The figures have not undergone a full national check for the past five or six years, but are extrapolated from localised and in-depth studies of police stations, which show that almost 80 per cent of people ask for legal advice and that the 20 per cent who waive that right do so because of the length of time that they have to remain in the station waiting for that advice.

However, in explaining why they waived the right, that 20 per cent might also say, "What difference would a solicitor make? I know whether I'm guilty or not." There is a real question about how the police go about informing suspects of their rights and that will require training and guidance. Although ACPOS's guidance explains the purpose of the right quite well, the police still need to be fully informed to ensure that they can pass on to a suspect the right information about why he or she might want to have a solicitor present. Of course, the people who attend a police station are not criminals, but suspects. The police might have got things wrong; after all, they act on intelligence that they receive. Moreover, the person at the police station might well have been involved in a crime but might have a defence. The role of a solicitor is not only to advise the client to remain silent but to advise them that, if they have a defence, they should put it forward. It is crucial that suspects in a police station fully understand the purpose of having legal representation.

On what Mr Brown said about challenges, the glaring absence from the legislation is the right to representation in a police interview, although it states that there is a right to advice. Such representation is what the Cadder judgment gives effect to, as well as the right to advice. It is clear from the judgment that that is what is meant. The SARF forms that Mr McGovern just spoke about do not include an obligation to explain that suspects have a right to representation.

Stewart Maxwell: Just to be sure, you seem to suggest that there has been no increase in people waiving their rights because of the extension of the periods for which suspects can be detained in England. In fact, the position seems to be the other way round.

Jodie Blackstock: No.

Stewart Maxwell: The two may not be connected.

Jodie Blackstock: They probably are connected, but there was not an extension of time in England and Wales—it is also up to 24 hours. It is difficult to see whether that had an impact, in the way that you could find out here through research, because there was no correlating extension of time at the point when the right came, nor is it possible—

Stewart Maxwell: I am sorry, I did not explain that well. When someone is being detained, an application can be made for an extension beyond the normal period. Has that led to people being more likely to waive their rights?

Jodie Blackstock: I am not aware of any research about that.

Stewart Maxwell: Okay. Thank you.

James Kelly: Section 7 of the 2010 act put in an additional test on finality and certainty for cases that the Scottish Criminal Cases Review Commission may refer. It has been suggested that that condition may be a constraint in dealing with cases in which there is a potential miscarriage of justice. Does anyone on the panel have a comment on that?

Professor Miller: Yes. I am glad that we have the opportunity to touch on this issue before we close the session. This is a clear example of a measure that was introduced through emergency procedures without any requirement by the Cadder judgment to do so, and which also went beyond that judgment in that it applies to all cases that the Scottish Criminal Cases Review Commission will look at and not just to cases relating to a Cadder point. There is a real concern as to whether that measure will have a chilling effect on the hitherto successful work of the SCCRC and its relationship with the High Court, which can now turn away cases from the SCCRC and not look at them, as it had done up until the 2010 act was passed. It is a real worry that the measure was introduced for reasons that were not required by Cadder, and that it goes well beyond the implications of the Cadder judgment.

The Convener: We have time for a short question from Nigel Don before we conclude.

Nigel Don: I wonder whether I can get the panel to clarify my thinking, because many of the population may be thinking the same way. If, as you have said, the Lord Advocate's guidance was adequate to deal with Cadder, why are we talking about over 800 cases having to be dropped? Are they only cases in which the interview occurred before the Lord Advocate's guidance was put in place?

Raymond McMenamin: I do not think that we said that the guidance was adequate to deal with Cadder. Our view is that it was sufficient to deal with the interim set of circumstances and to allow debate. I think that it is accepted that the legislation had to be looked at and that something had to be done. However, the Lord Advocate's guidelines could have stayed in place for a period to allow sufficient time to debate and scrutinise what required to be done.

Nigel Don: Forgive me, but I have already heard that and I am not disputing it. However, I still want to know where the 800 or so cases came from. The only conclusion that I can draw from the statement that the Lord Advocate's guidance was good enough is that all the cases that have had to be dropped are cases in which the interview took place before the Lord Advocate's guidance came in. If that is not the case, could somebody explain to me in short words and, preferably, short sentences why those cases have had to be dropped?

John McGovern: To my knowledge, those cases would have involved pre-Cadder interviews, but none of us works for the Crown Office and Procurator Fiscal Service, so we cannot confirm that.

Nigel Don: That is your logic, as well. Your understanding is that that would be the case.

John McGovern: That would be my logic, but I qualify that by saying that there are now challenges regarding post-Cadder interviews in which the suspect has apparently exercised his right at the police station, in terms of the SARF form, not to have a solicitor present. Issues arise about the informed nature of the consent in such decisions.

Nigel Don: I understand that. There will be many other issues, post-guidance, about what Cadder introduces. Thank you.

Jodie Blackstock: I would like to clarify that point. The Supreme Court said that cases that were still live—which would include those going up to the point of final appeal—would be caught by its decision, whereas any case that was closed would be a matter for the Scottish Criminal Cases Review Commission, so those 800-plus cases could have been at any stage of prosecution from police detention up to final appeal. That might explain the number of cases. They would still be live for that reason.

The Convener: The committee would be grateful to hear from the witnesses on anything that has not been covered, but I urge you not to repeat what has already been said.

John McGovern: I would like to make one brief point. Forgive me if I am paraphrasing, but Mr Maxwell said that it seems that no one had pointed out that a solicitor being denied access to a police interview was a situation that lay latent for some

time prior to Cadder. However, the Glasgow Bar Association wrote to the Cabinet Secretary for Justice in June 2009 and pointed out that the Salduz decision changed matters in Scots law.

Stewart Maxwell: I am aware of that, but I refer you to the point that I made to Mr Miller. With all due respect to your highly respected opinion and that of the Glasgow Bar Association, there was a ruling in place from seven High Court judges.

John McGovern: I absolutely accept that.

The Convener: I encourage everyone not to reopen that discussion. Are there any other points?

Raymond McMenamin: I have a very brief point. If it is envisaged that we are to have people in custody for 12 or up to 24 hours, some thought should be given to the conditions in which they are held. That in itself may give rise to challenge. If a young person is held in fairly poor conditions for a long period, they may well give up their right to a lawyer just to get out early. I am not sure that that has been addressed.

Jodie Blackstock: As an outsider looking in who has watched the debate about how these matters have come before the court, and who has listened to the rhetoric that has surrounded the issue, I make the point that we are not talking about a decision that has been imposed as a result of a situation in Turkey where someone has been tortured, as seems to have been suggested; we are talking about a keystone rubric of Scottish justice, which has been identified and extrapolated by Lord Rodger in the Cadder judgment. The Criminal Procedure (Scotland) Act 1887 gave effect to the right to advice and representation before the sheriff court, and the judgment returns that right to a suspect, who could be anyone. It is very important that it is seen as a positive thing that returns equality of arms, rather than an imposition by an outside court, whether in Strasbourg or in London.

The Convener: Okay. I thank all the witnesses on the panel for their time. All the committee members have found your evidence to be extremely helpful. Thank you.

11:44

Meeting suspended.

11:50

On resuming—

The Convener: Before we move on to agenda item 4, I invite the committee to decide whether to invite a representative from ACPOS to give oral evidence alongside the cabinet secretary at next week's meeting. The cabinet secretary has suggested that; a short letter from him is among members' papers. A separate committee decision is required because ACPOS is not one of those organisations that the committee previously agreed to invite under the heading of the Cadder evidence that we have just discussed. Do members have any views?

Cathie Craigie: From some of the evidence that we heard this morning, it is clear that ACPOS would have something to say and it would be in our interests to find out what is happening on the ground. I suggest that we take evidence from ACPOS and then from the cabinet secretary. I do not want to set the precedent of taking evidence from them both together. The cabinet secretary is responsible and he should be required to give evidence on his own.

The Convener: The clerk has advised me that it is likely to be one panel with ACPOS and the cabinet secretary together.

Cathie Craigie: Surely we should advise the clerks how we want the meeting to go ahead, and I think that it would be better to have the cabinet secretary on his own.

Bill Butler: The panels should most definitely be separate in this instance. To have them together would be inappropriate.

Stewart Maxwell: I cannot see the problem. I do not really see what the issue is and why it would be so inappropriate to have them together. We should take evidence from ACPOS next week, but I am confused about why it would be inappropriate to have representatives from ACPOS sitting on the same panel as the cabinet secretary. Frankly, I do not see the problem.

Dave Thompson: I was going to make the same point, convener.

Robert Brown: I take the opposite view, because a cabinet secretary is different from any other witness who comes before this or any other committee. The cabinet secretary represents the Government and is the responsible officer. To mix up his role, even by implication, with that of representatives from ACPOS is not at all satisfactory. It sets a bad precedent.

The Convener: There seems to be agreement that we should invite a representative from ACPOS. Is the committee happy for me to discuss the issue with the clerks and others and decide what is the best mechanism for taking evidence, and whether there should be one panel or separate sessions? We are agreed that we need to invite ACPOS, but there needs to be a separate discussion about how we manage that.

Robert Brown: With great respect, convener, that is a matter for the committee. It may be that the view that is taken is one that is hostile, but it is

an important point. I do not think that it is a matter that should be sorted out behind the scenes; it is a matter of principle.

Dave Thompson: From a purely practical point of view, that will mean that we will end up taking an awful lot more time over the issue. It could be much more beneficial to take evidence from both of them together because a lot of the points that we want to raise could be answered by the cabinet secretary and ACPOS at the same time. I do not see why there should be any difficulty with that. Time is a problem for us, although we should not make it the overriding factor. Would members like to elaborate on why they think it would be inappropriate to take evidence from both the cabinet secretary and ACPOS together?

James Kelly: I agree that we should have separate panels. The committee now has to resolve the issue. There are different opinions that the committee has to resolve, rather than allowing a separate discussion to happen off screen.

Bill Butler: The separation of the panels is appropriate because the cabinet secretary is responsible for Government policy, and we are going to be discussing a policy matter.

ACPOS's views on policy are, of course, of interest, as are those of others, and those views should be treated with due respect, but the panel that deals with policy has always been separate and discrete. That panel should be formed by the Government.

Stewart Maxwell: To be helpful, I say that I will not die in a ditch on the issue. I see no particular problem but, if members feel strongly about the matter, let us have two panels. I have no big issue with that; I just thought that it would probably be practical and helpful to have one panel, given that we have a heavy agenda. I agree with Dave Thompson that one panel would be quicker but, if other members have a difficulty with that, that is fair enough—I do not mind.

The Convener: We agree that we should invite ACPOS to give evidence, but we seem to disagree about whether to have one or two panels. I am conscious of the timing, but I am prepared to put the issue to a vote.

Nigel Don: I say with respect that you do not have to do that. On my side of the table, it has been suggested that one panel might be quicker. I still think that one panel would be quicker, but if a principle is at stake, let us stick to that and hear from the cabinet secretary separately.

The Convener: That is fine. Do we agree to have two sessions—one with ACPOS and one with the cabinet secretary?

Members *indicated agreement.*

Subordinate Legislation

Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011 (Draft)

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No 2) Regulations 2011 (Draft)

Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 (Draft)

11:56

The Convener: We move on to item 4. I apologise to the Minister for Community Safety and his team for the delay in starting the item—I know that they have waited for some time.

The committee will consider three draft affirmative instruments. The relevant cover notes are papers 5 to 7. Item 4 provides the opportunity to take evidence from the minister and his officials on the instruments, before we formally debate the motions to recommend their approval under item 5. The Subordinate Legislation Committee drew none of the instruments to the attention of the Parliament or the committee.

I welcome the minister, who is accompanied from the Scottish Government by James How, head of the access to justice team, and Fraser Gough and Graham Fisher, from the directorate for legal services; and from the Accountant in Bankruptcy by Sharon Bell, head of the policy development team, and Claire Keggie, head of policy and compliance.

First, we will consider the draft Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011. I invite the minister to make a short opening statement, after which committee members can ask questions.

The Minister for Community Safety (Fergus Ewing): I am happy to appear in a combined panel of myself and officials.

The regulations will uprate the financial eligibility limits and contribution thresholds for advice and assistance and for civil legal aid. The annual uprate is calculated according to figures that the Department for Work and Pensions supplies, which are based on the consumer prices index. The CPI, which is currently 3.1 per cent, is the headline measure of inflation in the UK, as well as the target measure that the Bank of England uses, and it is internationally recognised.

Demand from those who seek financial help towards court costs for civil actions has risen sharply because of the economic downturn. Against that background, and to preserve access to justice, it is important to uprate the figures to reflect inflation.

Regulation 8 disapplies the financial eligibility test for advice and assistance when a suspect is detained for police questioning, which is done by means of the new power that the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 inserted into the Legal Aid (Scotland) Act 1986. Members will be aware that the 2010 act was introduced in response to the Supreme Court ruling in Cadder v Her Majesty's Advocate.

Disapplying the financial eligibility test will make it easier for advice to be provided to suspects in some circumstances. It will enable solicitors from the Public Defence Solicitors Office to provide advice and assistance to suspects, which broadens the range of solicitors who can be included in any future police station duty scheme. At present, the PDSO can provide advice and assistance only to those who are eligible for legal assistance. The provision will also provide certainty about the method of payment for those who are in private practice. We have consulted the Law Society of Scotland, the Scottish Legal Aid Board, the Crown Office and Procurator Fiscal Service and the Association of Chief Police Officers in Scotland on regulation 8.

As a result of the regulations, 6.2 per cent of suspects who would not previously have been eligible for advice and assistance will become eligible. However, the newly eligible will still have to pay contributions towards the cost of their advice and assistance and will be likely to contribute the maximum amount. Given that, the measure is estimated to be largely cost neutral.

12:00

Nigel Don: Good morning, minister. Can I say how pleased I am to see such things in front of us? It would be easy for a Government to allow creep on these things and for inflation to reduce access to justice. That would be a big temptation and I am pleased that you are not succumbing to it. I am also pleased to note that regulation 8 introduces something that we brought forward as a result of Cadder, which we discussed earlier. I was not sure what had happened to that, but the regulations answer the question.

Robert Brown: At the risk of opening up a previous discussion, can I ask what has happened in the meantime? Have there been any cases where the PDSO has had to knock back people in these circumstances? Have any problems arisen? Such concerns were one reason for the speed of the legislation, one imagines.

Fergus Ewing: James How is going to help us out.

James How (Scottish Government Directorate for Justice): The PDSO has regularly been involved in providing advice and assistance since June last year, first under the Lord Advocate's guidelines and then under the new legislation, but it is not allowed by statute to provide advice to people who are not eligible for advice and assistance, so there will have been cases where it has been unable to do that and people in private practice will have had to do it. The number of such cases will be small, because the Scottish Legal Aid Board estimates that only 6 per cent of suspects in police stations are not eligible. Taking forward the measure will assist us when we come to put together a police station duty scheme, which is what SLAB and the Law Society are negotiating as a long-term solution to the interim arrangements.

Robert Brown: I was not challenging that. I was asking whether there have been cases where people have been knocked back. I suppose that what I have at the back of my mind is whether there is scope for people to protest these matters in legal challenges of any kind.

James How: In terms of the interim measures?

Robert Brown: Yes.

James How: My understanding is that they have been working well and that the legislation has been complied with since it and the Lord Advocate's guidelines came into force. As I said, the regulations will move us towards a police station duty scheme. ACPOS will probably have the latest figures, and I think that you agreed to invite it to the committee next week.

The Convener: As there are no further questions, we move on to the second instrument, which is the draft Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No 2) Regulations 2011. I invite the minister to make a short statement, which will be followed by questions from committee members.

Fergus Ewing: Thank you, convener. These draft amendment regulations will enable assistance by way of representation, which is commonly termed ABWOR, to be made available in relation to disability discrimination in schools cases that appear before the Additional Support Needs Tribunals for Scotland.

The UK Equality Act 2010 will move disability discrimination in schools cases from the sheriff court to the ASNTS. That will take place on 18 March. Currently, civil legal aid is available for those cases. The Government has concluded

generally that ABWOR is the most appropriate aid type for proceedings before tribunals, which are generally designed to be informal in nature. The priority going forward will be to maintain a reasonable level of access to legal assistance for such cases. The Scottish Legal Aid Board and the Law Society of Scotland have been consulted on the regulations and relevant stakeholders have been informed. There are only a few such cases per year, so there are not expected to be any significant cost implications.

The regulations take the opportunity to remove paragraphs that provide that ABWOR could only be provided under regulation 6A(1) of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 by an assisted person's appointed solicitor, as defined by regulation 6A(1)(e). Provision to similar effect is to be made in a separate set of regulations that will cover duty arrangements in a comprehensive manner. Those separate regulations, which will ensure continuity, will come into force at the same time as regulation 2(3) of these regulations.

The Convener: As there are no questions, we will move to the third instrument, which is the draft Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011. I invite the minister to make a short opening statement, which will be followed by questions from members.

Fergus Ewing: Thanks again, convener. These are technical regulations that replace the provisions in the Debt Arrangement Scheme (Scotland) Amendment Regulations 2007. The regulations are made under powers in section 7A of the Debt Arrangement and Attachment (Scotland) Act 2002, which were inserted into that act by the Bankruptcy and Diligence etc (Scotland) Act 2007.

These technical regulations provide that any debt included in a debt payment programme will be frozen when that programme is approved. That means that creditors will be prevented from adding any further interest, fees, charges or other penalties to the debt from that date. That has been purposely defined as generally as possible to prevent a creditor from reintroducing interest by the back door in the form of charges.

The intention is that what the debtor owes on the date that the debt payment programme is approved will be the full and final amount that they have to repay to clear their debt. That makes things much clearer for the debtor and removes an undesirable element of uncertainty from the process.

The regulations support the main Debt Arrangement Scheme (Scotland) Regulations 2011, which I believe that I wrote to the committee about on 2 February and which, among other changes to the scheme, introduce the ability to apply for a joint debt payment programme where the debtors have a joint and severally liable debt. I am happy to answer questions on the main regulations if members wish to pose them today. As a result of the proposed change in those regulations, the regulations before the committee today add a minor consequential provision to prevent creditors from adding interest and charges on to debts where a debtor has been party to a joint debt payment programme—as part of a couple with joint and several debt—that has had to be revoked because the couple are no longer together or wish to enter into separate plans, where the debtor applies within 21 days for a new debt payment programme. I think that the committee will agree that people should not be penalised if their relationship breaks down if they are still able and willing to pay their debts.

This change has been made with full consultation of stakeholders, including the money advice sector.

I commend the regulations to the committee.

The Convener: I have a brief question. An issue that citizens advice bureaux in my constituency have raised with me—I am sure that other members have had similar experiences—is that creditors south of the border do not always recognise the scheme as something that they will adhere to. What is the Scottish Government doing to try to encourage awareness of the scheme south of the border? Could anything further be done to try to address the concern that has been raised?

Fergus Ewing: You are right to say that the take-up of the scheme was not as high as we would have liked initially. That has now improved as a result of changes that were made to the scheme, particularly the innovation of freezing the principal amount due so that interest would not continue to run, so that when people entered into the scheme they knew where they were in relation to the full amount being charged.

On the gateways to the scheme, which of course are covered by some of the main provisions in the regulations that I understand that the committee will come on to consider in more detail next week, I am not aware that we have devoted any budgetary resources to educating the good people south of the border to encourage them to enter into schemes north of the border, but perhaps my officials could tell me whether any information on that could usefully be provided to the committee. I think that Claire Keggie is able to do so.

Claire Keggie (Accountant in Bankruptcy): We have had a number of stakeholder events that we encouraged creditors from throughout the country to attend. As part of the launch arrangements for the new scheme, we will produce publications, one of which will be targeted at creditors. We will continue our awareness-raising programme and will seek to hold further events where we explain the content of the new system to creditors. We hope that that process will raise awareness and encourage them to interact with the new system. Incidentally, the new IT system that will be launched as part of the new arrangements will make it much easier for creditors to engage with the process. It will make the process simpler and reduce the administrative burden on them. Again, those measures should be helpful to creditors generally.

James Kelly: On the changes to the main scheme, I am supportive of measures that ensure a more orderly process for the repayment of debts. However, one of the proposals is to allow for a six-month payment holiday for debtors in appropriate circumstances. Will the minister provide some clarification on that and reassure me that its introduction will not lead debtors to regard it as a way to take advantage by slowing down the payment of their debts, to the disadvantage of those to whom the money is owed?

Fergus Ewing: Last week, I spoke at a conference about that topic, among other things. The benefit of the debt payment programme is that it allows people to pay their debts. It is debt management rather than debt relief. Therefore, we wish to encourage it in Scotland. We wish people to pay their debts, where possible, and that they are not simply relieved of them. In addition, if people pay their debts, they do not risk the downrating of their credit in future to the extent that that happens if they enter into a trust deed or bankruptcy.

In general, as a nation, we would like people to pay their debts when they can. We provide a vehicle to enable them to do that—a diligence stopper, which prevents creditors from attacking the house and allows an orderly payment over an appropriate period. The average period is eight years, I believe, and the average amount of money is £26,000 or thereabout.

Last year, the DAS was used in more than 1,500 cases, and in the first quarter this year, it has been used in nearly 500 cases, so the trend is upwards—perhaps to 2,000 a year. More people are using the scheme. That is good, and I welcome James Kelly's support. However, there was one lacuna with which we wanted to deal. We all know that, in life, events occur that may have significant impact on the household income, whether unpleasant events—redundancy, bereavement, separation or incapacity, for instance—or pleasant events, such as maternity, paternity or adoption.

If there is a shock to the household income and it diminishes substantially, the arrangement that was entered into beforehand to pay, say, a couple of hundred pounds a month may be unsustainable. Therefore, we felt that it was right to give the opportunity in certain clearly defined circumstances to allow a payment holiday to take place, for which we thought that six months would be a reasonable length of time.

The regulations provide a fairly tough gateway to that provision. To satisfy the criteria for a six-month payment holiday, the person must demonstrate that their disposable income has reduced by 50 per cent or more in the following circumstances:

"(a) a period of unemployment or change in employment;

(b) a period of leave from employment for maternity, paternity, adoption or to care for a dependant;

(c) a period of illness of the debtor;

(d) divorce, dissolution of civil partnership or separation"

recognised by decree of judicial separation of the debtor from any other person; and, lastly,

"(e) death of a person with whom the debtor shared care".

Those are some of the major, life-changing events that we would all accept may adversely affect an individual's capacity to continue to pay a DPP. Plainly, we would like the DPP to be renewed after the individual has been able to find their feet, recover from the event, get a job back, regain employment or whatever.

That is an innovative method. Scotland is leading the way. There is no such measure south of Hadrian's wall, as far as I am aware. We are proud to introduce that measure today, and I am pleased that it has in-principle support from members.

The Convener: There are no more questions. The next item of business, item 5, is formal consideration of the motions on the three affirmative instruments that we discussed under the previous item.

Motions moved,

That the Justice Committee recommends that the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011 be approved.

That the Justice Committee recommends that the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No. 2) Regulations 2011 be approved.

That the Justice Committee recommends that the Debt Arrangement Scheme (Interest, Fees, Penalties and Other

Charges) (Scotland) Regulations 2011 be approved.—[*Fergus Ewing.*]

Motions agreed to.

The Convener: I thank the minister and the other witnesses for attending. I will suspend the meeting briefly to allow the tables to be cleared.

12:14

Meeting suspended.

12:14

On resuming—

The Convener: Under item 6, we will consider seven negative instruments. The relevant cover papers are papers 8 to 14. The Subordinate Legislation Committee drew none of the instruments to the attention of the committee or the Parliament.

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 2011 (SSI 2011/86)

Sale and Hire of Crossbows, Knives and certain other Articles to Children and Young Persons (Scotland) Order 2011 (SSI 2011/129)

Licensing (Local Licensing Forum) (Scotland) Order 2011 (SSI 2011/130)

The Convener: If members have no comments on the first three instruments, are we content to note them?

Members *indicated agreement.*

Advice and Assistance and Civil Legal Aid (Special Urgency and Property Recovered or Preserved) (Scotland) Regulations 2011 (SSI 2011/134)

The Convener: Do members have comments on the regulations?

Robert Brown: This is a brief observation. Clawback in matrimonial home cases has been a long-standing issue in relation to legal aid regulations. I cannot quite remember on what basis it was introduced, but I think that it came in after much dissatisfaction. Ought we to ask for more background on why it was brought in in the first place and whether those reasons still apply? I am not against the approach per se, on the basis of the information that I have, but the issue has been controversial, as you will know, convener.

The Convener: Do you think that we should seek written clarification or ask for oral evidence from the cabinet secretary?

Robert Brown: No, no. It is not a matter of seeking oral evidence; I just seek a bit of background on the regulations.

The Convener: We could defer consideration of the regulations until next week.

Robert Brown: Yes.

The Convener: Are members content with that?

Members *indicated agreement.*

Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2011 (SSI 2011/135)

Bankruptcy Fees (Scotland) Amendment Regulations 2011 (SSI 2011/142)

Disclosure (Persons engaged in the Investigation and Reporting of Crime or Sudden Deaths) (Scotland) Regulations 2011 (SSI 2011/146)

The Convener: If members have no comments on the instruments, are we content to note them?

Members *indicated agreement.*

The Convener: There is a further decision to be taken under item 6. One of the negative instruments that we will consider at next week's meeting is the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162)—an instrument that has generated controversy in the legal profession. James Kelly has lodged a motion to annul the regulations, which we will need to consider at the meeting next week.

The question for the committee today is whether to take oral evidence on the regulations at next week's meeting. As is suggested in paper 15, we could invite representatives from the Law Society of Scotland and the Glasgow Bar Association, as well as hearing from the Scottish Government. Is the committee content to seek oral evidence on the basis that is set out in paper 15?

Robert Brown: Yes, although I question whether it is safe to have the GBA and the Law Society together. That is another matter.

Bill Butler: We will just have to take our chances.

Nigel Don: Will we have one or two panels of witnesses? I want us to have a sensible discussion about the issues. I accept the principle in relation to panels, which I know that we have agreed, but would it be more sensible to hear from

everyone together? If we do not do so, the lawyers will give their side and then the cabinet secretary will give his, and that will be the end of it.

Stewart Maxwell: Perhaps that is a debate for another time.

Nigel Don: If that is what we do in principle, that is what we do, but I am not sure that it is the best way of having the discussion.

The Convener: Are you proposing that we have a single panel?

Nigel Don: I am just reflecting that having a single panel would enable us to have a discussion.

Stewart Maxwell: Given our earlier discussion, I think that we agreed the principle. There might well be a valid debate to have about the matter, but this is not the place to have it. There is perhaps a wider question for other committees and the Parliament to consider. Perhaps the Conveners Group will want to look at the issue. I think that we should stick to what we agreed.

The Convener: Fine. Do members agree to invite oral evidence on the basis that is set out in the paper?

Members *indicated agreement.*

The Convener: Thank you.

12:19

Meeting continued in private until 13:12.

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