JUSTICE 1 COMMITTEE

Tuesday 27 March 2001
(*Morning*)

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JUSTICE 1 COMMITTEE
8th Meeting 2001, Session 1

CONVENER

*Alasdair Morgan (Galloway and Upper Nithsdale) (SNP)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Phil Gallie (South of Scotland) (Con)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)
Euan Robson (Roxburgh and Berwickshire) (LD)

*attended

WITNESSES

Neil Anderson (Association of Scottish Legal Advice Networks)
Iain Gray (Deputy Minister for Justice)
Peter Hunter (Association of Scottish Legal Advice Networks)
Louise Johnson (Scottish Women's Aid)
Rosemary Lester (Victim Support Scotland)
David McKenna (Victim Support Scotland)
Jean McKenzie (Scottish Women's Aid)
Gerard MacMillan (Glasgow Bar Association)
Vincent Smith (Glasgow Bar Association)
Andrew Stevenson (Glasgow Bar Association)
Mairead Tagg (Scottish Women's Aid)

CLERK TO THE COMMITTEE

Lynn Tullis

SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Tuesday 27 March 2001

(*Morning*)

[THE CONVENER *opened the meeting at 09:22*]

The Convener (Alasdair Morgan): Good morning, ladies and gentlemen. Members should turn off mobile phones and set pagers to silent.

We have apologies from Euan Robson because of his elevation to a ministerial post.

Members may care to note that they can now lodge amendments for stage 2 of the Convention Rights (Compliance) (Scotland) Bill. The closing date for lodging amendments is Monday 23 April. Although that sounds like a lot of notice, it is the first day back after the Easter recess.

Drafting instructions are now being issued on the protection from abuse bill. We hope that a draft bill will be given to the committee by 25 April.

Members may also care to note that, following our request, the Parliamentary Bureau has agreed that the Justice 1 Committee and the Justice 2 Committee may meet as a joint committee to scrutinise the budget. The first joint meeting, which will be fairly short, is due to take place tomorrow at 12.30 pm in committee room 1 to consider the approach to the process and to decide whether an adviser should be appointed.

There will be no meeting of this committee next week, but a short joint meeting of the two justice committees will take place on 4 April.

Having looked at the agenda again, I am inclined not to take item 7 in private. Unless any member objects, I propose to take item 7 in public. Is that agreed?

Members *indicated agreement*.

Legal Aid Inquiry

The Convener: Agenda item 2 concerns our legal aid inquiry. Our first witnesses today are from Victim Support Scotland: David McKenna is the director and Rosemary Lester is the services manager. You may make a short opening statement. Please make it very short, because we have a lot on today.

David McKenna (Victim Support Scotland): Good morning. Victim Support Scotland very much welcomes the opportunity to contribute to the Justice 1 Committee's review of legal aid. This is an important opportunity to address some of the outstanding issues concerning access to justice for the communities in Scotland. I will touch briefly on some of the points in our written submission.

We are concerned that victims of crime get access to appropriate advice, assistance and representation in all legal matters. Specifically, we are concerned that victims get access to compensation for criminal injuries and that they have access to civil remedies when domestic issues arise or when they have problems with anti-social neighbours.

We believe that it is important that the Executive and the Parliament monitor the introduction of the fixed-fees system in relation to legal aid. We have concerns that the system might impact on the way in which victims are treated in Scotland.

That is all that I want to say at this point. I am happy to answer questions.

The Convener: Perhaps I can pick up on your final point. You suggest that victims of certain crimes, such as sexual assault and rape, suffer as a result of the fixed-fees system. Can you explain why that is? Is it simply because there is less likelihood that precognitions will be taken and there will therefore be more cross-examination?

David McKenna: Our concern about fixed fees does not relate specifically to rape and sexual assault victims, but to victims of crime more generally. It is early days yet to be getting feedback on the workings of the fixed-fees system. However, since the introduction of fixed fees, we have had a general concern that the system might impact on victims of crime, because accused persons may, increasingly, undertake for themselves the precognition of witnesses and victims.

The Convener: Have you any evidence of that?

David McKenna: It is too early for that. We are saying that it is important that the fixed-fees system is monitored and evaluated to see what impact it is having on victims of crime.

The Convener: How often will rape cases be heard in summary courts and therefore be subject to a fixed fee?

David McKenna: Our concern about fixed fees does not relate directly to rape and sexual assault cases. We have no evidence that victims of rape and sexual assault are being precognosced by accused persons as a result of the fixed-fees system.

The Convener: So, you have no evidence that there is a problem.

David McKenna: In relation to rape and sexual assault victims, we have no evidence that there is a problem. If there is an issue at all, it is with the right of the accused person to precognosce witnesses and victims directly. That is a wider concern that does not relate only to legal aid.

Paul Martin (Glasgow Springburn) (Lab): In your written evidence, you call for an independent review of the declining proportion of persons who, having been granted legal aid, take up the offer. I understand from other evidence that has been submitted that the Scottish Legal Aid Board has commissioned a research project on that specific topic. Are you satisfied with that?

David McKenna: That is an important step forward. We also welcome the establishment of the Executive's working group on access to justice in the community, and we look forward to the publication of its recommendations.

Rosemary Lester (Victim Support Scotland): We are satisfied with that, but we obviously have concerns. For example, we have direct evidence from our own local services of individuals who feel unable to proceed with an action for interdict because of the contribution that they would have to pay. For a single parent with a part-time job, the contribution level required for representation is significant, so that such people may feel that they are unable to access the right to proceed because they cannot afford the contribution. We remain concerned about the level at which contributions are paid.

Paul Martin: What do you think we should do to drive the trend? Do you believe, for example, that victims of abuse should be treated differently from other categories of victims when it comes to legal aid?

David McKenna: Broadly speaking, we believe that victims of crime should have a special status in the legal aid system in Scotland. If victims of violence are entitled to criminal injuries compensation, the state should assist them with their application. That assistance should include not only advice and assistance, but also representation. Where women—it is particularly women—are suffering harassment, intimidation, threats and violence and are looking to use interdict, we believe that that should be fully funded by the state to protect those victims.

Paul Martin: You say that someone who is a victim of abuse, violence or other forms of anti-social behaviour should be funded fully through the legal aid system. If such a victim has quite substantial financial means to pay their legal costs, should they get priority over someone on a lower income who may be in a different category?

09:30

David McKenna: Questions about priorities are always difficult, as are questions about budgets and available resources. I am not sure that I would feel happy about saying which group of potential applicants should receive lower priority, but I certainly believe that the legal aid system in Scotland is doing a disservice to women victims of violence and that that must be addressed. How we pay for that is probably a matter more for the Parliament and the Executive than for me.

Paul Martin: So, regardless of someone's financial means, do you believe that their application should be fully funded by the state if it falls into one of those categories?

David McKenna: Definitely.

Paul Martin: So even a millionaire who is experiencing difficulties with an anti-social neighbour could—

David McKenna: I understand that it could mean that, on occasion, an applicant who has substantial resources could get free legal aid. However, the vast majority of people who are suffering from violence come from poor households and from communities that suffer from severe social exclusion. It is in the interests of the vast majority of people, who have difficulty in accessing that kind of civil remedy, that we support them by funding it.

The Convener: Are you suggesting that the majority of such victims are people who would qualify for legal aid anyway?

David McKenna: The issue is wider than simply qualifying or not qualifying for legal aid; it concerns the message that we send out to women in Scotland about what help and support is available to them in the aftermath of violence, harassment and intimidation. What we are saying, quite straightforwardly, is that women who find themselves in those circumstances and have to go to the civil law for remedy should get funding for legal support.

A wider issue that impinges on that matter is the fact that we are increasingly using the civil law to address issues that should, ideally, be resolved by

the criminal law. However, it can be difficult to prove instances of harassment and intimidation in criminal law, so the next best thing is a civil remedy. If victims are to use those kinds of civil remedies in those types of cases, we believe that they should be fully funded.

The Convener: I wonder how tightly you are defining what you call "those types of cases". Would it apply to men who are assaulted or beaten up? Would it apply to neighbourhood disputes? How far do you go? There can be a fine line between one kind of dispute and another.

David McKenna: Obviously, there is always a question of degree. Our view would be that, whatever the degree, support to access civil remedies should be available to all people who are seeking to protect themselves. Where there is a risk of violence—whether psychological or physical, whether to a man or a woman—we should fund assistance to ensure that civil remedies can be sought.

The Convener: I am just worried that that could be a bit hard to define. In the current system, whatever you may say about its defects, if someone has a case but not the requisite income, they are entitled to support regardless of the case. That is fairly clear cut, but you may be muddying the waters somewhat.

David McKenna: Victim Support Scotland's position is more moral than legal. We simply believe that it is the duty of the state to protect its citizens. The use of civil remedies is one way in which the state can protect its citizens, so it should provide the funding by which citizens can get access to that protection.

The Convener: Do you have evidence of significant numbers of people being deprived of that protection because they do not qualify for legal aid?

David McKenna: Rosemary Lester has done some research over the past week or two with local Victim Support services, so she may want to comment.

Women who come to Victim Support for practical and emotional support often tell us that, irrespective of whether they meet the legal aid eligibility requirements, they cannot afford to make a contribution and therefore do not take action.

Rosemary Lester: You asked whether the numbers are significant. The evidence from victim support services over the past year is that they are not. Irrespective of the numbers, the individuals concerned were affected significantly because they were unable to apply for what they perceive to be a level of protection for themselves. We are not talking about vast numbers, but making legal aid available to those individuals would mean quite a lot to them.

The Convener: We will move on to questions about compensation.

Phil Gallie (South of Scotland) (Con): On the Criminal Injuries Compensation Authority, your written evidence suggests that many victims of serious crime in Scotland fail to apply for compensation, for fear that the related costs might be high. What evidence do you have to support that assertion?

David McKenna: I will give some background information first. About £11 million is spent in Scotland every year on criminal injuries compensation for victims of violent crime, which is substantially less than the amount spent on defence precognition in Scotland. The levels of compensation that are given to victims of violent crime have fallen over the past five years from a high of about £20 million in 1995-96 down to approximately £11 million.

The average number of applications submitted in Scotland to the CICA each year is 5,000, of which about 20 per cent are refused at the first stage. About 10 per cent of the 5,000 total subsequently require to be appealed to the Criminal Injuries Compensation Appeals Panel.

Although victims of crime are able, in theory and sometimes in practice, to avail themselves of legal aid for advice and assistance, legal aid does not extend to representation at the CICAP. The guidance notes that we issue to volunteers on working with the CICAP are about 550 pages long. It is not easy for individuals to represent themselves at an appeals panel.

The costs to an individual of employing someone to represent them can be prohibitive and often discourage victims of violent crime from making an application to appeal CICA decisions. It is a sad fact that, in Scotland, when a victim of rape sees someone arrested, charged, prosecuted and found not guilty of that crime, it is almost automatic that the CICA will reject their claim simply because someone was found not guilty at trial. In almost all such cases, the rape victim is required to appeal to the CICAP.

Our view is that the purpose of legal aid, which was established 50 years ago, was to allow people access to justice. The purpose of the compensation scheme was to recognise the state's responsibility to protect people and to provide some compensation when it failed to protect them. There is a third element: the state must also provide the means through which people can access that compensation.

Phil Gallie: A number of questions arise from that answer.

The Convener: Carry on, Phil. That is what we are here for.

Phil Gallie: I will stick to the script for the moment.

Do you think that the number of applications to the CICA would rise if civil legal aid were made available to support claims for compensation? What difference would means testing make? What priority would you give to that proposal, as opposed to the proposal to make civil legal aid, without means testing, available to victims of abuse?

David McKenna: I will try to remember all those questions.

One of the issues about the number of applications that are made in Scotland to the CICA is that little public information about criminal injuries compensation is available, so many victims do not learn about the existence of the scheme. That is a major factor.

In 1985, the first report of the Home Affairs Select Committee stated that only one in four victims of violence in Great Britain accessed the criminal injuries compensation scheme. Recent figures from CICA suggest that it believes that that figure is now one in three. However, our experience suggests that one in six of those victims of violent crime who may be eligible for compensation access that compensation.

I am not sure whether I can answer the question about where the funding of legal aid for criminal injuries compensation applicants falls in relation to other priorities, such as civil remedies. However, I do not necessarily mean that only the Scottish Legal Aid Board can provide the advice, assistance and representation that victims require, whether for civil remedies or for criminal injuries compensation applications. It is possible to find other ways of funding community organisations to provide those services. I noted with interest that, 14 days ago, the Home Secretary announced a grant to Victim Support in England and Wales of £6 million to allow it to develop its work with victims of crime on criminal injuries compensation applications.

Phil Gallie: You suggested that only about one in six of those who suffer criminal injuries through serious assault is entitled to compensation.

David McKenna: Our experience suggests that about one in six of those victims of crime who could be, or are likely to be, entitled to compensation as a result of a crime of violence gets access to compensation.

Phil Gallie: I am tempted to ask the questions that came into my mind about the rules for criminal injuries compensation. I find it remarkable that only about one in six victims of crime is entitled—

David McKenna: They are entitled to compensation but they do not apply for it.

Phil Gallie: Does that suggest that the CICA rules are too strict and that people balk at them?

David McKenna: There are two issues. The first is the lack of public awareness of the scheme's existence and the second is that people find it difficult to gain access to advice and assistance in relation to the application process. Many victims are dissuaded from applying because of the potentially high legal fees. The minimum award from the CICA is £1,000—for example, a broken nose that was sustained in an assault might attract compensation of about £1,000. However, the legal fees involved in pursuing such a claim could come to £1,200.

The issues are quite complex and our hearts go out to victims of crime, such as young children, families of murder victims and victims of rape and sexual assault, who want to continue their claims but cannot, because they cannot afford to do so.

Phil Gallie: I am trying to get from you why you think that there is a need for legal representation for compensation claims, the formula for which is that someone is found guilty in court, with no blame attached to their victim, who may have suffered an assault. Why should an individual require legal aid to pursue a claim for compensation for a broken nose?

David McKenna: The new scheme, which came into effect in April 1996, simplified the application process to an extent. The formula that you described is accurate. However, when the characteristics of an application deviate from that framework, victims run into difficulties. They must demonstrate certain aspects of their claim to the CICA.

For example, Mr Gallie, let us suppose that you are a victim of rape, but the evidence that was led in court and the case that was prosecuted was based on sexual assault. The CICA might compensate you for the sexual assault, but not for the rape. However, you know that you were raped and you must then demonstrate that you should be compensated for rape as opposed to sexual assault; you must argue and win that case. That also happens with claims for post-traumatic stress disorder, in which victims must demonstrate the degree of post-traumatic stress disorder that they have suffered, as the amount of compensation available depends on that.

It is interesting to note from the CICA's report for 1999 that only one applicant in Scotland received an award of more than £40,000, although the authority can make awards of up to £250,000. Despite all the crime and the horrifying details that are published in our media every day of the week, no victim in Scotland was given more than

£40,000.

Victims must be able to demonstrate the degree to which they have suffered, which often involves obtaining medical and specialist reports, and getting legal advice and assistance or representation at the CICAP. No matter how informal the appeals panel is, the ordinary man or woman the street is not able to represent themselves effectively in such complex cases.

Phil Gallie: Do you think that there is a case for victims to be given legal representation, whether through legal aid or whatever, in criminal cases? At present, the procurator fiscal is responsible for looking after the victim's interests. However, the procurator is there to get a conviction and he may not look after the victim's interests.

David McKenna: There is a growing feeling among victim organisations in Scotland and the United Kingdom that, although victims have no role in the courts at present, they must be given a role, whether through legal representation or becoming a party, with the prosecution, to the proceedings. I am not sure, but I think that the term for such a role is partie civile.

The Macpherson report proposed that the Government should consider allowing the victim—or co-victim in murder cases—to be party to the proceedings and to sit with the prosecution during the conduct of the trial, as that would enable the victim to give information to the prosecution as the trial proceeds. There is a case for considering how the victim could be more involved in the justice process, without unbalancing the equality and fairness of that process. The Macpherson proposal may be the way forward, in which case we would expect the victim to receive legal aid.

09:45

Maureen Macmillan (Highlands and Islands) (Lab): I must first declare an interest. My husband is a solicitor who deals with legal aid cases.

What are your views on how a community legal service should develop? You welcome the establishment of the working group that will develop proposals on a community legal service in Scotland, but have you had any input into those proposals?

David McKenna: We would have welcomed an opportunity to take part in the working group and to present the views that we have presented this morning. However, we are not represented on the working group.

Maureen Macmillan: If a community legal service were established, would there be a role for Victim Support? An idea that has been floated is that organisations such as Victim Support could have a role as a provider of advice and assistance to clients, perhaps even taking cases as far as court appearances. How would you feel about representing people at the CICAP, for example?

David McKenna: Victim Support believes that victims should have choice and should be able to go to a solicitor or a citizens advice bureau.

Victim Support already provides support to people who apply for criminal injuries compensation. Last year, around 1,000 people in Scotland received help, from form filling right through to support at the CICAP. We had some level of involvement in about 20 per cent of all applications for criminal injuries compensation.

There is an unmet need for advice, assistance and representation for such claims and, since Victim Support's inception in 1985, the organisation has developed a lot of knowledge and skills in its work with the former Criminal Injuries Compensation Board and with the CICA. Our knowledge allows us to assist victims when they come to us for help. We have no problem with that, apart from the fact that providing that service takes a lot of resources from the organisation. We estimate that that work takes up £150,000 to £200,000-worth of our resources. If we were to expand that work, we would require additional resources.

Maureen Macmillan: If the new community legal service were to incorporate voluntary organisations, would you like to be part of that service?

David McKenna: We look forward to hearing what the proposals will contain. We are aware that SLAB is bringing in opportunities for solicitors to be employed across a range of organisations under part V of the Legal Aid (Scotland) Act 1986. We are interested in exploring that with the board at an appropriate time.

The Convener: As there are no further questions from members, I thank the witnesses for their help this morning.

The Deputy Minister for Justice will not be here until 10 o'clock, so I propose to deal with items 5, 6 and 7 on the agenda now.

Phil Gallie: Before we do that, and while we are still discussing legal aid, an e-mail from Duncan Shields has been circulated. It contained the reasonable suggestion that we should involve the Scottish family mediation services in this inquiry. Would that be possible? Could we take evidence from the service?

The Convener: We could certainly ask the service for written evidence and then decide whether we wanted to take oral evidence as well. That will not be a problem.

Phil Gallie: Thank you, convener.

Subordinate Legislation

The Convener: Item 6 is on subordinate legislation and members have various statutory instruments in front of them. The Subordinate Legislation Committee has drawn our attention to one point, but it refers to the drafting of the explanatory notes and I do not expect anyone to get too excited about that. Does anyone have any comments on any of the instruments?

Phil Gallie: My comment is all-embracing. It is difficult to see how anyone could object to any of the statutory instruments on adults with incapacity. However, one thing strikes me. The Adults with Incapacity (Scotland) Act 2000 was supposed to remove the complications involved in dealing with the affairs of people who are not capable. It was supposed to make life easier for the people who become their advocates. However, when we see the amount of regulation and the number of forms and overviews that are involved—even though they are perhaps necessary—I wonder whether we are again overcomplicating the issues, especially for cases that involve only small amounts of cash.

The Convener: That may be the case, Phil, but I cannot comment. I do not think that that is the matter under discussion, but your comment will have been recorded for posterity.

Are members happy simply to note these instruments?

Members *indicated agreement.*

Petition

The Convener: Item 5 on the agenda is petition PE265 from George McAulay. Members will see that we have received a fair number of responses expressing some sympathy for the idea in the petition, including support from the Law Society of Scotland. However, more concern was expressed about protecting the anonymity of the victim as a consequence of giving anonymity to the accused, rather than about being in favour of giving anonymity to the accused per se. There have also been responses against the petition. Members will also have received a late e-mail from the petitioner. How should we deal with this?

Phil Gallie: The opinion has been expressed that we should perhaps discuss this with the Minister for Justice. That might be worth while.

There are good arguments on both sides of this debate. However, injustice sometimes occurs because of failure to give some individuals anonymity with respect to the type of charge that the petition refers to. It is unfortunate when names are mentioned, because that gives rise to publicity. In his letter to us, Mr McAulay writes about one individual who has suffered extremely badly because of the lack of anonymity. There have been many such instances.

To my mind, the issue centres on the seriousness of this particular offence. Rape is probably one of the basest of crimes. If someone is charged with rape, there is a stigma, especially if the sexual abuse of children is involved. This crime is different from other crimes. Most of the arguments that are employed against granting anonymity to the accused are based on the fact that anonymity is not granted for people accused of other crimes. However, as I say, this crime is different.

Maureen Macmillan, in the protection from abuse bill that she has been working on, recognises that, with this crime, we are dealing with special circumstances. I therefore think that the Government should consider this matter again. In Ireland, anonymity can be granted; the Irish Government had good reasons for allowing that. I was interested to learn in the evidence that we have received that that was once tried in the UK—or at least in England—but then abandoned.

There is a lot of conflicting evidence but, at the end of the day, my mind goes back to one person in Ayr who took his own life in such a case. I am frightened that similar situations may have developed since then.

The Convener: Phil Gallie is correct. This is a difficult area, there are conflicting views and it is not easy to see the correct way forward.

Maureen Macmillan: When we discussed this before, I said that I had no objection to reporting restrictions being imposed in such cases, because a lot of damage is done by salacious newspaper reporting. It would be different from giving someone anonymity, but having some kind of restriction on the reporting of such cases might help.

The Convener: We have not yet asked the Minister for Justice about this. We could formally ask the department for written comment or we could take the opportunity, the next time that the minister attends the committee, to ask some questions on this issue. I am not convinced that we should ask the minister to come to the committee specifically to answer questions on this issue. It is not sufficiently urgent and our view is not yet clear enough.

Phil Gallie: Mr McAulay has provided us with written information. I think that we should, in committee, ask questions and put our own views—and members will have different views. I accept that we do not need to ask the minister to come to the committee specifically to address this issue, but, the next time that he does come, I would be obliged, convener, if you could fit it into the agenda. That would keep the petition running.

The Convener: Are members happy with that suggestion?

Members *indicated agreement.*

Draft Land Reform Bill

The Convener: Item 7 is on the draft land reform bill. Members have received timetables showing the likely legislative work load of the Justice 1 Committee and the Justice 2 Committee. At one time, it was thought that the title conditions bill would conflict with the land reform bill, but that now seems to be extremely unlikely. Do any members have a particular interest in the land reform bill, bearing in mind the fact that that will not influence one way or another whether this committee gets to deal with the exciting title conditions bill?

Maureen Macmillan: Yes.

Michael Matheson (Central Scotland) (SNP): Yes.

The Convener: I am also interested, so that makes at least three members who would be interested in considering the land reform bill. Is anyone violently against our considering the land reform bill?

Phil Gallie: I am not against it; but one bill that is missing from the list in the timetables is the protection from abuse bill. I am not sure where that will fit into our timetable. I assume that it will come to the Justice 1 Committee because of Maureen Macmillan's involvement.

The Convener: The clerk tells me that it will go to the Justice 2 Committee. Because of my role as sponsor of the bill, it would obviously be difficult for me, as convener of the committee, to deal with the committee's own bill. It is sensible that the bill should go to the Justice 2 Committee.

Phil Gallie: Okay—that reverses my argument.

The Convener: Obviously, it will be up to me and the convener of the Justice 2 Committee to decide what happens to the land reform bill. However, I thank members for their views.

Armed Forces Bill

The Convener: We now move to item 3 on the agenda. We have with us the Deputy Minister for Justice, who will speak to the memorandum on the Armed Forces Bill.

10:00

The Deputy Minister for Justice (Iain Gray): Before I start, may I introduce Gerald Byrne from the Scottish Executive police division and Alan Williams from the Scottish Executive office of the solicitor. They will help me out if I get stuck.

An armed forces bill is required every five years to extend the acts that provide for discipline in the armed forces. Those acts also contain other measures relating to defence. The bill that is currently before Westminster contains provisions on the search powers of armed forces policemen and on the updating of the system of courts martial. It also contains provisions that relate to the jurisdiction of the Ministry of Defence police. Those provisions require the consent of this Parliament.

The details of the proposals are in the memorandum that accompanies the bill. Briefly, the Parliament's agreement is sought on the Ministry of Defence police having jurisdiction: to meet a request from the local chief constable for policing assistance in the vicinity of Ministry of Defence land; to act in response to a request for assistance with a particular incident or operation from a member of the local force anywhere in the local force area; to act in an emergency, without prior request from a member of the local force, when there has been an offence involving violence against a person, or when action is necessary to save life or minimise injury; and finally, to act as a constable when on secondment or loan to a local force.

The bill also allows the chief constable of a local police force to request assistance from the Ministry of Defence police to meet special demands on his resources anywhere in the force area. That measure does not extend the jurisdiction of the MDP, but it allows the MDP to provide officers or other resources by way of assistance. Under the bill, the measures would commence for Scottish police forces, or in Scotland, by a joint order made by the Secretary of State for Scotland and Scottish ministers.

We believe that those proposals should extend to Scotland. Most of them would be used only at the request of Scottish forces or constables and would allow them to take advantage of useful additional resources when they wished and required. We also think that the MDP should be able to act in emergencies when the local police cannot attend quickly enough. We do not believe that trained MDP officers—possibly in uniform—should have only the powers of normal citizens to react to incidents involving violence and personal injury. However, that power should be used only rarely. MDP estimates are of between 12 and 20 incidents a year in Scotland.

Although the Scottish Parliament may be able to legislate to introduce these measures in Scotland, the Executive believes that the measures in the Westminster bill should be extended to Scotland as part of a coherent UK-wide jurisdiction. The interest of the Scottish Parliament and Executive is recognised in the giving to Scottish ministers of a joint power with UK ministers to commence the provisions in Scotland.

In addition to these measures, we expect an amendment to be tabled later this week that will place the inspection of the MDP by Her Majesty's inspectorate of constabulary on a statutory footing. Currently, the MDP invites inspection on a voluntary basis. The expected amendment follows the Secretary of State for Defence's undertaking to look kindly on such a proposal during select committee consideration of the bill in the House of Commons. In anticipation of that amendment, we have changed the Sewel motion slightly from the version that I sent to members last week. I hope that that was communicated to the convener yesterday.

The Sewel motion now reads:

"That the Parliament agrees the principles contained in the provisions of the Armed Forces Bill as they relate to the Ministry of Defence Police in Scotland and that the Scottish Ministers should consent to the measures on jurisdiction being commenced in Scotland; and agrees that the relevant provisions to achieve those ends in the Bill should be considered by the UK Parliament."

The Convener: You may not be able to answer this, minister, but will the Sewel motion be able to be debated in the chamber, or will it simply be voted on?

Iain Gray: My understanding is that it is in the business bulletin for Thursday, which is when it will be moved formally.

The Convener: So this is the only opportunity that the Parliament will have to discuss the provisions.

Iain Gray: That is my understanding, but I have not checked that this morning.

The Convener: I do not know about other members, but my concerns centre around items 4(iv) and 4(vi) of the Executive memorandum, which indicate that Ministry of Defence police are being given powers that are in effect outwith the control or request of the local constabulary. The MOD police have existed for some time, so why

has it been thought necessary to implement such powers now? Have problems arisen that have led to this?

Iain Gray: There have been instances. One example, which was referred to in evidence to the select committee, involved an attack on a United States Air Force officer. A Ministry of Defence policeman intervened, but appeared to do so outside his legal ability. The key to it lies in the comment that Ministry of Defence police have been around for a while. The statute under which they operate—the Ministry of Defence Police Act 1987—is 13 years old. Ministry of Defence police have 13 years of experience and there may have been changes in the way that they operate. They feel that their officers can sometimes be put in difficult positions, which would be alleviated by the measures contained in the bill.

The Convener: Item 4(vi) says that there is a proposal in the bill

"to give MDP jurisdiction in cases where defence personnel are victims."

Does that imply that, in such cases, civilian police would lose their jurisdiction?

Iain Gray: I do not think that it does; it gives Ministry of Defence police jurisdiction too. The measure is a clarification. There is a view that Ministry of Defence police have jurisdiction in cases where defence personnel are victims, as they do in cases where defence personnel are involved in criminal activity. However, there has been some difference of opinion in the past—this is an opportunity to clarify the situation.

The Convener: Clarify for me what happens when both forces are involved in such a situation.

Iain Gray: In every area where the MDP are involved there is a memorandum of understanding with local police forces. Protocols have been agreed on how matters will be handled.

The Convener: Is that a matter for local decision? If police in both forces are involved in a case such as that described in item 4(vi), someone presumably has to be in charge. Who is generally in charge? Is it the senior officer of whichever force is present?

Iain Gray: The memorandum of agreement would be made with the chief constable for that area. The force in charge of the crime would be the force that is best placed to deal with it. The memorandums of agreement are devised with chief constables in the areas in which the MDP are operational. That would continue to be the case.

The Convener: Sorry, I am not familiar with all the bill's provisions and the memorandum of understanding is not written into the bill. Does that mean that we could have a situation where the MDP say, "The bill gives us jurisdiction. We are exercising that jurisdiction," regardless of a local objection?

Iain Gray: That has not been the experience of the past; indeed, when the Association of Chief Police Officers in Scotland gave evidence to the select committee in Whitehall, it was asked about relations between local forces and the MDP. The reply was that the relationship was excellent in all circumstances.

Michael Matheson: Is it normal for Ministry of Defence police to be armed?

Iain Gray: They are entitled to carry arms—that is also covered in the memorandum of understanding and the protocols. Normally, they will carry arms on Ministry of Defence land. However, if they are not on Ministry of Defence land—for example, if they are travelling between two MOD establishments—their firearms must be locked away securely.

Michael Matheson: I see that the local force could call upon them for assistance. Would they normally be armed when that happened?

Iain Gray: No, their firearms would normally be locked away.

Michael Matheson: So, in an emergency, if they had to leave a Ministry of Defence site, they would first lock away their arms.

Iain Gray: Their vehicles have the facility to lock firearms away, so that would not take up a great deal of time.

Michael Matheson: The Executive note refers to there being between 12 and 20 incidents a year in Scotland. What was the nature of those incidents? You referred to a case in England involving an American serviceman, but what incidents have there been in Scotland?

Iain Gray: One of the changes that has taken place in the way in which the MDP operate arises from a change in the way that MOD establishments operate. They tend to have few personnel, so the MDP are a more mobile force and are less tied to a particular establishment than they were 13 years ago. The suggestion is that they might see a violent assault when travelling between two defence establishments. They are police officers in uniform, but as things stand in statute, they would have no greater power to intervene than you or I would in such circumstances. Members can imagine that it would be puzzling for a victim of an assault if someone who appeared to be a police officer in uniform did not respond in the way that the victim would expect. The provision would allow the officer to respond as a police officer would in such circumstances. The nature of the incident is defined—it must involve violence or the saving of

a life.

Michael Matheson: It would be serious matters.

Iain Gray: It would be incidents of violence or where a life was at stake.

Michael Matheson: The Executive memorandum talks about officers who are "possibly in uniform". What does that mean? Will it be different when officers are off duty and out of uniform?

Iain Gray: If they were not in uniform, they would have to identify themselves in another way. However, if they were off duty, the circumstances would be different. We are talking about circumstances where they are on duty but not on Ministry of Defence land.

Michael Matheson: So, at such times they would have to show their warrant card or something.

Iain Gray: Yes.

Michael Matheson: Is it normal for Ministry of Defence police officers to operate in a covert—or plain-clothed—manner?

Iain Gray: It is our understanding that the patrols are mainly in uniform.

Michael Matheson: Do they do covert operations that mean that they would be in plain clothes?

Iain Gray: Our understanding is that that would be unusual, but if Mr Matheson wishes I would be happy to get back to him in writing with a fuller answer.

Michael Matheson: That would be helpful.

10:15

The Convener: Are there any further questions?

Phil Gallie: I have a brief question. Is there much interchangeability between MDP officers from bases south of the border and those from bases north of the border? In such cases, do officers who are assisting local constabularies have any problems understanding the differences between Scottish and English law?

Iain Gray: That is a concern, in that they are a UK police force, so officers will be transferred from one posting to another and that could mean that they transfer from a posting in England to a posting in Scotland. That was addressed in the select committee evidence that was taken in Whitehall—assurances were given that training is available to officers. It is not a new aspect of their service. Service personnel are already subject to Scots law while they are resident in Scotland and the force is already delivering the training requirement. It is important, but it ought not to pose a problem.

Phil Gallie: Finally, my understanding is that ACPOS fully approves of the measure. Is that correct?

Iain Gray: ACPOS supported it in its evidence. Other bodies that represent the police—the Police Federation, for example—have raised concerns, such as the one that Mr Gallie mentioned. However, the evidence is that the relationship between the local police forces and the MDP is excellent. In general, there is support for the changes.

Michael Matheson: If MOD police were operating in a covert manner, would they have to work under the provisions of the Regulation of Investigatory Powers (Scotland) Act 2000?

Iain Gray: Yes.

The Convener: You have indicated that some of the other police organisations were not 100 per cent happy with the bill or with certain provisions of it. As you explained, the bill is subject to a Sewel motion, which means that this is the only scrutiny that it will get in the Parliament. There will be no opportunity for anyone to think through the particular consequences of the enactment of the bill in Scotland, in so far as it relates to devolved areas. Was any thought given to making the proposals the subject of separate legislation? I presume that the clauses are already there, so to put them in a Scottish bill would not have strained the resources of the justice department too much.

Iain Gray: Consideration was given to that. However, we would have required a legislative vehicle to allow us to do that and the likely outcome would have been a difference—at least for a period—between the jurisdictions in Scotland and in the rest of the UK. We felt that the MDP was a UK police force, as are the British Transport Police, so it made sense that they operate in a UK-wide jurisdiction. If they did not, it would exacerbate rather than alleviate the kind of concerns that we discussed following Mr Gallie's question. We felt that the provision ought to be scrutinised in the Parliament—which is what is happening today—and that Scottish ministers ought to have a role in the commencement of the provisions. That is why the Sewel motion seemed to be the most appropriate vehicle.

The Convener: If there are no further questions, I thank the minister and his officials for their attendance.

Legal Aid Inquiry

The Convener: For agenda item 4, we have witnesses from the Association of Scottish Legal Advice Networks. Peter Hunter is the director of the Scottish Low Pay Unit. Neil Anderson is from the Federation of Information and Advice Centres. Please keep your opening statement very short.

Peter Hunter (Association of Scottish Legal Advice Networks): Good morning. A copy of my statement has been circulated to members. I thank members for the invitation to give evidence to the committee.

The Convener: If you have given us a copy of your statement, it will not be necessary for you to read through the whole thing. If there are certain salient points that you wish to make, feel free to do so.

Peter Hunter: Okay. ASLAN's background is given in the opening paragraphs, which members can read at their leisure.

The principal point that ASLAN wants to make is that much of the poverty that is experienced by Scottish people is in some form unlawful. Much can be done to mobilise or organise legal services to reduce the experience of poverty. For example, unlawful evictions, illegal credit agreements, pay discrimination at work and unfair dismissal are all areas in which effective access to legal services could prevent—or, at least, minimise—exposure to poverty.

ASLAN is a network of agencies that deal primarily in social welfare law—poverty law, as Professor Alan Paterson, I think, described it to the committee. ASLAN hopes that the committee, in its deliberations, will take time to assess legal aid provision against the benchmark of tackling poverty and will consider to what extent legal services are used to tackle poverty and discrimination.

We are conscious that the impact of the European convention on human rights is one of the background dimensions to the issue. The second page of my statement contains a section on the nature of inequality. In particular, article 6 of the convention, which—to use the shorthand version of the provisions of article 6—concerns the right to a fair trial, has already had a big impact.

On the equality of arms and the balance of power between parties involved in litigation, our position is that it is important to understand the context in which individuals find themselves. The inequality of arms that one sometimes finds in courts or tribunals is, in a sense, only one manifestation of fundamental inequalities in society. I have listed some of those inequalities in the bullet points on page 2 of my statement.

Our position is that such inequalities are incontrovertible facts, which should form the background against which the future of legal aid is assessed. For example, men continue to enjoy significant political, economic and social advantages over women. That is not to say that all men are necessarily better off than women, but the statistics—such as the recent Scottish Executive initiative on the pay gap, for example—show that the position of men and women in society continues to be quite different.

Disabled people face profound discrimination in access to all manner of services, such as education, employment, goods and services in the high street—you name it. Another fact is the existence of institutional discrimination on the ground of race. There are also fundamental imbalances of power within key relationships—for example, between employer and employee, landlord and tenant, husband and wife, adult and child.

ASLAN's perspective is that, if the legal aid system—and legal services generally—is to be used to advance the lot of disadvantaged groups within society, the ability to restore a greater degree of balance in those relationships must be the ultimate goal.

To improve the situation, we would first deal with the lack of a strategic planning function within the Scottish Legal Aid Board and within legal services generally in Scotland. Professor Alan Paterson has already given a far more eloquent description of that than I could and I have included his description on page 3 of my statement, under the heading "Strategic Planning".

There are numerous gaps in the legal service system across Scotland, ranging from services in relation to housing in Wick and employment in Dundee to discrimination law in the Borders. There are also skills gaps. Although it may be possible to get information and advice in Glasgow, skills gaps mean that there may be no representation in north Glasgow, whereas in south Glasgow it is quite good. The picture is uneven and there are huge, gaping holes in the pattern of provision.

The Scottish Legal Aid Board and—to be honest—every other body are at a complete loss to know how to respond to the problem. The Scottish Legal Aid Board, in particular, has no formal function to sit down and say, "There is a gap in the Western Isles; we ought to find a lawyer or an advice centre to fill that gap." There is no way of doing that and there ought to be.

Eligibility criteria are incredibly restrictive. In our submission, we say that, frankly, they are a joke. That is our position. The criteria are so restrictive that access to civil justice is pretty much limited to

people on either very low or very high incomes. There is a huge gap in the middle where people find it particularly difficult to access civil justice.

The majority of ASLAN members are lay advisers rather than practising solicitors. We take the position that the continuing freeze on payment rates to solicitors is a major problem in accessing justice. It is not economically viable for solicitors to undertake social welfare law. That is a fundamental problem.

ASLAN's position is that there is a considerable amount of untapped potential in our legal services that could be used to tackle poverty, inequality and disadvantage, which sadly is not being fully utilised at the moment. To do so would involve considerable reappraisal of the legal aid system. That has to be done alongside the on-going review of community legal services. The key elements of such a reappraised legal aid system would be a far stronger strategic dimension to the planning of legal services and more generous resourcing of those services in the future.

The Convener: If I were the Minister for Justice, I would ask you by how much I would have to increase my budget to meet those requests. Do you have any idea of what the increase would have to be?

Peter Hunter: The slightly bizarre position with civil legal aid is that the budget is going down. An important step would be to reverse that decline. One of the reasons that the civil legal aid budget is being used less well year on year at the moment is that applicants, particularly those who do not get support in full, have difficulty in accessing the fund and have to pay a contribution. It is difficult for applicants to find solicitors who will do the work. Alterations in those two areas would reverse the decline in civil legal aid. That would at least turn us round so that we were heading in the right direction. Expenditure on legal aid is being reduced year on year as a result of reforms that were introduced earlier in the 1990s. The money could be clawed back to the Scottish Executive. Alternatively, it could be diverted from the criminal to the civil legal aid budget.

Michael Matheson: In your opening remarks, you referred to areas that are presently outwith the scope of assistance or representation under the legal aid provision. Which areas would you like to see included in legal aid provision?

Peter Hunter: There are areas, including the recent partial extension of ABWOR—assistance by way of representation—to cover employment tribunal cases. Sadly, there are probably more people on the Justice 1 Committee—if I include the clerks in that total—than there are people who have managed to take advantage of that extension, as the qualifying criteria are so strict. A more generous application of legal aid to employment tribunals would be an important extension.

We also need to move away from funding cases on an individual time-and-line basis. It would be worth exploring the possibility of awarding contracts. If, for example, research conducted by the Executive showed that there was an annual average of 10 to 15 housing cases in Thurso and Wick, a simple solution would be to recruit a solicitor on a contract to provide that service locally. There are many different ways of expanding legal services. That includes altering the jurisdictions in which legal aid is payable. It can also be achieved by being proactive and going out and saying, "We know that there are people here with problems. Let us find an advice centre, a solicitor or another person who is willing to meet that need."

Michael Matheson: You mentioned employment tribunals. Are there any other tribunals for which people cannot currently receive legal aid, but which you would like to be included in the list?

Peter Hunter: Social security appeal tribunals are another such tribunal.

10:30

Neil Anderson (Association of Scottish Legal Advice Networks): There is difficulty in all areas of civil law, because of the divides that dictate that the very rich and the very poor are the people who will probably be able to get access to the law. The existence of any excluded area means that the people who are covered by it are excluded from access to justice.

We would also have liked extension in the form of further consideration of alternative ways of resolving problems, without taking every problem through the courts. We have found the use of such alternatives to be a successful way in which to resolve problems.

Michael Matheson: You mentioned the social security tribunal system, which has been mentioned previously to the committee. Is there is an area of law on which you are continually presented with cases in which people would like some sort of legal remedy, but cannot obtain legal aid?

Peter Hunter: My experience at the Scottish Low Pay Unit has primarily been to do with employment and discrimination cases. The number of solicitors who are willing to do advice and assistance work on employment and discrimination cases is incredibly small. Many members of Citizens Advice Scotland and the Federation of Information and Advice Centres go

to incredible lengths—often through the work of volunteers—to try to plug the gap.

If a client faces a five-day case on discrimination, the reality is that even if a volunteer could get his or her head around the complexity of the law on discrimination, given the major limitation of that volunteer's only being able to commit to one or two days per week, that volunteer could not represent the person at that five-day tribunal. We often have on the phone clients who have very solvable problems that might not require litigation. However, their cases cannot be resolved because there is nobody anywhere in the country to whom to refer them.

Neil Anderson: My members have reported that some cases are becoming so complex that it is becoming very difficult for anyone from a lay background to feel sufficiently able and adequately trained to handle some of the more complex arguments with which they are being faced these days. That is the case not only in social security law, but across the board, particularly in cases that relate to disability.

Michael Matheson: How extensive is that problem in the work that you undertake?

Peter Hunter: It is literally a daily experience for us. The occasions on which we are able satisfactorily to refer somebody to an agency that can offer affordable or free advice and representation are greatly outnumbered by cases in which we might tell somebody, "Well, I'll try and write this out in a letter, and I'll describe your situation, but I'm afraid that there's nothing else we can do for you beyond that." My fear is that those people go home, read the letter and conclude that there is nothing more than they can do. They then continue to experience deductions from their wages, harassment or whatever it was that caused them to come to us in the first place.

Michael Matheson: Do you have any idea about what percentage of people find themselves in such positions and who then drop the cases in which they were involved?

Peter Hunter: A high proportion of the cases that are lodged at tribunal do not proceed, for a variety of reasons. I work in the tribunal system, sitting as a lay member. I have seen applicants appearing unrepresented. I am not saying that such applicants are wasting their time, but the odds that they are up against are, in many cases, so phenomenal that there is no way—in my view—that they experience the fair trial to which they are entitled under the European convention on human rights.

Neil Anderson: One of the problems that we face is in the nature of some of the networks, which are not particularly well funded or staffed. I understand that Citizens Advice Scotland has given evidence to the committee. That organisation is relatively well staffed and is perhaps in a position to give the committee some figures. The Federation of Information and Advice Centres, on the other hand, is not so well staffed and is not in a position to collect the numbers or to go through a number-crunching exercise.

We are coming up with anecdotal evidence that is rather similar to what Citizens Advice Scotland is saying. We cannot give total numbers at the moment, because we do not have the resources to collect the information.

Peter Hunter: To collect the information would be a useful exercise for the community legal services working group, in which we are involved. That group is commissioning some research into consumers' experience of trying to access legal services of one form or another. It would be useful to track the sequence of events from consumers' initial inquiries to the outcome, whether they give up or come to a conclusion.

Phil Gallie: I will pick up on the areas to which legal aid could be extended, and the comments that were made about tribunals. Mr Anderson commented on disability allowances. I have some sympathy with the point that he made, but I wonder whether, by considering disability under legal aid support, we are going to make decisions more difficult. I would have thought that we would require independent medical input on disability, rather than the views of solicitors. How do you feel about that? Are we looking at the wrong area in such issues?

Neil Anderson: The solution is manifold. Independent medical evidence has a role to play. On the other hand, whoever is advocating for a claimant also has a role to play, in that they must be able to understand the medical arguments that are being put forward on behalf of the claimant so that they uphold the legal side of the argument about disability benefit.

I reiterate that there is a need for intervention in complex cases. Some cases are relatively simple. At the moment, a number of cases are successfully handled merely by somebody writing a letter on behalf of the claimant. The cases that cannot be handled in that way are worrying, as is the lack of representation in general. Quite a lot of people try to represent their cases to tribunals when they do not understand the nature of the tribunal, what they are trying to take on or the complexity of the argument that they face. Some individual claimants try to do that for themselves, but they often fail, become confused and get caught up in a system that they do not understand.

Peter Hunter: I will add something to that. Phil Gallie's question raises an important point. There is a danger in equating improved access to justice

with the employment of more solicitors, but that is not necessarily what people want. They want problems to be solved as early as possible and the public purse wants them to be resolved as cheaply as possible—but they want them to be resolved with the least amount of confrontation between the two parties.

That need not necessarily be rocket science. Sometimes, it is necessary to litigate, but it is often unnecessary. To be honest, it is a matter of horses for courses: we should identify what we are trying to achieve in a particular situation and then put in place what is needed to achieve it. If what is needed is a medical expert, we should put one in place. If law reform is necessary to improve access to justice—for example, in the case of divorce—we should change the law. We should not necessarily hire more lawyers to sue more cases. However, we need to ensure that people who have real problems that cannot be mediated—for example, cases of domestic violence—have access to lawyers when they need them. Horses for courses is a good rule of thumb.

Phil Gallie: I have one more point. You talked about inequality and referred to it again in your answers to Michael Matheson. I do not agree with everything that you said but, that apart, you made one important point, which was that, at the moment, the very poor and the very rich have access to the law. Do you have any ideas about the people who are just above the poverty band, and some of the middle-income groups as well, who are virtually excluded.

Peter Hunter: Our experience at the Scottish Low Pay Unit is that, because a lot of the people with whom we work are employed, they earn just enough to take them above benefit levels. Therefore, they earn enough money to move them into the contributory category for legal aid or out of the system altogether. It is a harsh reward for those who have made the effort to find work—even if that work is not particularly well paid and involves long hours and a certain amount of repetition—if, by taking on that commitment, they exclude themselves from a variety of services, such as legal aid.

Those who are just above the eligibility criteria are, potentially, the most vulnerable. Ironically, they are more vulnerable than those who are on very low incomes. It would be very helpful if the committee recommended a review of the eligibility criteria for legal aid, with a view to bringing into the catchment those who are just above the band or, perhaps, particular groups who in the view of the committee, the Executive or the Parliament, are particularly vulnerable and therefore in need of help.

Maureen Macmillan: I want to ask about areas of the law that are neglected by the legal profession. There seem to be two categories in which expertise and remuneration are lacking. You said that in Thurso there are 10 to 15 housing cases a year, but no lawyer to deal with them. Is that because lawyers there do not have the expertise, or because they cannot afford to take on those cases? When you have answered that question, I want to talk a bit more about the rural dimension.

Peter Hunter: I shall answer the first question, and Neil Anderson can talk about the rural dimension. There can be a variety of reasons for a mismatch between the services that people need and what the legal profession is able to provide. There is not a one-size-fits-all answer. Although I am legally trained, I am not a practising solicitor. It is unusual for me—coming as I do from the voluntary sector—to say that solicitors could do with a better deal. The fees that are paid under the legal aid system make it very difficult for lawyers to run civil legal aid practices. It is a very marginal existence. One of the consequences of that is that the pool of talent to which people can get access is reduced. It would do people in poverty some good if the Law Society of Scotland lobbied for an improvement in the money that is available to solicitors through civil legal aid, so that more solicitors were drawn into that work.

At the other end of the spectrum, somebody who has a housing or employment problem, but who is required to pay a contribution for assistance from the Scottish Legal Aid Board, may not have the disposable income to enable them to take up that offer of support. In a sense, there are difficulties on both sides of the process.

Maureen Macmillan: An organisation such as Citizens Advice Scotland would probably have more expertise in housing law and regulations than a local solicitor would. Do you feel that the Scottish Legal Aid Board ought to fund in-house advice from citizens advice bureaux, rather than directing people to a local solicitor who might not know very much about that area of law?

Peter Hunter: To be honest, at the moment nobody stops to ask that question, never mind to answer it. The Scottish Legal Aid Board funds one set of provisions and a combination of local authorities, the National Lottery Charities Board and various charitable funds fills the gaps. I have spent the past 10 years, as have Neil Anderson and many others, working for agencies that try to spread themselves thinly on the ground to cover those gaps. The difficulty is that nobody sits down and works out what is needed in Caithness and Sutherland or in Ross and Cromarty, or what specialist services to deal with difficulties are needed in Inverness, Edinburgh or Glasgow.

Maureen Macmillan: We could take the health service as an analogy. There is no brain surgeon

in Achiltibuie, but somebody who lives there might need the services of a brain surgeon. The situation may be similar for legal services, but we have to find ways for people to have their problem identified locally, although the expertise that they require may be available only in urban centres.

Peter Hunter: The analogy with the health service is very instructive, because it is important to deploy generalists and specialists in a way that best meets the need on the ground. A further medical analogy is the idea that prevention is better than cure, which brings us back to Mr Gallie's point. If you can bring two parties together to resolve a dispute without going to court, that is not only cheaper, but better all round, particularly if those parties must then go on and work together.

The analogy with the health service is good. Legal services lack many things, compared to the health service. Civil legal aid lacks strategic service delivery, planning and a collective idea of demand. We are starting from a very low point.

Maureen Macmillan: So the way in which need is met in those areas is not good.

Peter Hunter: No, it is not. You asked about rural areas particularly, on which Neil Anderson has relevant experience.

Neil Anderson: I live in Argyll, and apart from working for the Federation of Information and Advice Centres, I spend my time mostly with the steering committee on a citizens advice bureau for Argyll. We finally received funding for that about a week ago, so later this year, there will be a CAB service in the Argyll area. With the exception of those on Bute, Islay and Jura, there have been no advice services to speak of in the area.

Apart from solicitors who are estate agents, there are few solicitors in Argyll. Perhaps the health service analogy can help again, in dealing with the amount of space in Argyll and the difficulties with transport and other matters. In similar situations around the country, the health service is considering employing general practitioners. Perhaps using people from CABx and independent advice centres and solicitors on a contractual basis might be a solution to getting services out to more rural areas.

10:45

Maureen Macmillan: That would also provide a point of contact in communities.

Neil Anderson: That is right.

Paul Martin: Will you elaborate on the consequences of the lack of interest in the areas that you mentioned?

Peter Hunter: Many people lose jobs unnecessarily: they have a minor dispute about a deduction from pay that escalates into an argument, as a result of which relationships deteriorate, which leads them to resign or employers to dismiss them. We deal with such problems. For example, a universal right to paid holidays was introduced in 1998. It is a common misconception that people used to have the right to public holidays with pay. Public holidays and statutory holidays are misnomers.

We are dealing with hundreds of cases of people who still do not receive paid time off work, despite being legally entitled to it. We tend to take it for granted that, when Parliament goes into recess, or when we close the Low Pay Unit for a holiday—of course that happens rarely, given the pressure that we are under—we can take time off without putting ourselves in a more difficult financial position than we were in before we went on holiday. If one has no money, not receiving pay while on holiday is a major disincentive to taking time off. For people who work long hours for low pay in repetitive jobs, and who may be in insecure employment—possibly juggling all that with family commitments—going for 52 weeks of the year with no time off gets close to a breach of a fundamental right. Discrimination at work, bullying and harassment can be added to that. All that means that many people's quality of life would be seriously improved if someone from a service could intervene to say, "This isn't acceptable, but it's not a major falling out. Can't we sort this out?".

Neil Anderson: Perhaps another example of that is the recent research by the National Association of Citizens Advice Bureaux on the number of women who tell their employers that they are pregnant and who are dismissed or threatened with dismissal by employers who want to avoid employment law obligations to provide maternity pay and leave. If a service could intervene early, that might discourage employers or people who are in strong positions from feeling that no action could be taken against them and from carrying on regardless.

Peter Hunter: I will add some figures to that. NACAB's evidence is that 28,000 pregnancy-related dismissals occur every year. The Equal Opportunities Commission's evidence is that pay discrimination that is associated with motherhood costs working women £250,000 over their career lifetimes. A significant number of people and a major economic disadvantage are involved. If you take £250,000 out of someone's wages over their lifetime, you can bet your bottom dollar that their pension entitlement will be significantly lower than that of people who have not had that experience.

That brings me back to our original point: many of the problems of access to justice underpin the poverty and inequality that the Parliament is committed to tackling, and on which we would like

legal services to be focused.

Paul Martin: Would it be possible to explore the question of why there is no interest on the part of the legal profession in such areas of the law? Is it because solicitors are profit motivated? Is there a way in which we could stimulate more involvement in those areas?

Peter Hunter: Solicitors are interested. What I am about to say will stick in my throat slightly, because running a voluntary sector organisation at the moment is, financially, an absolute nightmare. Some dots could perhaps be inserted before the word "nightmare" for the record; it is really hard. However, as a result of running what, in law, is a small company, I have a lot of sympathy with solicitors who may be considering the options of family law, conveyancing or social welfare law. I can understand why they do not necessarily take up social welfare law, given the stress and insecurity—from a small-business perspective—that is suffered by lawyers who work in that area.

If members spoke to lawyers as individuals to ask them whether they care about the people who are involved, and about their experience with regard to housing, welfare or work, they would find that lawyers do care. It just costs money.

Neil Anderson: Some of the evidence that lawyers care is in the amount of pro bono work that they do because they care. They realise that, from a market position, there is no way that they can take on social welfare as a specialism all the time. They will go and do conveyancing but, when they have a few hours to spare, they will approach the local advice centre to offer to help some of its clients on a pro bono basis. However, that does not address the strategic problem that lawyers do not feel that social welfare work is a generally profitable area. After all, they must make a living.

Peter Hunter: I am conscious that this is in danger of turning into a lawyers fan club submission, rather than one from the voluntary sector. Historically, there have been tensions between solicitors and the voluntary sector, particularly over what will happen to legal aid. Will legal aid money be diverted into the voluntary sector? It is important for us to go on record as saying that we see the value of the role that lawyers can play. However, the caveat lies in Mr Gallie's point that lawyers and lay advisors must have appropriate roles.

Phil Gallie: I would like to turn to the community legal service side of the matter. I recognise that Govan Law Centre has done a lot of good work. I am also prepared to acknowledge North Ayrshire Law Centre. However, it seems that many such organisations are funded by local government, whose budgets are pressured. Do you feel that the legal aid budget could be used to a greater extent to provide core funding for such organisations as the law centres? Would it be reasonable for us to look for that in future?

Peter Hunter: Yes.

Neil Anderson: In short, yes.

Phil Gallie: This is a chance for you to cut across your solicitors supporters club.

Peter Hunter: Yes, or supporters association. It is interesting that there are law centres in some areas, but not in others. That is partly to do with concentrations of poverty. Neil Anderson has got together with a group of people to set up a CAB in Argyll. That kind of bottom-up initiative is all very well, but what happens to people who happen to live in a housing estate or in a community in which nobody has got together and decided that it would be good to lobby for—and therefore fund—a law centre? That is why we need a little bit of strategic thought and creative thinking at national level. If that can be provided through the Scottish Legal Aid Board, that is fine. If it can be provided through the Executive, that is also fine.

If a customer who has used a legal service is asked whether that service was provided through a law centre, a CAB or an independent advice centre, they will not know. All they will know is that they spoke to a person behind a desk, who was either good or bad, either helpful or not. How the service is provided does not matter as much as that it exists, that it is consistent, that it is of a decent quality and that it is provided nationwide.

Neil Anderson: It is also important that the service is strategically thought out. That applies particularly to the difficulties of providing such services in rural areas and in some pockets of the inner cities, where there are particular problems. Areas that have a large ethnic minority might need a particular specialist service. There is nothing to underpin the provision of such services. Unless services that meet local need grow organically on an estate or in a particular county, the only way to deal with local needs is to take them on strategically, and to decide that certain services should be available countrywide, according to need.

Phil Gallie: That, to a degree, answers the other questions that I intended to ask. Thank you.

The Convener: Are there circumstances in which the community legal service could be more efficient and effective than it is at present?

Peter Hunter: I do not advocate freezing the current budget—I want it to be increased. However, it would be possible to take the money that is currently spent on civil legal services—by bodies including the Legal Aid Board, local authorities and the National Lottery Charities Board—and pool it and rework it more efficiently.

At the moment, people have access to local services by accident rather than by design. To take the existing budget and rework it would be massively more efficient. That would deal effectively with the points that were made by Maureen Macmillan about integrating services, particularly for people in rural areas who cannot just walk down the high street if they are referred from one agency to another. I am bound to argue that the impact of such a change would be greater if extra money was put in to the system.

The Convener: As there are no further questions, I thank Mr Hunter and Mr Anderson for giving evidence this morning.

We move on to evidence from Scottish Women's Aid. Louise Johnson, who is a worker on legal issues, Jean McKenzie, who is from East Lothian Women's Aid, and Mairead Tagg, who is from Greater Easterhouse Women's Aid, are with us this morning. Are you happy to move straight to the question-and-answer session?

Louise Johnson (Scottish Women's Aid): Yes.

The Convener: One of the points that you make is that benefits such as the working families tax credit are passported benefits as far as advice and assistance are concerned. However, for the purposes of civil legal aid, such benefits are counted as part of income. You say that that disadvantages women especially. Is that because more women are on low incomes and in receipt of that benefit, or are other factors involved?

Mairead Tagg (Scottish Women's Aid/Greater Easterhouse Women's Aid): Women are on lower incomes. Part of the price that women pay for leaving abusive situations is that they leave everything, including their homes, jobs, neighbourhoods and communities. To survive, women are often forced into low-paid employment that fits around their children's school timetables. Our experience of working in the network is that women are extremely poorly paid and that they top up their low incomes with benefits such as family credit.

Many women have already taken their children from a reasonable standard of living to one that amounts to abject poverty. To have then to pay legal support contributions on top of that and to have family tax credits taken into account can push some women over the edge. We know of women who have returned to abusive men because they could not pay for the legal support that they required. The level of poverty that they were enduring was so severe, and their children were so distressed, that they felt that it was better to endure the beatings than to live in those dreadful conditions.

The Convener: Is that kind of occurrence frequent?

Mairead Tagg: We see it regularly in greater Easterhouse. Women come to us from all over Scotland, and even from England. We find that women return regularly to their former homes because of the levels of poverty to which their children are subjected.

The Convener: Those are people who have come to you to explore the possibility of getting legal aid. Is it the case that, when you go through the sums, they say that they cannot go on?

Mairead Tagg: Yes, they cannot afford the contributions, especially when they have to make pretty substantial contributions. If they must put money up front, they cannot do that, because they do not have it.

Jean McKenzie (Scottish Women's Aid/East Lothian Women's Aid): In the past couple of years, I have found that more and more women telephone us for information about their entitlements. When we tell them, they say that there is no point in going any further because they cannot afford to do so. We feel at a loss—we do not know what to offer those women.

The Convener: Are more women telephoning you because there is an increased awareness of your services?

Jean McKenzie: Yes, but it is also because women want to take steps to protect themselves. Those women ask us questions that include questions about what they should do to protect themselves. We do not have answers to those questions.

Mairead Tagg: It is a real problem. In a sense, society is asking women to work and pay taxes in order to be considered full citizens. Women are asked to pay again to be protected from what is, in effect, a crime. That is an example of dichotomous thinking. The Scottish Executive has been fantastic in raising the issue of domestic abuse and in saying that it is completely unacceptable. On the other hand, however, women are expected to pay for the matrimonial interdicts that would protect them from being battered, abused, intimidated and even killed.

Phil Gallie: I suppose that that is an extension of the argument about justice for only those on low incomes and the very rich. I presume that you acknowledge that.

Mairead Tagg: Absolutely.

11:00

Phil Gallie: You argue that invalidity benefit and disability living allowance should become passport benefits to obtaining advice and assistance. Are you also arguing that they should become

passport benefits to civil legal aid?

Louise Johnson: Yes. In our view, if the Government has recognised that one's income and financial situation are so straitened and reduced that one is entitled a state benefit, one should also be eligible for civil legal aid, which is another state allowance. There is no reason why the state should apply one criterion for one state benefit but tell the recipient of that benefit that, unfortunately, they are not suitable for another state allowance.

Phil Gallie: Is not it logical to argue that someone who is on invalidity benefit receives that benefit as a substitute for a wage? As has been argued, wage earners are virtually excluded from civil legal aid, so if invalidity benefit is a substitute for a wage, it is a natural barrier to civil legal aid, irrespective of the fact that it is a benefit.

Louise Johnson: If one receives a benefit, one has been passported and is regarded as a vulnerable member of society, whose income or level of support is not sufficient to sustain them. I do not see why someone in that category should, in effect, be discriminated against.

Phil Gallie: I could accept your argument in relation to disability living allowance, as that is a care allowance, which gives support to someone who is in a poor state. That would be a fair argument, but I am concerned about your argument with respect to invalidity benefit, given the comparison that is drawn between it and wages. Could you adjust your thinking to take account of such factors?

Louise Johnson: Other benefits, such as income support, which is a benefit in place of income, and income-based jobseeker's allowance, which is another form of income, are passported. If those benefits, like invalidity benefit, are a replacement for income, why should invalidity benefit be discriminated against?

Phil Gallie: I will not labour the point, but I think that income support is intended to bring people up to a set standard of living, but it is hoped that invalidity benefit should take people above the minimum standard of living to which income support relates.

Louise Johnson: However, that is also the case for income-based jobseeker's allowance.

The Convener: If we pursue that line too far, are we in danger of discriminating against people whose income is from employment, even though it is not particularly high? Should the answer be to raise the levels of income at which people receive legal aid?

Louise Johnson: That is suggested in our paper. We have done calculations that are based on the Scottish Low Pay Unit's estimates of low pay. Estimates for weekly low pay and income are based on between £3.70 per hour, which is the national minimum, and £6.82 per hour. Our submission states that a weekly income somewhere between the limits that are produced using those figures should be regarded as low income. The figure that is used for calculations at the moment is probably too low.

Michael Matheson: For clarification, is invalidity benefit now referred to as incapacity benefit? My understanding was that invalidity benefit was done away with and changed to incapacity benefit.

Louise Johnson: We refer to it as incapacity benefit.

Paul Martin: The written evidence from Women's Aid dealt with the reassessment of income, or rather of the repayment period. You felt, in effect, that women were being discriminated against with regard to the possibility of rebuilding their lives after, and as a result of, the reassessment period. In your experience, how often does the reassessment take place?

Mairead Tagg: We do not have figures on that. Women tend to come to us in a state of absolute crisis. Once they have moved on, often they do not want anything that reminds them of the trouble that they have been in. That, unfortunately, is a normal response to trauma. It would be useful, however, for such figures to be gathered routinely and to be made available as evidence.

Paul Martin: My next question is even more difficult. Is reassessment any more or less frequent in cases of domestic abuse compared with civil legal aid cases?

Louise Johnson: We prepared our submission on the basis of conversations with members of the Scottish Women's Aid network and certain solicitors. We asked whether the Women's Aid network could speak to those solicitors who were sympathetic to the plight of women suffering domestic abuse and who would take on their cases. We received numerous phone calls and written submissions from solicitors, saying that on the occasions that women had come to them, the women felt that the contributions and repayment levels were a barrier to their accessing civil justice.

When the women have escaped life in an abusive situation, they then have the difficulty of establishing a new home. They have children, and, probably, child care expenses to pay—subsidised or not. They have to bear the expenses of their new home and new life. They probably also have to service the expenses and joint debts of their previous relationship from a greatly reduced income, because they are, in effect, single parents, on either a low income or a benefit-assisted income. The solicitors stated that the women in such cases have despaired and said

that it is not possible to meet even what we would regard as fairly small payments. Such payments are still a great chunk of their income.

Paul Martin: You touched on the idea that no repayment should have to be made until a living wage of £10,000 per annum has been reached. Are you arguing that that should apply to all legal aid grants, or just to those associated with domestic abuse?

Mairead Tagg: That would be something for the committee to decide. We are here as people who work face to face with domestic abuse. We see the level of hardship that women endure and the fact that many of them are, in effect, precluded from seeking justice and support from the system. We are just saying that the situation is not good enough. Domestic abuse is what we feel confident enough to talk about. The repayment not having to be made until an income threshold of £10,000 is reached is certainly something that we would advocate for cases of domestic abuse—it is such an awful thing.

Michael Matheson: You commented on women applying for legal aid to obtain matrimonial interdicts or for exclusion orders. There is an issue around the way in which the women's and the women's partners' incomes are jointly assessed. Could you expand on that, please?

Mairead Tagg: For a woman who lives in a bought home with her partner, refuge provision is scarce. We turn away twice as many women as we can take in. Refuge provision does not suit everybody, anyway. The woman may, in effect, be trapped in the family home because she does not have enough income to get away and re-establish herself in another house. There is a huge shortage of suitable housing. If she is stuck in the family home, her partner's income will be assessed along with hers. In a way, he exerts further control over her behaviour, simply because she has to stay in the same house as him and cannot get away.

Michael Matheson: Is there provision for SLAB to reassess someone's contributions for 12 months after the case? Is there a possibility to consider that retrospectively?

Louise Johnson: Often, the problem is that women are not given that option. They are too frightened to end up possibly being sued by a solicitor, in case of it all going pear-shaped. Most women are not experts in housing law or matrimonial law and are taking a huge step into the unknown. Most women are told by their abusive partners, "The only way you'll leave me is in a box." It is a fact that most women are killed or seriously injured by their abusive partners as they leave or after they have left.

They have that pressure on them, as well as the pressure of supporting the children. Suddenly, they are faced with trying to deal with between five and seven agencies, as well as having to access some kind of legal support. That is a minefield for women, who often cannot access the information that they need, which is not made freely available to them. We know examples of women being given information that is frankly erroneous and misleading by solicitors who are not up to speed on domestic abuse and matrimonial interdicts.

Michael Matheson: Even if there is lack of knowledge about the actual provisions at SLAB's disposal, you do not think that those provisions are sufficient to address the problem.

Mairead Tagg: That is correct: I really do not think so. In cases of domestic abuse, one of the woman's problems is that she is, in effect, being held captive by the man, who will not sign some form to say, "Yes, I earn £25,000 a year, but she's leaving me because I'm a bully." The situation precludes her moving on.

Michael Matheson: I note from your evidence that solicitors may, apparently, be required by SLAB to justify why a civil remedy, as opposed to a criminal remedy or police intervention, should be sought. How often is such justification of a decision demanded?

Mairead Tagg: The awful thing is that you never know—it is random and chaotic. There is no clear path of which we can advise women; we cannot tell them that this or that will happen. One person in SLAB might say to the solicitors, "Justify that." We feel that that is completely inappropriate, when women are in fear of their lives.

Marilyn McKenna died while she was waiting for a non-harassment order to be granted. She died because we, as a system, failed to put in place the relevant safeguards. There will be more Marilyn McKennas for as long as people who are not particularly expert in domestic abuse are expected to make such assessments. In a way, it is inappropriate to expect legal aid assessors to decide what is, and what is not, justification. If people do not really know about the complexities, it is scarcely fair to ask them to make assessments based on what is often a complex situation.

Michael Matheson: Do you believe that SLAB is not in a position to make such decisions?

Mairead Tagg: I do not think that it is in such a position, to be honest.

Michael Matheson: You mentioned an inconsistency, in that whether a solicitor has to justify the choice of remedy depends on who in SLAB receives the case. There is an inconsistency in how SLAB operates the system. How often does the problem occur? I understand that you may not have national statistics on that, but do you

have an idea from anecdotal evidence?

Mairead Tagg: In greater Easterhouse, where I work, it does not happen desperately often. The majority of women with whom I work are on income support and do not have to pay, but I do a lot of court work for abused women and, in contact and residence cases, and sometimes in the case of matrimonial interdicts, we have had to justify our decisions. In Easterhouse, we tend to work with specific lawyers who are used to the type of work and can put together quite a good case.

What worries me is that Women's Aid sees only the tip of the iceberg. We do not work with every abused woman in Scotland. If an abused woman goes to a solicitor who does not know much about such cases and is not all that interested, the chances are that she will not get the support she needs. That can cost her her life.

Michael Matheson: Have you heard of cases in which legal aid has been refused on the basis that SLAB has not been happy with the justification for the decision to pursue a civil remedy?

Mairead Tagg: I can think of two such cases. It is lottery, however, and that is not acceptable.

Louise Johnson: We raised the matter in our submission because solicitors whom we canvassed said that it had been flagged up. I do not know the frequency with which it happens, but those solicitors said that they had experience of SLAB questioning them as to whether police intervention was not sufficient to remedy the situation and whether civil action—an interdict or whatever—would be better. In any case, they said that there was a problem.

Michael Matheson: What information would an officer in SLAB have before them with which to make such a decision?

Louise Johnson: I understand that the solicitor would always have to take statements from the woman who was applying for advice and assistance or for civil legal aid. He would probably have to take statements from other interested parties who could assist him with the case, or even from the woman's doctor. SLAB would make the decision based on the evidence that the solicitor supplied.

Michael Matheson: Would the officer make the decision based on cold statements that they had read?

Mairead Tagg: Yes. Again, it depends on the expertise and knowledge base of the solicitor who is handling the case.

Michael Matheson: How much time could there be between the statements being taken and the matter going before an officer? Things could have moved on significantly since the statements were taken.

11:15

Mairead Tagg: In my experience, that depends on the solicitor. Some solicitors will keep in close contact to ensure that those matters are going through, especially if they know that the woman is in real danger.

In some cases that I have worked on, it has been six or eight weeks before the woman has known whether she will get what she needs. That is an awful long time when someone is living in terror.

Jean McKenzie: Women sometimes have to chase up the matter themselves; they have to go back to solicitors time and time again to find out what is happening. It is always about procedure. Even though the woman has done everything that has been asked of her, something else always seems to be wrong. Meanwhile, she is living in the community and her partner is out there waiting for her.

Phil Gallie: You said that in many cases the solicitors do not know what they are doing. In some of the circumstances that you have described, the people who I believe—perhaps naively—to have all the answers are the social work departments. Where do they fit in? Is there a deficiency there?

Mairead Tagg: There is a huge problem with social work departments. They are, in effect, child protection agencies. They say that quite overtly. They have a statutory responsibility to support children who are in danger, but they have no statutory responsibility to support abused woman. When a woman approaches social work, her child care comes under scrutiny, not her experience of domestic abuse. There is not a widely held view that the best way to support the children is to support the non-abusing parent.

I have been to court to support a woman who had her three younger children taken away from her and adopted. The reason that the social work department gave was her failure to protect the children from witnessing the domestic violence that was utilised against her. That is a real problem.

My own research into the response of social work departments shows that social workers feel powerless and hampered. They cannot support abused women and they have not had training. A third of the social workers that we questioned had had no pre-qualifying training in domestic abuse, yet social workers are expected to monitor and, in some ways to police, the situations that families are in. Social work departments are not the agency that should have to deal with this; they are

already overburdened and overstretched.

Phil Gallie: Perhaps they are overburdened and overstretched, but—as you said—going down the law route inevitably adds time and creates dangers. Should we be looking at the social work situation? If changes were to be made, that would have an effect on resources, but should we recommend that people concentrate on that sector?

Mairead Tagg: My answer will sound incredibly self-seeking. Women's Aid has more than 25 years' experience as a front-line service dealing with domestic abuse. We are grossly short of resources, refuge spaces and houses for women to move to. Apart from anything else, this is a housing issue.

The police service has come a long way in addressing the difficulties that existed previously, when women were told, "It is a domestic; there is nothing that we can do." More effective police training, more resources for Women's Aid and better housing availability for women who are fleeing domestic abuse would go a long way to help women get away.

At the end of the day, if the woman gets a piece of paper, what is she going to do—hit her abusive partner with it when he comes to her door? How do women who live in poverty and do not have a phone get help, even with the interdict? We must have better structures in place to allow women to leave abusive partners and to set up on their own. We must empower the police and ensure that police forces understand the situation.

A non-harassment order is the best way forward, because it has a hidden power of arrest. Many police officers do not know that. The phrasing of the order is perhaps not all that it could be—some members of the judiciary have thrown it out of court. We should clarify the wording of the order and do away with matrimonial interdicts. Women need to be protected from criminal behaviour. The non-harassment order, because it makes harassment or intimidation of a woman a criminal matter, is by far the most useful piece of paper that she can have. We must explore how we can use the order more effectively, because it gives the police more power.

Phil Gallie: I am sure that Maureen Macmillan has taken all of that in.

Jean McKenzie: I agree with everything that Mairead Tagg has said, but more resources should also be put into social work. In our experience, social work is there only for the children. Women are often directed to return to their partner, because the social worker thinks that things will get better and that the woman is much more powerful. Women are put in dangerous situations.

Gordon Jackson (Glasgow Govan) (Lab): This is slightly off the point, but resources in one place affect resources in other places. It all comes to the same thing; it is all the one public purse. That is my justification, convener.

The Convener: It is tenuous, but never mind.

Gordon Jackson: I am interested in what you say about social work. I thought that I detected a wee note of criticism—maybe I was wrong. Are you suggesting that the problem with social work in this area is that it has a first duty to children—because the welfare of the child is the first priority on resources—or did I detect the suggestion that social work departments are not tuned in to the woman's problem?

Jean McKenzie: In many cases that is true. There can also be a lack of understanding of the woman's need for confidentiality—that can put her in danger. Social work sees the family as a whole. That is fine, but it has to consider that domestic abuse is not like anything else. Women cannot negotiate or go back. Social work has to take the woman's experiences into account. It should listen to what she has to say, because she knows the perpetrator better than anybody. She knows what can happen next.

I was recently sitting in with a woman when the social worker advised her to contact her ex-partner about residence for the children. She did not take it in that the woman was saying "No, I do not want to be with him. I do not want to see him." The social worker just said, "Research has proved that children thrive better if parents negotiate." That is fine if it is a relationship break-up, but not in cases of domestic abuse.

Gordon Jackson: If that is your criticism of social work, how would you address that?

Mairead Tagg: Some social workers are wonderful. We could not ask for better support for women. Others make us pull our hair out in despair. I expect that the same is said about Women's Aid workers. There is variation between individuals. The main issue is that social workers are poorly trained on domestic abuse issues. The increasing tendency to believe that children need fathers is a problem. It would help if social workers understood that men who use violence against women are likely to use violence—including sexual violence—against children. The research that social workers quote is out of date and is not comprehensive enough to give them a clear picture of what is going on. That is worrying.

Maureen Macmillan: Part of the problem is that people do not take domestic abuse seriously enough. That includes some social workers and some people in the Scottish Legal Aid Board. I noted what you said about the delays at SLAB and the fact that women are sometimes turned down

because it is not deemed appropriate to take a civil action. Would some sort of fast-tracking in SLAB for domestic abuse cases help? An asterisk could be put on those cases to say that they should be dealt with as soon as possible.

Mairead Tagg: Absolutely.

Maureen Macmillan: I also wanted to talk to you about the idea that the tests of probable cause and reasonableness are less appropriate in the case of women who are subject to abuse than undue hardship and the interests of justice. Will you expand on your submission?

Louise Johnson: In 1998, Scottish Women's Aid produced a response to the consultation paper "Access to Justice—Beyond the Year 2000", part of which I will read out:

"A test only of 'reasonableness' has some value in deciding a legal aid application but necessarily leaves it open to SLAB to develop definitions and policies as to what is or is not reasonable. This is not desirable as it introduces an element of flexibility which might result in arbitrary even flawed decisions being made. If the sole test is one of reasonableness then probable cause must be a potential category or element in such a test and the definitions of what is reasonable must be infinite. Otherwise a separate test of probable cause should be retained"—

and this is an important point—

"solicitors making legal aid applications on behalf of their clients have already concluded there is a case in law and SLAB confirms this as part of the merits test … For abused women the critical issue is safety for themselves and their children, and recourse to the law for legal protection via civil remedies is the sole route to safety and is always justified. Whether or not the application is 'reasonable' is entirely founded on the cost factor at present and decided on the basis of whether a client with adequate means would be likely to proceed. For abused women and their children safety is not a choice but an absolute right and in some cases, particularly domestic violence cases it would be helpful to extend the merits test to include an element of **need**."

That was part of the submission that was made in response to the "Access to Justice" consultation paper. I hope that it is sufficient explanation.

Maureen Macmillan: That certainly explains where you are coming from. Other organisations that we have spoken to today feel that cases of domestic abuse, rape or sexual abuse should be special categories, such that legal aid is free for everybody. Do you agree with that?

Mairead Tagg: Yes, 100 per cent, heart and soul. Women and children have a right to be safe as part of our civil and human rights. We are not asking for anything special, we are just asking to be safe, and most men would support that contention.

Maureen Macmillan: I am sure that they would.

I wish to ask about the establishment of the working group, which the Executive has proposed, to deliver legal aid in what is hoped will be a fairer way. Have you been consulted on that?

Louise Johnson: No. Apart from the correspondence that we have had from the Justice 1 Committee, we have not been consulted.

Maureen Macmillan: Do you see a role for individual Women's Aid collectives in giving legal advice and assistance, and perhaps even taking cases as far as a court appearance, or having an in-house solicitor? I know that you have close contacts with some solicitors. Do you see yourselves developing something along the lines of community legal aid?

Mairead Tagg: We are on our knees.

Maureen Macmillan: Obviously, you would require funding.

Mairead Tagg: We would require funding. We do give women legal advice. Most Women's Aid workers could fairly quickly break down what is likely to happen, but it is difficult in terms of workers' time and commitment and resources. A lot of collectives would say, "For God's sake, give us the money for a refuge" or "Give us the money for women in crisis". There are solicitors who should be able to provide advice, so it would just be another competing set of needs. It is a problem.

Maureen Macmillan: So even if you were given special funding, for example from SLAB, you would prefer that you did not provide legal services, because you want to concentrate on other aspects?

Mairead Tagg: Different groups might have different views on that. We would have to consult the network.

Maureen Macmillan: I understand that.

Jean McKenzie: It would depend on resources for individual groups. We already feel that we are overworked. We would end up trying to do everything.

Maureen Macmillan: You would have to have considerable financial support before you could contemplate being part of a community legal services network.

The Convener: If there are no other questions, I thank the witnesses, whose evidence has been helpful.

Louise Johnson: Thank you for the opportunity to speak.

11:30

The Convener: We will now take evidence from the Glasgow Bar Association. We have with us Gerard MacMillan, who is president of the

association, Vincent Smith, who is vice-president, and Andrew Stevenson, who is treasurer. Good morning.

Your submission makes the point, which has been made by other groups that have given evidence, that although the receipt of benefits such as the working families tax credit automatically makes the recipient eligible for advice and assistance, those benefits count as part of their income when it comes to civil legal aid. Do you have similar concerns about other benefits that cause the same problem?

Andrew Stevenson (Glasgow Bar Association): The working families tax credit is the main benefit that gives rise to concern on a daily basis.

The Convener: Is that because it is the most common benefit that people coming to you receive?

Andrew Stevenson: Yes.

The Convener: What proportion of the applicants for legal aid who come to you have such a problem with a benefit?

Andrew Stevenson: It is hard to give precise statistics on the number of applicants who find difficulty in qualifying for legal aid because they are in receipt of the working families tax credit. One often encounters such cases in relation to women with families who require legal aid to protect themselves against domestic abuse or because of problems involving the children. In a fair number of cases in that category, the woman is in difficulty, or perceives herself to be in difficulty, because she is required to pay a contribution as she is in receipt of the working families tax credit.

Vincent Smith (Glasgow Bar Association): This is becoming a problem that we encounter more and more. Solicitors are placed in a dreadful position from time to time. I appreciate that you are not here to consider individual cases, but we gave you examples in our submission.

A typical example is a case that I dealt with recently, in which the woman is not only the victim but the defender—the male has raised an action as the pursuer—and is not able financially to defend the allegations or the orders that the pursuer is seeking because of the substantial contribution that is being sought from her. What are solicitors to do when the client states to them that she cannot proceed further because she cannot afford to pay the required contribution to the Scottish Legal Aid Board?

More and more, we find ourselves in that position. Solicitors are being forced to carry on without payment in actions that invariably proceed to proof if they cannot be resolved at another stage. There is a limit to how often solicitors can appear in proofs and other matters when they are not receiving any payment.

The Convener: You say that you find yourselves in that position more and more. Is that because more and more such cases are arising?

Vincent Smith: It is becoming more common for people to be in receipt of the working families tax credit, as the Government promotes the idea of mothers returning to work. Their salaries are not particularly high, so they receive that benefit, which is then regarded as part of their income. That then causes a problem, because SLAB takes that back, almost pound for pound; it sees that as the contribution to legal aid.

Michael Matheson: I welcome the Glasgow Bar Association. For the record, I want to thank the association for the day that it organised several months ago for committee members at Glasgow sheriff court—that was very helpful. The diary has also been helpful. It is probably one of the few occasions on which my visit to Glasgow sheriff court has been enjoyable.

In your submission, you refer to some misgivings about a successful legal aid defender's liability for the recoverability of costs to the legal aid fund. For those of us who are not entirely familiar with it, will you expand on the problem? Can you illustrate the type of case with which there are difficulties?

Andrew Stevenson: Do you mean with recoupment provisions?

Michael Matheson: Yes.

Andrew Stevenson: When legal aid was originally introduced, there was an exemption for divorce cases, whereby the first £2,500 of any money recoverable by the assisted person was not required to be paid to the legal aid fund. That figure of £2,500 has never been increased since 1987. We have calculated that, taking into account the effects of inflation, that figure should be more like £4,000. We believe that the exemption is there for public policy reasons, in that it encourages attempts to settle divorce actions and ensures that the assisted person does not have to pay most or all of his award or agreed sum by way of clawback to the legal aid fund. We feel that the amount is too low. It should be in the region of £4,000 at least, just to have kept pace with inflation.

There is also an anomaly between the advice and assistance scheme and the civil legal aid scheme. Only under the advice and assistance scheme is it possible to apply for exemption from the clawback provision on the ground that it would cause grave hardship to the client; one cannot do that in relation to civil legal aid. We find that rather anomalous and feel that it ought to be addressed

by amending the civil legal aid application regulations so that parties can move for an exemption on the ground of grave financial hardship.

Michael Matheson: You referred to the problem of recoupment of expenses. How common is it for people who take cases to find, once costs are awarded, that they are not able to recoup the full amount because of the provisions?

Andrew Stevenson: Are you referring to litigation situations where there is an assisted person and a non-assisted person and the non-assisted person is successful?

Michael Matheson: Yes.

Andrew Stevenson: There is provision within the Legal Aid (Scotland) Act 1986 for an assisted person who is unsuccessful to ask the court to modify his or her liability to nil. That motion is made fairly commonly in actions. There is also provision for the non-assisted person to apply to have his or her expenses paid out of the legal aid fund. That provision is not often used. One has to demonstrate that payment of the expenses by the non-assisted person would cause him or her hardship. It is not always possible to do that; it depends on the size of the expenses.

Michael Matheson: You referred earlier to the difference between someone who is getting advice and assistance and someone who is getting full legal aid and the anomaly that exists between the criminal and the civil system. Is the reason for that that often advice and assistance would involve only very small amounts?

Andrew Stevenson: Although that might be the theory, I do not know whether it is all that valid. Fairly large amounts of money can be involved under the advice and assistance scheme.

Phil Gallie: Some small companies that have been pursuing actions or small debts have been ruled out of the frame because their opposition can get legal aid and they cannot. Are there any means of overcoming that problem?

Andrew Stevenson: Small companies cannot apply for legal aid.

Phil Gallie: That is my point. Many small businesses that operate on a shoestring income are severely damaged by that rule. Should we seek change in that area?

Andrew Stevenson: I have not identified any significant difficulty in that particular area.

Vincent Smith: I have always found that the difficulty is in exacting payment from the person whom the small businesses want to sue. I have never found a problem with defenders finding a defence and the matter being put off the rails. However, matters that proceed to proof for small claims and debts almost invariably end up in favour of the pursuer, not the defender. For example, my practice has offices in Glasgow's peripheral estates and when people appear with a summons for a small claim, our function is to negotiate a settlement that takes into account the fact that the person will already be receiving state benefits.

Phil Gallie: Okay. You have called for civil legal aid to be made available for a range of tribunals. Do you mean full civil legal aid, or ABWOR, which is now available for employment tribunals?

Vincent Smith: The ABWOR scheme should be extended to cover benefit tribunals and so on, instead of civil legal aid being used. In an ordinary tribunal, the course that a particular matter will take can be defined: the person who wants to go to tribunal will serve papers, there will be some indication of a defence and then there will be a hearing. However, no one can say how long an ordinary civil case will last, what steps will be taken or what expert evidence will be required. Obviously ABWOR would not be appropriate in such a situation.

Phil Gallie: Can you list some of the other tribunals besides employment tribunals where ABWOR might be appropriate?

Vincent Smith: It would be appropriate for tribunals involving welfare benefit claims such as for disability living allowance and so on.

Phil Gallie: The question of disability living allowance came up earlier. What can a solicitor offer to benefit an individual that an independent medical source might not be better able to provide? For example, the provision of disability living allowance usually comes down to an argument about a medical condition.

Gerard MacMillan (Glasgow Bar Association): Sometimes the doctor is not prepared to come forward and articulate what he has said in his report, which is his or her area of expertise. The solicitor will have much more intimate knowledge of the circumstances of the person for whom they are preparing and presenting the case. Many people do not wish to come into a daunting forum and address one person, never mind a body of people. People's reasons for being before the tribunal may not be fully ventilated if they do not have someone with legal knowledge.

To broaden it out, anyone who appears in front of a tribunal should be entitled to have some form of legal guidance. Perhaps we can come to this later, but doctors are simply not prepared to come along and sit around. They will say, "That's my medical opinion. Do what you like with it." However, the issue goes further than that.

11:45

Phil Gallie: One of the problems with tribunals, such as employment tribunals, is that there is often no record of what has been said in proceedings. If we start to involve the legal profession, will we move towards a court scenario? If that were the case, would court procedures have to be followed that could well add more cost to the system?

Gerard MacMillan: One would hope that involving lawyers would mean that we could cut to the issues more speedily. Some people might not agree, but that is the theory. As I understand it, the industrial tribunals were set up to be relatively informal. They are now one of the most complex areas of the law. Somebody who appears before a tribunal without help—well, God help them. People should have someone with expertise with them. People who are not properly represented at hearings often go off at a tangent, which wastes a lot of time. The hope is that someone who has expertise in the relevant area and is prepared to represent the person will cut to the issues more speedily. In the long term, that should save money.

Phil Gallie: I return to my first question. I recognise that expertise may be required when big business is being taken on, but we are talking about extending the right to businesses across the employment range. Unless small businesses have access to civil legal aid, they will, in some instances, be unable to stand up and defend themselves. How do you feel about that?

Gerard MacMillan: Speaking as a small businessman, I can empathise with someone in that position. Unhappily, that is a more primary matter. As my colleague Mr Stevenson said, companies do not qualify for legal aid, so we have not addressed that issue.

Phil Gallie: To return to the welfare aspect, how much expertise do solicitors have in dealing with welfare law issues?

Andrew Stevenson: Solicitors will undertake work if they can afford to. The difficulty is that solicitors are unable to undertake areas of work that are unremunerative and which will not finance the upkeep of an office or business. It is not that they do not want to do such work but that they simply cannot afford to. Many of our members face the difficulty that legal aid rates and advice and assistance rates are low in comparison with equivalent private rates. Rising overheads for businesses are another factor. Solicitors cannot afford to do work in many such areas. If rates were addressed to bring them more into line with private rates, solicitors would be far more able to undertake work in those areas.

The Convener: Do you mean able in terms of having the experience?

Andrew Stevenson: No, able in terms of being able to meet their office overheads.

The Convener: The point has been made to us that because your members have no experience in many of the cases that we are discussing, they are not necessarily the best people to deal with them. Is that a fair view?

Vincent Smith: That is a fair view, in the sense that few solicitors would call themselves experts in the field. However, if the remuneration were available, more solicitors would undoubtedly work in welfare law. From my experience, I can say that we do not tend to work for individuals in welfare and benefits representation. We tend to get involved at the instance of the social work department, which contacts us and asks us whether we will assist it. We do so and we help the persons concerned. However, if the matter is not capable of settlement or agreement, somebody from the social work department will end up going to appear with the persons, instead of the solicitor who has been dealing with the case.

Paul Martin: I want to deal with fee levels. In civil matters, do solicitors who take up legal aid clients specialise in that type of client or do they have a mixture of clients?

Gerard MacMillan: I believe that the committee investigated that matter on 13 March and I will reiterate some of the points that were raised then. If solicitors are not paid, they cannot do the work; if they do not get any experience, they do not get any expertise—it becomes a chicken-and-egg circle. People will not go to solicitors because they do not have the expertise; the solicitors do not have the expertise because they are not paid; if they are not paid, they do not build up a volume of expertise in the field.

I want to echo Mr Smith's comments to an extent. I run offices in impoverished parts of Glasgow—for those of you who are familiar with Glasgow, they are in Tollcross, Dalmarnock and Anderston, which are some of the most impoverished areas of the city. We have given out advice on welfare law matters over a number of years. However, I am finding it harder and harder to retain and pay solicitors to do that. The little expertise that we manage to build up is being dissipated. In my experience as a solicitor and a businessman, that is directly related to the level of fees, as we have set out in our document.

Vincent Smith: I want to be sure that I picked up Mr Martin's question correctly: was it whether we mix civil legal aid clientele with private clientele?

Paul Martin: Yes. What is the normal client

profile?

Vincent Smith: The profile of my clients is similar to that of Mr MacMillan's. My offices are in estates throughout Glasgow. I regret to say that IBM does not come knocking on my door on a weekly basis. By definition, we are a legal aid firm. I would like to have private clients, but I do not. Very rarely will someone advise us that they do not think that they qualify for legal aid.

Paul Martin: Is there any evidence that solicitors are unwilling to take up legal aid work as a result of the fees that are involved?

Vincent Smith: It depends—are you talking about civil legal aid or criminal legal aid?

Paul Martin: Civil legal aid.

Vincent Smith: Specialisation is coming to the fore throughout our profession. I do not have figures to back this up, but I am quite sure that a great many firms will consider the costs and the eventual remuneration and decide that they will not do civil legal aid cases.

I can give an example from my own firm's work. Some years ago, we ceased taking reparation matters, for example accident claims, to court. One of the principal reasons for that was that, at any one time, the outlays that were being expended, notably on court fees and medical reports, were such that we came to the conclusion that it was no longer worth our while to continue with such cases because it was taking years to recover the money. We are still involved in a number of civil matters, but reparation matters can be extremely costly and it may be years before the matter comes to a conclusion. In the intervening time, the cost of three, four or five medical reports may require to be covered. When that is multiplied by the number of cases, substantial sums of money can be involved.

Paul Martin: Is there any evidence to suggest that there have been difficulties in retaining or recruiting support staff?

Vincent Smith: Undoubtedly.

Gerard MacMillan: I could perhaps provide an example of that. One of our secretaries left in autumn last year—such are the problems of running a small business, which is what we are. We advertised for a solicitor from October until December, but if one cannot get one's stuff typed, there is no point in doing the legal work. We could not get the stuff out of the door and we were reaching the stage of thinking that we would have to shut down an office. We are in competition with what one might call the private sector—accountants, architects and so on. Secretaries can go off and get jobs in establishments elsewhere at much better rates than we can afford to pay.

If one is desperate and brings in somebody else simply to have somebody—anyone who runs a small business will recognise this problem—the rest of the staff will be discontented and say, "That Maisie who has just started is getting paid much more than me, but I've been with you for 10 years—what about me?" The whole pay structure will go out of the window, basically because the rates for legal aid firms have not risen. Our basic rates have not changed, and the position has become insupportable. I have discussed ancillary staff, but later—if it is appropriate—I will develop the question of professional staff.

Gordon Jackson: Criminal legal aid fixed fees are here to stay. They will be made more flexible, but it seems unlikely that they will disappear. What we hear from solicitors seems to be inconsistent. First, they tell us that fixed fees prevent proper preparation, so that the client suffers. However, they also say that the solicitor suffers because he or she has to do more work than they are paid for. On a simplistic level, people regard that as inconsistency, so we should be clear. What impact has the introduction of fixed fees in summary criminal cases had on how well cases are prepared and made?

Gerard MacMillan: I will answer by referring to a specific example, because the generality is made up of specific cases. I think that this will help to focus the committee.

We represent solicitors who come to us for a raft of reasons. Increasingly, they are desperate to know how they can run their businesses properly financially, and represent their clients. I received a fax on a matter that is currently being dealt with in Glasgow sheriff court—I have permission to refer to it. The case involves two accused, 18 charges and 44 witnesses. One boy who is accused has a mental age of 10 and, without getting technical, I can say that the case against him is based on special knowledge admissions—statements that he is meant to have made to the police. In trying to investigate the case, the solicitor sought a psychologist's report. The psychologist, who is an expert, said that he would do the work for £500, but the Legal Aid Board said that it would pay only £250. However, the amount for which the psychologist said that he would do the job is non-negotiable—that is the case in all walks of life.

What the Legal Aid Board said is unfair to the solicitor and the professor of psychology. In a letter dated 20 March 2001, the professor writes:

"I am aware that as a matter of principle, I should refuse to have anything further to do with this case until the Legal Aid Board reviews its ridiculous position".

The letter continues in that vein and finishes by saying:

"I must indicate again that I feel that this is totally

inadequate, but am prepared to do what I can in an attempt to help".

Most people are just manning the pumps and trying to help out. Believe you me, we are bailing out but we are being overwhelmed. In the case that I described, the solicitor wrote a begging letter to the professor. In my experience, doctors say to us, "Please don't write to us. I know that I have been on your expert list for a number of years, but don't write; we are not doing that." That has an impact on the solicitor who runs the business and on the person whom we are trying to defend—in this case, the chap who has a mental age of 10. Perhaps that deals to some extent with the point that Gordon Jackson raised.

Gordon Jackson: That answer dealt with the very simple point that there are many cases in which one cannot do the job properly for the fixed fee. I will come to that in a minute, but we are interested in the effect that that has on whether solicitors are preparing cases properly. Of course, we are interested in whether lawyers suffer, but we are also interested in whether—

Gerard MacMillan: Members should bear it in mind that in that case, for £500, the precognition of 44 witnesses was required. Common sense dictates that that is not financially viable and so the client suffers from reduced access to justice and the solicitor, who is the provider, also suffers.

12:00

Gordon Jackson: That is a specific case but, in general, are cases not being adequately prepared because of financial constraints, or are they being prepared properly, despite solicitors' not being paid enough? That is an important distinction.

Vincent Smith: The latter. Solicitors, first and foremost, are officers of the court. We can go into a court only when we are fully prepared to present a case properly and to negotiate, if necessary, with the procurator fiscal's office. Undoubtedly, cases are as well prepared as they were previously. I have no doubt about the integrity of solicitors, especially those who are members of the Glasgow Bar Association. However, there is now a totally different method of being paid for preparation of those cases.

Previously, the cost of having statements taken by recognised precognition officers was seen as an outlay that would be paid for by the Scottish Legal Aid Board. Now, however, that cost must come from the £500 that is paid to the solicitor at the end of the day. It is hard for me to come up with the costs of precognoscing 44 witnesses but, assuming that they were all in the same locality, that might cost at least around £200 or £300.

Gordon Jackson: It is important to understand in what direction we are going. As I understand your position, it is that the clients are not suffering and cases are still being adequately prepared, but that it is impossible to deal with some cases, given the constraints of money.

I am raising issues with the witnesses that I have raised with others. I have been told that there are swings and roundabouts in the situation that has been described; while there are cases in which the system does not work, there are also cases in which it does. The fact that there is a fixed fee of £500 means that there will be cases in which £500 is not enough, but that there will be others in which it is more than enough.

Gerard MacMillan: As Vincent Smith says, for moral and ethical reasons, solicitors must prepare each case properly. There is also the fact that, if one is going to appear in front of a court, one will receive a roasting if one is not prepared. However, is it correct that solicitors should be placed in a position in which they hope that they get two swings, but no roundabout? If one gets too many swings—because of the low rate, swings are more likely than roundabouts, almost by definition—that might militate against the continued provision of legal aid to the disadvantaged client.

Gordon Jackson: Obviously, I have an interest because I am involved in legal aid. I should also declare an interest in that today's witnesses are personal friends of mine.

I wonder when the breaking point will come. If the system of swings and roundabouts is not working, but solicitors are doing the necessary work anyway and the client is not suffering, what will happen?

Vincent Smith: I am sure that Gordon Jackson knows of firms in that situation that have simply closed their doors. That is happening more and more frequently. Many firms are either doing that or they are simply closing their doors on criminal legal aid work and going elsewhere.

The other consequence is something that I, Gerard and other members of the Glasgow Bar Association have expressed concern about. Although few firms are recruiting, we are finding it difficult to recruit. We find that students and assistants do not want to enter legal aid practices, because the salaries in the private sector are much greater. This week, the Glasgow Bar Association sponsored many events, one of which was a criminal plea and mitigation competition at the Glasgow graduate school of law. The top three competitors are all going to commercial firms in the summer; none have any interest in entering criminal legal aid practices. Each year, one would expect to see fresh faces around the sheriff court in the autumn, when graduates have completed their one or two years as trainees. That is not happening any more.

Gerard MacMillan: I echo what Vincent Smith said. For many years, I lectured and tutored at the University of Strathclyde. I am now a tutor of criminal advocacy and pleading at the Glasgow graduate law school. This year, when I asked the class to put their hands up to see who was coming into legal aid practice, not one did so; they were all going into what one might call private client firms, although students on that course are being trained in criminal advocacy and pleading.

We do not have the resources to mount an investigation, but perhaps the committee does. Could it inquire into how many students are coming into legal aid practices? I am sure that the University of Glasgow could set that up. Perhaps the committee could also inquire into how many people provide criminal legal advice and assistance and legal aid through the new provisions on fixed fees.

I do not know how we would answer the third question. As Vincent Smith said, we can see it with our own eyes and we hear about the number of younger people who are leaving civil and criminal legal aid law. They are going back to university to do LLMs, going into the private sector or going into local government. They are voting with their feet and getting out of the legal aid sector. The committee perhaps has the resources to inquire about the figures.

I am approached weekly by solicitors that we represent—we are the biggest voluntary group of solicitors and we represent about 400 solicitors. They approach me in varying degrees of desperation about what is going on. In any walk of life, if fee levels had not been raised since 1992, something would have to give. Something is giving and it will give completely very soon.

The Convener: If I remember correctly, the Convention Rights (Compliance) (Scotland) Bill that is being considered contains provision for, in effect, reverting in more complex cases to time-and-line payments. Will that assist you?

Vincent Smith: No.

I anticipate, from past experience, that the Scottish Legal Aid Board will view the regulations fairly strictly. It will not be an opportunity for solicitors to be granted regular and frequent increases.

The Convener: Would the provisions assist you in the specific case that you mentioned?

Vincent Smith: That kind of case is crying out for an increase in the fees. I respectfully submit that that would be the exception rather than the rule.

Gordon Jackson: Your written evidence mentioned that. Under the fixed fee system, solicitors lose out when a trial is postponed, through no fault of the accused person or the solicitor. Will you expand on that?

Vincent Smith: When a trial is postponed on the day of the trial, the solicitor is not paid for it; that is included in the fixed fee. A case might not be heard on a certain day because of lack of time—there is a general rule that cases cannot be called until 3.30 in the afternoon so we could sit from before 10 o'clock waiting for a case to be put off. On many occasions the case will be put off. We have no control over that; we cannot say when a case will be called in court. We must wait until after 3 o'clock in the afternoon for the case to be put off. That could happen again. We might have waited in court for two days before getting a start and we are not paid for that. We sit around doing nothing. We are not allowed to do anything else; we cannot go back to our offices to continue on legal aid work. We have undertaken that, for the time that we are in court, we will do nothing else. We find that to be a strain. Trials are postponed regularly.

Gerard MacMillan: Any number of agencies are engaged in getting a case to start in court. Sometimes I think it is a miracle that any case starts. The procurator fiscal and the clerk need their papers; the sheriff needs to get through from Edinburgh on time; the police have to bring the person through and so on. Any number of factors are needed to get the show on the road, and if one person fails and the case cannot start, the only person who does not receive any payment is the solicitor, even though he might have been sitting since 9 am with all his papers ready. If that happens twice or three times for whatever reason, he does not go back to the office junior or the secretaries and tell them that they will have to take a pro rata cut in wages because he did not earn anything for those two or three days. No solicitor can run a business like that. Michael Matheson has experienced some of that chaos. We are not exaggerating when we say that it happens day and daily; we are not trying to turn one example into something that does not exist.

The Convener: Maureen, I think that the areas you wanted to talk about have been covered.

Maureen Macmillan: They have been more or less covered, but I have a few other questions.

You mentioned the difficulty with recruiting people into criminal law. Does the same difficulty exist in civil legal aid work?

Andrew Stevenson: Yes. There is bound to be a difficulty where there is such a disparity between private and legal aid rates. That disparity has always existed, but it has been exacerbated because advice and assistance and civil legal aid rates have not increased properly over the past 14 years. The problem is more acute now. For

example, the Law Society of Scotland's recommended private rate is about £98 an hour, but with advice and assistance a solicitor is paid about £44 an hour. There is very little incentive for someone to go into advice and assistance work and earn that kind of money when he can do exactly the same work on a private basis and get paid a hugely more attractive remuneration. It is also the same in civil legal aid.

Maureen Macmillan: I want you to comment on some earlier evidence about civil legal aid funding for domestic cases and matrimonial interdicts. We were told that there have been times when the SLAB has refused civil legal aid in domestic abuse cases on the ground that it is a criminal matter for the police to deal with. Have you heard of such instances?

Witnesses: Yes.

Maureen Macmillan: How often does that happen?

Vincent Smith: As often as SLAB can get away with it.

Maureen Macmillan: I am interested by that answer. Are such decisions driven by financial considerations?

Andrew Stevenson: I do not know, but the problem is common.

Maureen Macmillan: So it is common for SLAB to turn down applications for civil cases.

Andrew Stevenson: The other side of the coin is that women consulting us have been told by the police to instruct solicitors to initiate civil proceedings to find a remedy that one would have expected the police to provide, such as protection.

Maureen Macmillan: And when they apply for civil legal aid they are told to go to the police.

Andrew Stevenson: Yes. It is all rather circular.

Maureen Macmillan: A couple of organisations that have given evidence believe that cases involving domestic abuse should be treated differently from other civil cases: for example, they should not be subjected to a means test for civil legal aid—it should be automatic—because of the fear of physical danger and the eligibility criteria should follow the criteria for accessing criminal legal aid instead of civil legal aid. Do you have any views on that?

Andrew Stevenson: I can see the initial attraction of that proposition but, with respect, there appears to be an element of discrimination which could not properly be justified on closer analysis. I do not see that domestic abuse cases of themselves are necessarily worse than other wrongs that may be suffered, particularly violent wrongs.

Maureen Macmillan: Could you give me examples of other cases that you think might be on a parallel?

Andrew Stevenson: While domestic abuse is a scourge on society, it has to be looked at in comparison with, for example, anti-social neighbours, who can inflict considerable distress, which is comparable to domestic abuse, but which would not be treated preferentially according to the hypothesis that you propose.

12:15

Maureen Macmillan: So do you think—never mind the adjective domestic—that cases in which there is abuse or the fear of violence, whether from neighbours or a partner or whomever, should be treated differently because there is a danger to life and limb?

Vincent Smith: When you say treated differently, do you mean with regard to any other kind of civil legal aid application, such as falling in the street or something like that?

Maureen Macmillan: Yes.

Vincent Smith: Undoubtedly.

Maureen Macmillan: So it should be looked at differently and perhaps fast-tracked and access should be given without means-testing?

Vincent Smith: In cases of domestic abuse, our function should be to try to get the matter resolved as quickly as possible. Solicitors should not be in a position in which we say to people, "I cannot go any further forward on your behalf until certain matters are resolved between ourselves and the Scottish Legal Aid Board." By the time they are resolved, it may be too late.

I can speak only from personal experience. I listened to the guidence from ladies, from Scottish Women's Aid, who direct women to us. It is not unusual for us to open the doors on a Monday morning and immediately see a lady, who is clearly exhibiting signs of abuse, in a terribly distressed state because of the behaviour of her partner, husband or whomever during the weekend. It would be great to say that we can have that case in court within an hour, but we cannot, because we have to go through certain procedures.

We are talking about Monday mornings. Everybody agrees that Monday is the busiest day for court practitioners. We will do everything we can to draft the writ as quickly as possible. We will have someone take it into the sheriff court, with a view to having it warranted and having an interim hearing that afternoon at 2 o'clock, but that can be difficult because the courts are so busy on Mondays. Perhaps there should be a fast-track

system in the courts to ensure that these matters are dealt with. The courts deal with them as quickly as they can, but on certain occasions, for one reason or another, it is impossible to do so immediately.

Gerard MacMillan: There is a problem with the Legal Aid Board in the scenario that Vincent Smith paints. You may have someone in distress on Monday morning who clearly exhibits all the signs of domestic violence. You get down to court as quickly as possible—there is the issue of procedure—and the sheriff grants the interim interdict, but at the end of the day the Legal Aid Board does not grant full legal aid because it says that the client did not require it. In the long term, even on a Monday morning, a solicitor has to ask, "Am I going to do that? To keep this firm viable, can I do that?" The cost of warranting is, I think, £70 and there may be the cost of servicing by sheriff officers. All those costs are carried by the solicitor, who worries at the end of the day, "Am I going to be paid for this?"

Vincent Smith: That may be a worry, but it is my experience—and I can say this on behalf of all members of our association—that the solicitor will undoubtedly have that matter in court as quickly as he or she possibly can. We must think about cost, but invariably we think about it later.

It is not unusual for us to bring a client in immediately at 9 o'clock on a Monday morning to draft a writ, get that into court, get the hearing at 2 o'clock in the afternoon if we can, have the interdict, have the interdict served on the person who allegedly committed the abuse and notify the police of the interdict. A legal aid application and other forms are then submitted. Two months down the line, the Legal Aid Board comes back and says, "Sorry, but we'll not pay you for that."

Michael Matheson: You say that the Legal Aid Board might come back and say that it will not pay. Are you aware of any criteria by which it works out whether it will provide legal aid? We have heard evidence that suggested that the decision may depend on which SLAB officer receives the application. Is there inconsistency in how SLAB decides whether civil legal aid will be provided for a matrimonial interdict?

Andrew Stevenson: Applications are determined with reference to financial eligibility and whether a case has a reasonable chance of success. Assessing the latter involves an element of judgment. Different people will take different views on whether it is worth giving public funding to a case. There is no way of avoiding some differences in the opinions of the individuals who are called on to decide those matters. There are always discrepancies; I do not know whether they can be eliminated.

Michael Matheson: Are applications in connection with matrimonial interdicts frequently refused?

Andrew Stevenson: It happens fairly frequently. It is even more difficult to get legal aid to defend such cases. That is an uphill struggle.

Michael Matheson: Does frequent mean 50 per cent of cases? From your experience, what would you say was a rough figure?

Andrew Stevenson: I do not have the statistics, so I would not like to give you information that might be misleading. My impression is that it happens fairly often.

The Convener: As there are no further questions, I thank Glasgow Bar Association for giving evidence.

We dealt with the rest of the agenda earlier, so all I should tell the committee is that, apart from the two short joint meetings with the Justice 2 Committee, the committee's next meeting will not be until 25 April, when we will take stage 2 of the Convention Rights (Compliance) (Scotland) Bill.

Meeting closed at 12:22.

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