OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 29 September 2021

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 29 September 2021

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CRIMINAL JUSTICE COMMITTEE
6th Meeting 2021, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Jamie Greene (West Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*Collette Stevenson (East Kilbride) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Keith Brown (Cabinet Secretary for Justice and Veterans)
Tom Fox (Scottish Prison Service)
David Fraser (Scottish Courts and Tribunals Service)
Gillian Fyfe (Citizens Advice Scotland)
Colin Lancaster (Scottish Legal Aid Board)
Tony Lenehen (Faculty of Advocates)
Jamie MacQueen (Scottish Government)
Julia McPartlin (Scottish Solicitors Bar Association)
Ian Moir (Law Society of Scotland)
Professor Alan Paterson (University of Strathclyde)
Dr Marsha Scott (Scottish Women's Aid)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 29 September 2021

[The Convener opened the meeting at 10:03]

Decision on Taking Business in Private

The Convener (Audrey Nicoll): Good morning, and welcome to the sixth meeting of the Criminal Justice Committee. No apologies have been received.

The first agenda item is a decision on whether to take in private item 6, which is consideration of today's evidence. Do we agree to take that item in private?

Members *indicated agreement.*

Legal Aid

10:04

The Convener: The next agenda item is a round-table discussion on legal aid and legal aid reform. I refer members to papers 2 and 3. We will take evidence from a round table of witnesses, who will join us virtually due to social distancing rules at Holyrood.

I welcome our witnesses: Gillian Fyfe, strategic lead for strong communities, Citizens Advice Scotland; Tony Lenehen, president of the Faculty of Advocates criminal bar association; Ian Moir, legal aid convener for the Law Society of Scotland; David Fraser, executive director of court operations at the Scottish Courts and Tribunals Service; Colin Lancaster, chief executive of the Scottish Legal Aid Board; Julia McPartlin, president of the Scottish Solicitors Bar Association; Professor Alan Paterson, professor of law at the University of Strathclyde; and Dr Marsha Scott, chief executive of Scottish Women's Aid. We appreciate the time that they have taken to join us, and I thank the witnesses who have provided written submissions. Those are available online.

I intend to allow an hour and 20 minutes for questions and discussion. I ask members to indicate which witness they are directing their remarks to, then we can open the floor to other witnesses for comments. If other witnesses wish to respond, I ask them to indicate that by typing R in the chat function on BlueJeans and I will bring them in if time permits. If they are merely agreeing with a point that has been made, there is no need to intervene to say so. Other comments that witnesses make in the chat function will not be visible to committee members or recorded anywhere, so if a witness wants to make a comment, they should do so by requesting to speak.

We now move on to questions. I ask members and our invited guests keep their questions and comments as succinct as possible to facilitate a free-flowing discussion. I will structure the discussion around a series of broad themes. The first theme is access to justice and the current experiences of users of the legal aid system, and I will direct some opening questions to Professor Alan Paterson and Mr Ian Moir.

Professor Paterson, you had an advisory role in Martyn Evans's review, which resulted in the report, "Rethinking Legal Aid—an independent strategic review" in 2018. It brought out some key issues about simplifying the system, creating a fair payments system and making the system more accessible. What priorities do you see in the

overall theme of accessing legal aid and how can we improve access to criminal justice legal aid?

Professor Alan Paterson (University of Strathclyde): Evans's primary aim was to provide a balanced, fair and proportionate access to justice for all, bearing in mind United Nations sustainable development goal 16.3, which drives us towards access to justice for all in an affordable manner. He was well aware of the financial pressures and requests from the profession but was unable to come up with a single conclusion other than that proper, evidenced-based research should be conducted into that. Following that, we have had the payment review panel, which itself struggled to come to a solution and recommended more research.

Criminal justice should become even more people centred than it is and more of a social or public service. That means that the current legal aid system—which was set up by 1986 legislation and is primarily a mechanism whereby private lawyers can be paid for delivering the legal aid services that they wish to deliver—must change to one that focuses on the population's needs and how best to deliver a proportionate service to meet those needs. That will require a change in the role of SLAB and in our attitude to legal aid. In that regard, I point to holism. The current system of judicare—paying case by case—does not lend itself to delivering a holistic service to members of the population. Although we know that individuals who come to criminal defence solicitors might have a raft of social, economic and legal problems, the criminal legal aid system is set up only to deal with their legal problems. What they need is a one-stop shop, as in New York, Australia and England. Increasingly, other jurisdictions are recognising that a holistic approach to the client is required whereby a number of their problems can be tackled together. It is to be hoped that that can be done in a one-stop shop.

The Convener: Thank you very much, Professor Paterson. Ian Moir, will you come in on that?

Ian Moir (Law Society of Scotland): I have been involved for a number of years with the sort of research that Professor Paterson has referred to. It is clear that there are no instant solutions for achieving a lot of the wider strategy that everyone is trying for in order to improve the system, because it is too complicated at the moment. It is difficult even for solicitors of many years' experience to understand the legislative framework, due to the way that legal aid has developed over the years and been constrained by the United Kingdom legal aid legislation that underpins everything that we do.

For me, there are two issues. Broadly speaking, I think that the profession is on board with the idea of simplification and change to the system. That is welcome; however, it is going to take too long to deal with the immediate crisis that faces legal aid providers.

We are not crying wolf about some theoretical problem in the system that might come down the line. The courts are gearing up to clear the backlog and, already, that is starting to fail. Firms such as mine are finding it really difficult to recruit and retain staff to cover the cases that they have, never mind gear up to clear the backlog. Already, the extra court that was set up in the Borders to clear the criminal backlog has had to be scrapped, because it was resourced for everybody except defence lawyers; the problem is that there are none to do the cases, so they simply had to mothball that court. It is not a theoretical notion of a problem that may be coming down the line; we are now right in the middle of a crisis that we have been warning about for a long time.

To me, the only solution, in the short term, is to use the crude tool of a significant increase in the existing legal aid rates, while we work on a constructive approach to improving the system in the medium or long term. That is going to take two or three years, and we simply do not have the time for that before there will be no lawyers—or not enough lawyers—to carry out the work. The immediate crisis needs fixing while there is still a willingness to work towards a framework that is going to take several years to achieve.

The Convener: That is really interesting—and a bit concerning when it comes to the backlog issues that you have highlighted.

From what you have said, one of the challenges involves recruitment, which is something that we have been conscious of. I will touch on that briefly. What do you see as some of the priorities in addressing that?

Ian Moir: As an example, my firm has been advertising for some time for a criminal assistant and there have been no applications whatsoever. I am aware of a number of other firms that are in exactly the same boat. That is really not a surprise, given that, quite rightly, the Crown Office and Procurator Fiscal Service and other Scottish Government solicitors have been given pay rises. They are entitled to those; however, their starting salary is around £50,000, and there is simply no way that legal aid firms can offer such a salary.

That is before we even get to the issue of work-life balance. We are out 24/7, 365 days a year. Our phones ring in the middle of the night. Clients phone us at 11 o'clock on a Sunday night to ask what time they are to be at court next Thursday. That sort of stuff happens literally every day. We need to be able to offer pay for holiday courts and that sort of thing, to have any chance of recruiting

and retaining staff. We simply are not in a position to do that at the moment. That is why I suggest that the only immediate fix that is available is a significant rise to the existing fee structure, while we work on a more nuanced and suitable way of moving forward.

10:15

The Convener: The committee will look at the fee structure and arrangements in due course, but thanks for that. Russell Findlay is next.

Russell Findlay (West Scotland) (Con): Thank you. I suppose that my question is addressed initially to Ian Moir, who has already used the phrase "cry wolf". The Martyn Evans report of 2018 paints a somewhat different picture. It refers to the facts that Scotland has the third highest legal aid spend per capita in Europe and that it funds more cases per 100,000 people than anywhere else in Europe. It refers to the Law Society of Scotland's Otterburn report. Mr Evans might have been too polite to use the word "spin", but he points out some of the ways in which that information was presented by the Law Society of Scotland as being somewhat questionable and selective. Is there not a risk that your doomsday warnings of today are very similar to those that we have heard in the past? Indeed, is it not just a question of the market being what it is and, to go back to your point, crying wolf?

Ian Moir: I did not say that it was crying wolf. I said that I was not crying wolf. No, this is a totally different scenario. We have been warning for years that we are heading to the point, which we have now reached, where, every week, young lawyers are leaving to join the Crown and other Government bodies. We cannot get lawyers to conduct trials, which means that, in the future, we will not have experienced lawyers to become the sheriffs, judges, senior prosecutors and so on that we need. To say, "Ach, well, we can get through today" is not good enough. We need to be in the position where the people of Scotland have proper access to justice. We already have legal aid deserts—vast parts of the country where nobody can access a solicitor. To say that we should spend less on civil legal aid because nobody is applying is a very poor thing indeed, if the reason why nobody is applying is because they cannot find somebody to represent them.

The other point that was quite clearly made about the spend per head is that we have a totally different adversarial system from that in many countries in Europe, where the judge is in charge of all the investigation and the lawyer's role is very limited. Scotland has a completely different system from that, so it simply is not a straight comparison. That has been accepted number of times in the past, and I am sure that Professor Paterson would agree with that.

Russell Findlay: To go back to my point, nobody is suggesting that there are not problems with accessing justice, but the blunt tool of more money seems slightly jarring. Do you agree with that?

Ian Moir: That must be set against the background of decades of falling fee levels. I started 30 years ago, and we are still broadly on the same page with regard to how much we get paid, and yet I must pay pension contributions for my staff and I have increased overheads, year on year. It is extremely difficult to run a legal aid business. To say, "Well, you should be willing to prop that up from other income" is not an answer to the need for fair remuneration for the work done, which is what we are statutorily entitled to.

Russell Findlay: I have the Evans report here—I can quote some of it, if you like. Referring to the Law Society of Scotland's Otterburn report, the Evans report states:

"Assumptions appear to have been made in the report and notional calculations used to reach the hourly rate"—

for the purpose of a press release—

"rather than figures provided by respondents."

Mr Evans describes the Otterburn report as

"an admirable attempt by the Law Society of Scotland to quantify the commercial viability of conducting legal aid work",

but he concludes that there is no evidential basis for raising fees. Do you discount the Evans report in its entirety? Do you recognise that picture?

Ian Moir: I have already indicated that we are more than happy to engage in a constructive way—as we have done in the past—with the Legal Aid Board and the Scottish Government on a better way of doing things in the future. I think that everyone agrees that there are better ways in which things could be done. The point is that, since the reports were done, we have had a global pandemic, the courts have ground to a complete halt and there has been a massive drop in the amount of money that the Legal Aid Board has spent, because cases simply were not concluding. I think that the figure is 23 per cent down on the spend last year—and that is despite firms being able to interim-fee cases. There is therefore a massive financial hole. That has been partly recognised by the Scottish Government through the resilience fund, which I welcomed, but that does not mean that there is not still a massive problem.

Like so many other areas, we have been dramatically affected by the pandemic, although we were already on our knees before that. Looking

into the past will not help us to solve the immediate crisis or the situation in the future. The reports were prepared against a totally different backdrop, and we need to focus on how we get through what we face now. I am still more than happy to consider the basis of those reports as a starting point for further discussion with the Government about a better way forward in the long term.

Russell Findlay: Professor Paterson, do you believe that there is any risk that the previous warnings from the Law Society of Scotland over many years—the Law Society being a very effective lobbying organisation—will count against it today? It is a case of crying wolf, perhaps—or that could be the public perception.

Professor Paterson: The profession is facing a real storm. The demands of criminal practice have been clearly laid out by Ian Moir. What is difficult—and what Evans and the payment review panel found difficult—is to find a straightforward solution to the financial difficulties. We know that criminal legal aid practitioners specialise, and we know that roughly 60 per cent of legal aid work is done by 25 per cent of firms—so, a lot of firms do not do very much.

Evans felt that coming across with a straight payment rise to make the system cost-effective for those who do not do very much legal aid runs a risk of over-rewarding the specialists, who could be very efficient and cost effective. Obviously, I am oversimplifying. We have to find a way of paying criminal legal aid practitioners that is fair to all. We have to consider the health of the market, too.

In the Netherlands, exactly the sort of research that the review panel recommended is being conducted, looking into both the numbers coming into the profession and the numbers of people who are willing and able to do criminal legal aid work. How many people are available to provide legal aid? It is true that significant numbers have been leaving the criminal legal aid profession, but it is not clear whether they are the specialists or those who do not do very much.

Russell Findlay: Could I ask two more brief questions, or are we moving on?

The Convener: I would quite like to move things on, thank you.

Collette Stevenson (East Kilbride) (SNP): Good morning to the panel. I want to focus on access to justice, and I want to ask Dr Marsha Scott about the submission from Scottish Women's Aid, which mentions some examples of good practice. I would like to find out a wee bit more about the advice, or misadvice, to women on their entitlement to legal aid and about how we can do better. Citizens Advice Scotland perhaps plays a role in that, too. I would like to hear from you about that if you do not mind, Dr Scott.

Dr Marsha Scott (Scottish Women's Aid): Absolutely. The submission that we made to the committee reflects probably a decade of concerns on the part of the violence against women sector in general, but particularly from Scottish Women's Aid, about the fact that the legal aid model is just not fit for purpose for women and children living with domestic abuse. It is described as needs led, but it is also means tested. As anybody who knows anything about domestic abuse will know, in more than 94 per cent of such cases, access to family assets and finances is restricted by the abuser, so there is no logical sense to the system.

I am happy to say that, in our discussions with the Law Society, although we may not agree on a number of other things, we certainly agree that the legal aid model is not appropriate for domestic abuse.

We have done a couple of pieces of work on the subject. I have to say a big thank you in public to Martyn Evans, not only because I thought that his review was remarkable, but because, after interviewing Scottish Women's Aid, he helped us to get in touch with the Legal Education Foundation in London, with which we have been doing a data-gathering project on problems with access to justice. I remind the committee that domestic abuse makes up 25 per cent of police and court business, so it is a really significant issue in the grand scheme of things.

Some good practice that we have known about for a while has involved what I call the SLAB-CAB project between the Scottish Legal Aid Board and the citizens advice bureau in Stirling. I think that the project is still operating. It was funded to provide a family law solicitor to the women involved in Stirling and District Women's Aid. It started a number of years ago, and the outcomes of the cases that the project dealt with were remarkably different from the outcomes that we regularly saw. That is because the solicitor who was hosted by Stirling and District Women's Aid was well versed in the problems that women would bring when they walked in, and understood the context of the cases. Importantly, the solicitor was able to provide a free service early on, which was an early intervention that looked nothing like the usual access to justice. Scottish Women's Aid has been interested in expanding our understanding of how that model worked, and how it could work if we spread it around Scotland.

I absolutely agree that the issues with access to justice are many and varied. From our perspective, they are particularly acute in island and rural communities. There is no guarantee that women will understand the complex system or that they will be given advice in a way that is nuanced

and seeks to understand their ability to access finances and safety. The system is remarkably poorly designed to deal with domestic abuse.

Martyn Evans and I talked quite a bit about the fact that the regulation scheme, which was referred to earlier, is part of a system that privileges private provision. We cannot blame the private solicitors for using it, but the difficulty is that it establishes regulatory barriers for organisations such as ours. We are not allowed to hire lawyers and could not do so even if we had a lot of money to enable that, because of the regulation scheme that protects those jobs for private lawyers.

We do not want to wait for a nuanced approach. As far as Scottish Women's Aid is concerned, we need a really bold step. That would have—

The Convener: Thank you, Dr Scott. I want to keep the discussion moving. Does Collette Stevenson have a follow-up question?

Collette Stevenson: Do the witnesses believe, based on the evidence that has come forward, that there is a role for non-lawyers in delivering criminal legal advice? Again, perhaps CAS could come in on that quickly, to comment on its past experience of such an approach.

Dr Scott: Is that question for Gillian Fyfe or for me?

The Convener: Collette, did you want to bring in our witness from Citizens Advice Scotland?

Collette Stevenson: Yes—if she does not mind.

10:30

Gillian Fyfe (Citizens Advice Scotland): I caveat my comments by saying that we do not tend to see a huge number of criminal cases come through the citizens advice network—our work is more on the civil side. Nevertheless, we see that there are challenges and limitations in the current legal aid system.

For context, I note that, between August last year and August this year, the citizens advice network provided more than 6,000 pieces of advice to more than 4,000 clients on finding a solicitor or advocate, and the number increased by 22 per cent during that time. Demand for advice on legal aid went up by 32 per cent during that time. We support an early intervention approach to ensure that people can get early access to advice and support in order to help them resolve their dispute in the way that they think is most appropriate.

With regard to access to practitioners across the country, we see that as a bit of an issue in certain areas and for certain specialities. Ian Moir referred to "deserts" in provision, and we see similar issues on the civil side, mostly in rural areas but not only in the Highlands—the issue stretches from the Borders to the Highlands. In that area, clients have to search for a solicitor over a wider geographical area, almost to the central belt, and sometimes they are still not able to access a practitioner. Often, the case will be withdrawn because the individual cannot find a practitioner to take it on.

Individual citizens advice bureaux support people in the best way that they can with advice on time limits and things such as housing and income maximisation. Ultimately, however, they need a solicitor to carry out the work related to their dispute, and if they are unable to find one, that barrier prevents them from having access to justice. To build on the comments from Scottish Women's Aid, we have had specific concerns raised with us by citizens advice bureaux in the Highland area—[*Inaudible*.]—as well.

With regard to good and bad practice, another issue is that we have anecdotal evidence of incorrect advice being issued by staff at solicitors' firms in relation to eligibility for legal aid. That does not help when someone is trying to resolve their problem—in the instance that I am thinking of, the person was trying to challenge an award payment from the Department for Work and Pensions.

Those are just some examples from the perspective of the CAS network. As I said, the issues that we see through the network tend to be focused on the civil side rather than the criminal side.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I want to follow up on the line of questioning of my colleague Collette Stevenson. Dr Scott, you highlight in your submission some of the barriers that women and children who are experiencing domestic abuse face. They include

"Scarcity of lawyers ... prepared to take on legal aid cases",

"Lack of ... quality and skill"

in immigration cases in particular, and issues with

"Child contact cases".

How acute is the problem? Those issues have been around for a while, but are they getting worse? Will you comment on the scale of the issue?

Dr Scott: On top of the fact that between 20 and 25 per cent of women in Scotland—one in four—experience domestic and sexual violence, the current backlog in court cases, which for the most part involves civil or criminal cases in summary court, now stands at 40,000. I think that I mentioned that when we spoke last week. As a result, we are seeing women vote with their feet. They cannot get access to a lawyer who can help

them to access protective orders if they need them, so it becomes immensely more dangerous for them to call the police, because the system—despite all the well-intentioned actors—is not able to respond quickly enough to protect women.

The reality is that, unless somebody makes a really bold move to do something about that court battle and to ensure that women can access a lawyer and that that lawyer understands domestic abuse, we will lose 20 years of progress on domestic abuse. Women are losing confidence in the system as we speak. The proposals for how we are going to deal with the backlog are simply not going to do the trick. I am immensely concerned that, while we can see the light at the end of the tunnel in terms of a possible model that is affordable and which delivers good outcomes, unless we do something about the backlog in the courts, the women will no longer be there once we can provide that service.

Rona Mackay: That leads me to open up the question to some of the legal experts on the panel.

The Convener: I will bring in Mr Lancaster, as he is keen to come in.

Colin Lancaster (Scottish Legal Aid Board): Good morning. I want to pick up on a number of the points that have been discussed. The points that Ian Moir and Marsha Scott have made highlight issues in the system that we recognise, such as the bluntness of some of the tools that exist to address particular issues, parts of the country, client groups or types of problem.

We have a national system that is a little bit one-size-fits-all. Something that Martyn Evans picked up in his review—the Government consulted on this in its follow-up consultation, and we certainly commented on it in our response—is that the judicare legal aid system is very reactive. It is a statutory framework that set tests for access to a fund, and it is very difficult to direct resources towards particular areas of need. It is also difficult to design services.

I am thinking of the sorts of things that Marsha Scott talked about, such as locating solicitors in other services or having solicitors who are dedicated to providing a service to users of other services in order to work with them to secure early intervention. It is difficult to design a system around the needs of users in particular cases, given the specific circumstances that they experience. Taking all those things into account is very difficult in a judicare system that is overwhelmingly directed towards reacting to clients who seek help, pass the test and are granted legal aid, after which a service is delivered in respect of the individual case.

That touches on Alan Paterson's point about taking a holistic approach. We need to think about how we can design wraparound services so that somebody who is seeking help, whether from a third sector advice organisation or a support service, or directly from a solicitor, can get access to the range of services that they might require in order to meet the needs with which they present.

As I said, the complexity of the judicare system can be a barrier to access. We have heard about potential confusion around eligibility. The system is complex, and there are people who are eligible but might not think that they are. Those sorts of things may create barriers to access in some circumstances.

We recognise that a one-size-fits-all approach might not always be appropriate where there are particular needs or problems. Similarly, a one-size-fits-all solution does not necessarily address those problems. For example, a general improvement in fee rates might have an effect, but it would not necessarily direct resources or availability of services towards the particular needs that are identified. That is why, in our response to the consultation, we set out a range of models, which could include the ability—alongside the judicare system, which generally serves the country well—to have targeted services, with resources directed to particular areas of needs, types of problem and parts of the country. That would ensure the availability of a service in those places, or for those people, in a way that is very difficult for the judicare system to provide.

Katy Clark (West Scotland) (Lab): What role might the Public Defence Solicitors Office play in a reformed legal aid system? What would the balance be between private practice and public sector provision through the PDSO?

With regard to the current crisis, is there a role for the PDSO, especially in busy courts? It may well be that, because of waiting times and so on, there are more efficient ways to deal with the problem and to ensure in the way that things are organised that solicitors are actually addressing the tasks that need done. I want to ask Colin Lancaster about that. Is there realistically a greater role for the PDSO to play in the immediate future?

Colin Lancaster: That is an interesting question with two parts: the current position and the future position. We currently have 25 or 26 public defenders around the country, alongside more than 900 private sector solicitors. That immediately gives a sense of the scale of the impact that those public solicitors have, or would be able to have, in relation to any particular issues. Their work is focused quite locally in the areas where they operate; they do not operate in all the courts in Scotland. They certainly make a contribution—they are busy and they deliver high-quality services alongside their peers in private practice. They are available as duty solicitors in all

the courts in which they operate, and they provide that cover effectively. As I said, however, the scale is very different in comparison with private practice.

With regard to a reformed system, SLAB suggested in its response to the consultation that there could be a variety of potential models for funding and for delivering not only criminal legal services, which we are discussing today, but all legal services. There is currently a case-by-case funding system for private practice, and we have the PDSO. We suggested that there might be a range of other ways in which we could blend those services or add to them with other forms of funding—whether in the form of grants, commissioned services or contract services—to secure the availability of the service, or particular parts of the service, in particular places at particular times. It might be worth while to target a bit of investment at specific aspects such as police station advice, custody court duty or sexual offences, and the PDSO can certainly play a part in that mix.

In our submission, we touched on a few potential areas in which the criminal justice system and the criminal legal aid system could evolve. That picks up on what Alan Paterson said about holistic advice. We need to think about how we can harness the great work that criminal defence agents not only do already, but are potentially able to do, to make a difference to their clients' wider problems.

The PDSO has huge potential to be a testing ground for those kinds of approaches. We have not done a huge amount of work in that way—the model has been very much to try to mirror the private practice approach as closely as possible and focus on delivering traditional defence services in the traditional way. However, there is great scope for looking at how emerging needs could be addressed and, perhaps, using the PDSO to test ideas and work in partnership with other agencies such as those in the third sector, other public agencies and private sector providers. In that way, we could establish how things could be done and perhaps establish how much those changes would cost and how we could best pay for them, so that they could be rolled out more broadly. We could bring the private sector in on that, too.

Over the past few months, we have been discussing the idea of independent legal representation for complainers in sexual offence cases, which Lady Dorrian's review touched on. With Rape Crisis Scotland, we have been exploring whether there could be a role for defence agents in that approach and whether we could test it out with the PDSO with a view to rolling it out more broadly.

I hope that that answers both sides of your question.

Katy Clark: Given the current crisis, are you expanding the Public Defence Solicitors Office? Are you recruiting? How does the pay compare with the pay for the types of solicitors in private practice to whom Ian Moir referred?

Colin Lancaster: With the way in which the PDSO is currently set up, there is a general size limit on the operation. We operate only in certain places and we are not generally authorised to expand the PDSO beyond, roughly, its current size. If ministers wanted us to do that, we could certainly look at expanding it into other areas or bringing additional solicitors into the offices that we already have. At present, however, any recruitment that we do is to provide cover for maternity leave and so on. As I said, the PDSO is a relatively small operation and it has been kept at that level for many years—it has been roughly the same size for the past decade. There are no immediate plans for expansion, because we have not been asked to do that.

10:45

The pay question is quite difficult for us to answer. Although the pay scales for public defenders are public and we publish them specifically when we recruit, we do not have very good information—or really any information at all—about what private sector solicitors are paid. I know that various recruitment processes are under way—the traineeship posts that have been advertised, which are funded partly by the Government's traineeship fund, have been massively oversubscribed—and that there are recommended rates for trainees. However, we do not know how much qualified assistants are paid in private practice firms, nor what the drawings of partners might be. In any debate or discussion about pay levels, therefore, there is a lack of information on which to base any comparisons or to enable an understanding of the dynamics of the situation. I cannot really answer that question.

Pauline McNeill (Glasgow) (Lab): I am interested in the impact on the quality of justice, given what we have just heard. I would also like to hear from Colin Lancaster about the system and early pleas.

I will start with Ian Moir. We have heard about the number of practitioners who are leaving the profession, and you have outlined the issues around competing with recruitment to other places such as the Government, and the gap in pay. You also talked about the work-life balance of criminal legal aid solicitors. Can you say a bit more about that? Is it the primary reason why we are losing solicitors from legal aid defence?

Ian Moir: That is very much the case. Edinburgh has probably been the worst-affected jurisdiction with young women leaving that area of work because the work-life balance is so off kilter. During the 26th UN climate change conference of the parties—COP26—courts will run seven days a week for three full weeks. We can be called out on any day of the year, including Christmas day and new year's day, to go to a police station to represent a vulnerable person or somebody who is facing a serious charge. We could be out for half the night doing that sort of work, and then we would have to be fresh to run a jury trial the next day.

The sort of people whom I am talking about, whom we currently see leaving in droves, are those who are between two and 10 years qualified. They get to the stage where—[*Inaudible*.]—do a difficult jury trial.

It is all very well to say that there is X number of solicitors on the criminal legal aid register, but they must have sufficient experience to provide a quality service. Until now, that has always been the case. As Colin Lancaster acknowledged earlier, every survey that has been done shows that the judicare system, with private practitioners, traditionally delivers an extremely high standard for the people of Scotland. Nobody wants to see that diminished, but the reality is that many of the people who are on the register do not practise regularly. Some of them are no longer in practice at all—they left some time ago. I am afraid to say that there are even people on the register who are now deceased. We therefore do not have a true figure for exactly how many people have the required level of experience and expertise to go to court every day, be at their best and provide the quality service that everyone wants.

The reality is that those of us who are left are being put under increasing pressure. Week by week, the situation is getting worse in trying to cover the courts, and that is before the programme of recovery is fully up and running. I cannot overstate just how difficult it will be, over the next year or two, for us to get through the backlog if we cannot recruit more people to help us.

I was passionate about, and fought hard for, the trainee fund. I am delighted to see that it has been introduced, and that there are 40 trainees. My firm has taken on one of those trainees, along with another trainee whom we are fully funding ourselves, in the hope that they can appear in court in the relatively near future. However, we will be responsible for them, as will all the other firms who recruit trainees. We are not suddenly going to throw those people in to do stuff that is way beyond their ability, so there is a limit to what they can do to help.

Pauline McNeill: That is an important point, which I want to come on to. I want to bring in Tony Lenehan on that. The SSBA submission mentions the recent boycott and the #gownsdown campaign. We also heard from Ian Moir about the importance of lawyers' experience.

Perhaps Tony Lenehan can say whether he thinks that the ability to choose a solicitor, and to have a solicitor with experience, is important for the quality of justice. I note that progress has been made, but do you have concerns about the quality of justice if we do not find a solution to the current issues in the short term?

Tony Lenehen (Faculty of Advocates): Ian Moir explained the current crisis earlier. What is creating a real difficulty just now is that all the plants surrounding criminal defence private practice are being watered, in the sense that the Crown has had an uplift in its pay scales and that sort of thing. It is the same with the Scottish Government, as I understand it. People are leaving simply because more attractive pastures are being created around them.

When I was a solicitor in private practice, I had a fairly limited view because I could see only the people who surrounded me in that jurisdiction. Now, I am instructed by people from all over the country, which lets me see a wide variety of instructing solicitors. Even though, by the time a case comes to the High Court, I am the person who speaks in court, the quality of the instructing solicitor is enormously important.

To go back to what Professor Paterson said, some solicitors have a real sense of their ability to make changes in the lives of vulnerable and damaged people. I am increasingly being instructed in cases by people who are much less senior than the people in such roles used to be. Previously, I had people who had 20 or 30 years' experience coming to court with me, bringing real weight and benefit to the role that they fulfilled as an instructing solicitor in the High Court. That has very much dropped away. Now, people are sent into the High Court at a much earlier stage in their career, which reduces—almost to the point of nil sometimes—the assistance that they can provide to the process of a trial.

I cannot tell you more about working in solicitors' offices, because I am a number of decades removed from that. Nonetheless, I see a real drop in the experience of people who are coming to instruct in the High Court, and that has a real effect on my ability, and that of my colleagues, whether they are advocates or solicitor advocates, to provide the best service to those who are in the greatest need of it. I see what is being spoken about today, and I hear about the difficulties from every point of the compass.

Pauline McNeill: My final question is for Colin Lancaster. The SSBA's submission states:

> "The current system of legal aid is not conducive to early resolution of cases. There are significant gaps in funding available at the early stages in the process and the system fails to adequately recognise the preparation and responsibility involved in negotiating early pleas."

Do you agree with that statement? Could there be a better system, in which early payment was made to ensure that early pleas were made? After all, that is what we would want in any court system.

Colin Lancaster: Yes, I agree with that point. In solemn cases, the work in the case tends to be quite back loaded, and that is the way that fee payments currently work. Several years ago, we had a range of discussions with the Law Society, on the back of discussions that the society had with its members. One of the priorities that emerged from that was the need to improve the way in which the fee structure recognised the value of early preparation, particularly when that led to early resolution of a case.

We then drew those principles into some proposals, and we discussed those with the profession at a series of roadshows back in 2017; they were quite well received. The point that we are talking about here is when a case is resolved by way of what is called a section 76 indictment. In solemn cases, that effectively brings the proceedings to a conclusion by way of an agreed plea before the case then proceeds to trial. The structure that we proposed would have included a fairly significant block fee, which would allow for the preparation, at an early stage, to enable consideration of the evidence and engagement with the Crown with a view to negotiating a section 76 conclusion. That would be paid for in a single block.

As I said, those fee proposals were well received. They were shared with the profession again last autumn as part of the discussions around the requests for support in response to the pandemic. The view was taken that although putting in place those reformed fees would not have an immediate impact, it might result in more cases resolving at an earlier stage, which would result in better payment earlier on for solicitors. That was important, particularly in the light of the backlogs that we could see were building, even at that time. There was growth in solemn cases in the past year, and such a change could have had a significant impact.

It is fair to say, I think, that emotions were running high when those proposals were shared. The profession was fairly clear that it did not think that that was the time to introduce those reforms, so regulations were not brought forward. Nevertheless, discussions with the Government have continued, and, just in the past week or so, the SSBA and the Law Society have met the Government to consider those proposals again.

We are keen for the proposals to move forward, for a number of reasons, but primarily because of the position in relation to early resolution, although we also think that the structure would hugely simplify what is a complex fee structure. It can be very time consuming and complicated for solicitors to frame their accounts. The fees can also be complicated to assess and that can result in disputes between us and the profession. We think that moving towards a block structure that better rewards early preparation would be a winner all round, so we are really keen to see that move forward.

The Convener: I know that Mr Lenehan would like to come back in. Before I bring him in, I would like to bring in Miss McPartlin, as I am aware that she supported the SSBA's written submission.

Julia McPartlin (Scottish Solicitors Bar Association): It is important to say that the SSBA recognises that fee reform is necessary. With regard to the comment in our submission that the current legal aid system is not conducive to early resolution of cases, that is important for the backlog.

Part of the problem that the profession has had with agreeing SLAB's proposed reforms is that they were initially designed to be cost neutral. While we want to see increased fees for section 76 pleas and so on, we do not want that to be at the expense of work further down the line. There is some concern that, if the system is front loaded at the expense of fees for sheriff and jury trials, that would lead to an imbalance. We are happy to keep working on that with the Scottish Government, and, as Dr Lancaster said, we are engaging in such work. Nevertheless, we recognise that those issues present problems.

11:00

An issue was raised earlier about the quality of solicitors in the profession if current trends continue. We welcome the traineeship fund, but it does not address the retention of staff. The biggest challenge is that, with the Procurator Fiscal Service having a recruitment drive, defence is the obvious place from which to recruit qualified solicitors in the criminal sphere. That means that we will miss out on the people who have experience, because we cannot compete with the wages that are being offered across the table from us.

The Convener: I will bring in Mr Lenehan—I ask him to make his comments as brief as possible—followed by Jamie Greene.

Tony Lenehen: I recognise that, as there are so many benefits to early resolution, it is a goal that we should strive towards. However, I have a word of caution. In my experience, the people who are involved in the criminal justice system are often poor decision makers who take short-term decisions. I frequently come across cases in which there is no doubt that early resolution would make sense, but the parties involved would rather take a decision that allows for an extra three months on bail, seeing Christmas out or whatever.

It is very good that we strive towards early resolution in cases, because that brings dividends in every direction—for policing, court time and everything else. However, as I have found over the years, and as has arisen in various post-Covid working groups, the reality is that you can lead a horse to water, but you cannot make it drink. The people who are involved in the criminal justice system are often poor decision takers, and it is hard to get them to see how early resolution would benefit them.

Jamie Greene (West Scotland) (Con): Good morning, panel. We have already covered a lot of ground, and I do not want to risk revisiting some of that, but my questions might lead to some crossover, so we might go back a bit.

First, I go back to the so-called "crisis" in the profession. The SSBA submission states:

"The profession is in crisis",

so my comments and questions are perhaps best directed at Miss McPartlin in the first instance.

I would like you to elaborate on that; I am sure that some of your comments will echo what Mr Moir said. I want to get to the nub of the matter. Is it the case that the reasons that the profession is in crisis are twofold? First, you are struggling to recruit new entrants to the market, and it takes time to get them up to speed to enable them to handle cases at the level that is required of them, and secondly, there is churn, and you are losing people halfway through their career, or even in the early stages, to other parts of the legal sector.

It has been suggested that the increase in legal aid will be a short-term fix for those issues, but I am not convinced that I have heard the evidence, or the argument, for the connection in that regard. Perhaps someone can help me with that. I do not see a direct link between an immediate raise in fees and a solution to the problem of churn. Why do you think that there is such a crisis in the profession?

Julia McPartlin: We have to go back, because there is a history of underfunding. The Law Society and local bar associations have given these warnings for decades; it is probably not an exaggeration to say that. That has led to a slow drip of people moving away from the profession to other areas where they may get better pay and conditions. It means that firms operating in criminal legal aid are not able to offer competitive packages in order to attract new solicitors.

The problem has been going on for some time, but it is now compounded by a situation in which funds are being put into the Crown Office and Procurator Fiscal Service—rightly so—to try to attract new staff there, with a view to tackling the backlog, so there is suddenly a recruitment drive in which better pay and conditions are being offered. People who work in criminal defence look at what is being offered in the Fiscal, and they are very well placed, with their existing experience and qualifications, to go to work for the Crown. We would normally see people going back and forth as a normal career progression, but now we are seeing a drain away, rather than swapping staff as happened in the past.

The reason we say that an increase would be a quick fix is that it would address the underfunding that has gone on for decades, so that we could get money back into defence as quickly as possible. Essentially, we are talking about an equivalent to the extra funds that are going to COPFS, which would allow us to pay our staff more so that we could compete with the salaries that are offered by those who are sitting across the table from us.

It is not that people do not want to do the job. A lot of people have applied to the traineeship fund, and we hear from people all the time that they think that criminal defence is an interesting line of work and they want to do it. I know people who have left who said that they enjoyed the job, and that the issue for them was more to do with financial concerns. The issue is the retention of staff, rather than getting the people in the first place.

Jamie Greene: Thank you for that helpful update. I was trying to make the link with the blunt tool that we are talking about. I presume that the assumption is that if we increase legal aid fees, that will somehow magic cash into your businesses, because that is the nature of the majority of your work. Therefore, either the amount of work has to increase, or the fee per job has to increase—one of those must be true.

Is it the nature of defence work that makes it so much more reliant on a subsidy? Effectively, legal aid is a subsidy to the profession rather than to the consumer.

Julia McPartlin: If we look at the statistics on how many firms are doing legal aid, we see that, for the majority of proper criminal legal aid firms, it will be all that they do. Such work takes up all of a solicitor's time—they will be in court for the whole

time. We do not have the capacity to do more work than we are already doing.

As fees have not been increased over the years, people are taking on more work in order to make their business financially viable. We cannot change that. It is important to understand that, although there been tweaks here and there, fees have remained static for such a long time that they have, in effect, decreased, if we take into account inflation. We cannot increase the amount of work that we do—we are at capacity already. The only other way to inject more money into firms is to increase the fee that we get paid.

Jamie Greene: Right. That raises a fundamental philosophical question as to whether the public purse should be subsidising private defence solicitors, but that is a whole other conversation.

Julia McPartlin: Legal aid is provided as a service to the public. You are talking about whether we want to offer—I think that, as a society, we should offer—representation to people who are accused of a crime, in particular a serious crime, by the state. That principle is already well established; the issue is how much you value the work that we do in providing the defence.

I am not sure that it is right to look at it as a public-private issue. In society, we need to have independent defence solicitors in order to represent people. We are talking about representing people against the state, so it would make sense to do that. At present, the amount that is paid for the work that is done by private firms does not reflect the complexity or the expertise involved. The fixed rates that we are paid have not changed with inflation—they are really outdated.

Jamie Greene: It sounds as if the legal aid payment review panel, which reported to Government earlier this year, has not gone down well with you either. You say that it

"has failed to produce any meaningful results."

I note that there was a Government-initated question in Parliament today, and the Minister for Community Safety said that the Government accepts that more consultation and research into reform needs to be done. I am sure that we will come on to talk about reform later.

I have a separate question about moving forward. We all accept that we are where we are at the moment. I think it was Mr Moir who said that courts that were set up are being mothballed. We know that there is a backlog of almost 50,000 cases to get through, and that is a concern to everyone we have spoken to at the Crown Office and in the legal profession. How do we address the backlog in the short term if there simply are not enough people to do it? I will direct that question at the Scottish Courts and Tribunals Service because you obviously have an ambitious drive to clear that backlog as soon as you can. We can do it if we have the buildings and the Crown resources, but we cannot do it if there are no defence lawyers. How do we plug that gap? That is quite worrying.

David Fraser (Scottish Courts and Tribunals Service): I will put Mr Moir's comment in a little bit of context. Within the recovery programme, which started on 6 September, we introduced an additional 10 summary courts across the estate. My understanding is that we introduced two courts over two four-week periods in the Borders, but one court has had to be put down as a result of the business being adjourned. I would say that, overall, the recovery programme is working well throughout our courts, with the obvious exception of the experience that Mr Moir has.

Marsha Scott was absolutely right that 25 per cent of cases that are lodged are related to domestic abuse, but 44 per cent of trials that proceeded this year were for domestic abuse, so we are focusing on that.

At this stage, and having listened to all the evidence, one might form the view that a problem is brewing, but from the courts' perspective, we are not seeing any major disruption as a result of defence solicitors not being available. That is partly because of the balance between the public defender and defence solicitors, but I am not sure that I can answer your question in relation to difficulties in the courts. At this point, we are not seeing an impact; we are still managing to get business through. Our recovery programme is up and running and, for the vast majority, it is working well.

Jamie Greene: That is not what the other witnesses are saying. They are telling us that it is not just that a crisis is brewing—it is already happening. Mr Moir, what is your response to what Mr Fraser said?

Ian Moir: For any of the courts to have a difficulty through a shortage of defence agents highlights that we are already at the point at which the crisis is real. When we say that there needs to be an increase in legal aid fees so that we can recruit and retain lawyers, it is because otherwise it will not simply be a case of one court not being able to sit in a month's time or two months' time. We are heading to the point at which we cannot cover the cases that we have, and that will only get worse as, week by week, two or three or four or five young lawyers, or even older and more experienced lawyers, leave to go and work on the other side of the table or for the Scottish Government. There are not enough of us to cope with this long term.

I have probably had five weeks holiday in two and a half years because we are having to work flat out as it is. There no extra capacity to say that we will have all the lawyers to run an extra 10 courts unless you do something about it to support us. That is not some kind of gift; that is a reality and money has to be spent across the board to get the backlog cleared. Quite rightly, money has been identified and spent on the remote jury centres.

11:15

We were part of all of the discussions and have been constructive throughout. When we have been listened to and action has been taken, it has generally ended with a positive conclusion in measures such as the resilience fund and the trainee fund.

You need to listen to us now before it is too late for us to fix any of the problems. We do not want a scenario in which we stand in front of a judge saying, "You will need to adjourn this trial because I have five other trials all in the same building and I have no other staff. I can't get any agents because they don't exist any more because there is no funding in the system." We are trying to alert you now to the real need for urgent action so that we can play our part in fixing the backlog. We are happy to engage—we always have been—and we always try to be constructive but we need to be listened to.

Jamie Greene: Why did so many defence lawyers boycott the holiday courts? Is that constructive?

Ian Moir: It has to be seen against the background that, without any consultation, eight further days of work were foisted upon us. We cannot even take holidays now that we do not get the holiday weekends either. It was felt as a great insult to the profession that we were not consulted on it and were simply told to get on with it. No extra funding is being discussed. The horse has bolted so it is harder for us to get funding now.

The way in which the holiday courts were introduced caused great upset to the profession, who have worked hard to make the system work through lockdown. I was going into the sheriff court in full lockdown and putting myself and my family at risk to ensure that people who were kept in custody were represented. That work was totally underappreciated.

Jamie Greene: I am sure that the Government is listening carefully to this exchange. Thank you for your comments.

The Convener: A number of people want to come in. I am conscious of time, so I ask for questions and responses to be as succinct as possible.

Katy Clark: My question is to Julia McPartlin and Ian Moir. Exactly what level of increase are you suggesting there needs to be in legal aid fees? Are you suggesting that the restructuring of legal aid to encourage pleas at an early stage would be sufficient to enable better recruitment for criminal defence agents or are you suggesting a percentage increase across the board on criminal legal aid rates? What kind of percentage is necessary now to enable you to recruit into the sector?

Julia McPartlin: That is a difficult question to answer. Front loading the system for early fees would not address the problem in itself. An increase and reforms are separate. Reforms are about making what budget we have work in a smarter way.

We are realistic. We understand that there are constraints on the amount of money available. The fixed fee for summary work, which covers a lot of what we do, was fixed in 1999. There have been some small decreases and increases but, if we were to adjust that fee for inflation, it would be worth in the region of £800 now. I appreciate that that is a huge jump that may not be feasible with the constraints that you have but it is a starting point to show what would bring us up to parity with what we were paid back in 1999 and what was deemed to be a fair rate then. That would be a start.

I do not want to put a percentage on the increase but those are the sorts of comparisons that might be used for the Government to work out what would be appropriate.

Katy Clark: I ask Ian Moir to come in on that. What would make a difference? There could be an increase but it might not be sufficient for what you are arguing for. What does the Government need to do?

Ian Moir: I am more than happy for most of the things in the fee reform proposal to be taken forward. Indeed, we have proposed many of them ourselves. For example, we have been arguing for a section 76 fee for many years now.

My difficulty is that getting a successful conclusion to any negotiation, followed by legislation, will leave us too far down the road to solve the immediate crisis. That is why we need to use the blunt tool of a significant increase, and Julia McPartlin has indicated what that might be in the very short term.

Being realistic, I think that it will take at least two years to do the earlier parts of the reforms, and some of them will take three, four or five years. After all, the Evans review was four or five years

ago, and we are only now at the stage of instructing further investigation. The reality is that, even with the best will in the world, this will take time, and we need to plug the gap in the meantime. That is why I am asking that, in the short term, money be found for a substantial rise to the existing fees to allow us to recruit and retain lawyers, represent people in court and keep the system moving. Not only that, but it will mean that people are available for weekend custody courts, to cover COP26, to do police interviews at night and so on. We are willing to do the job, but we need support.

Katy Clark: So you are saying that to maintain your business model and recruit lawyers you need to go back to 1999 levels in the immediate future. I am not talking about the long-term structure—I am talking about what needs to be done now to ensure that we do not have a crisis this winter.

Ian Moir: I am not suggesting any particular figure right now but in general terms another 5 per cent is not going to fix the situation. It needs to be a substantial amount.

The Convener: I will bring in Dr Scott at this point.

Dr Scott: Just picking up on a couple of things, I have to say that the elephant in the room in some of this discussion is the failure to gender the whole problem. Ian Moir mentioned young women lawyers; the intersection of Covid and its extraordinarily disproportionate impact on young women with regard to childcare and unpaid work reflects some of what is happening in larger society and, indeed, with solicitors.

Prior to joining Scottish Women's Aid, I was the chair of the equality advisory group for the Crown Office, and when we carried out an analysis of the gender pay gap for solicitors in Scotland, we found that the pay gap was much bigger in the private sector and that the work-life balance was much better in the public sector. There are many issues here that go way beyond, say, the amount of money that is being offered to solicitors, and they will have to be dealt with as we move forward with reform and Covid recovery. If we do not see any more evidence of equality impact assessments in these procedures and analyses, we will be having these conversations again in five or 10 years.

I also want to quickly highlight the Scottish Government's work to address women's homelessness because of domestic abuse. I note that the Government accepted all the recommendations in the report "Improving housing outcomes for women and children experiencing domestic abuse", including that women and children experiencing domestic abuse be

"able to easily access free domestic abuse-competent legal advice and representation."

I really hope that the committee will think about how that can be embedded in any legal reform or changes to legal aid, because that is a commitment that the Government has already made.

Finally, on the backlog, the setting up of cases is back to pre-Covid levels and the Crown Office has done a really good job of privileging domestic abuse cases, but as far as we know, only one in about five cases is going forward because of all the problems in the system, many of which relate to Covid. The Government and the criminal justice system are going to have to make some really hard decisions about what cases need to be taken out of the backlog to give the domestic abuse and other really high-priority cases the space and resources to be taken forward.

The Convener: I will bring in Mr Lancaster for a very quick comment, and then I will move to Mr Findlay for questions on other aspects.

Colin Lancaster: I will try to be quick, convener.

In general, the question of what would make a difference is very difficult to answer in the short term. I agree with other panel members that this is a long-term situation; indeed, we say in our submission that, over 10 years, there has been a 35 per cent reduction in the number of criminal prosecutions but a 20 per cent reduction in the number of criminal practitioners. There has been a mismatch in those trends, but what we are seeing now is a sudden increase in demand. The firms in the sector are predominantly small—40 per cent of firms providing criminal legal assistance have only two or fewer criminal lawyers—and it is therefore very difficult for those firms to flex their capacity. I know that firms have had an extremely difficult time with Covid—they have had to work in all sorts of ways and have found things really challenging—and I can see that the backlog reduction measures are now presenting a significant challenge, because the ability for those small firms to flex capacity to meet demand is really constrained.

Similarly, some of the gender and work-life balance issues that Marsha Scott highlighted might be associated with the structure of the system and the market, with small firms perhaps struggling to do that sort of thing. It is therefore difficult to see how an immediate fee increase would address those points. When the payment panel looked at all of these things, it concluded that there was a lack of evidence on any of them, and we need to know more if we are to better understand the scale and the causes of the problems and to design solutions that address them. At the moment, we are lacking that kind of good information.

Russell Findlay: I want to ask Mr Lancaster about fraud and abuse of legal aid. By my reckoning, just under £1.9 billion of legal aid has been paid out since the banking crash, and some have found such rich pickings rather tempting. In my previous job as a journalist, I reported extensively on a number of solicitors who committed suspected fraud with regard to legal aid. I will not name names—it is all in the public domain—but it is worth while touching on some of the details.

One particular solicitor claimed £600,000 in two years. The claims were unnecessary and excessive and were made to exploit the legal aid fund, but it still took four years to ban him for making any more claims. Another submitted 81 accounts that were described as fictional and fraudulent, but he was not prosecuted. A third solicitor who claimed £560,000 in one year had a history of such abuse, but, again, it took several more years to strike him off.

Around the same time, we became aware of 14 solicitors, who might or might not have included the three whom I have mentioned, being reported to the Crown Office for similar fraud, but none was the subject of criminal proceedings. As the gatekeeper and guardian of these huge sums of public money, do you know whether similar types of abuse are still happening today?

Colin Lancaster: I think that I know some of the cases that you have referred to. In the introduction to your question, you referred to fraud and abuse, and it is important to point out that those are two subtly different things. In the first case that you highlighted, there was abuse of legal aid in that unnecessary work was being done simply to generate fee income. As you have said, it took some time for action to be taken. I think that the two of us have corresponded previously on the matter, but we have certainly responded to freedom of information requests on it and have confirmed that we did not need to recover any funds, because we paid only for the work that we considered to be necessary and appropriate.

11:30

I should say that there is a complicated landscape in relation to regulation, which has changed a bit over the years. We have different powers in relation to civil, children's and criminal legal aid; for example, we have fewer powers in relation to civil legal aid than we have in relation to criminal legal aid. The overarching power to exclude people from delivering legal aid was originally held by the Law Society of Scotland, but that changed several years ago when the power was transferred to SLAB. However, exactly what powers can apply to what types of legal aid remains a slightly complex picture.

Generally speaking, we have a programme of compliance audit and peer review of solicitors. We check accounts rigorously; I think that the profession would argue that we sometimes check accounts too rigorously, but we certainly want to ensure a proportionate balance in our approach, which enables us to identify any patterns in charging that appear to be suspicious. If anything is inflated, we can investigate and take action where necessary.

I cannot comment on decisions about prosecutions for fraud; whether such cases are prosecuted is entirely a matter for the police and the Crown Office. However, in relation to the assurance work that we do, we are not aware of there being a significant problem.

Russell Findlay: That is helpful. I understand the difference between fraud and questionable claims, but some of the language used in respect of those specific cases made it clear that they were fraudulent.

Why did those cases all appear to happen in the past 10 years or so? Was there a problem that we have now fixed or was it simply that the media did its job and identified it? What confidence can the public have that those abuses are not still happening, especially against the backdrop of what the profession is describing as a crisis in legal aid?

Colin Lancaster: I cannot be sure exactly which cases Russell Findlay is talking about or exactly which circumstances were present in those cases. However, where we observe new behaviours as a result of our analysis, investigations or accounts assessment, we ensure that we monitor them. At the gateway—if you like—when people ask us to pay their bills, we ensure that we apply controls. We learn from the cases that we observe and change our controls in response to that.

If we spot a thing, which we might report onwards to the Crown or the police, we ensure that our day-to-day processes, such as those for assessing accounts, look out for those things, so as to prevent any further issues from arising. It may be that there is a particular issue at a point in time, but the steps that we take around our accounts assessment processes and the checks that we undertake will be effective in managing it for the future.

The Convener: I would like the session to run on a little bit to 11.40, so we have about seven minutes left. We will bring things to a close by looking at aspects of reform and different models for change.

Rona Mackay: My question is for Gillian Fyfe. Your submission states that the demand for advice

on legal aid has risen by 32 per cent during the pandemic. It also points out that

"legal aid is not currently available for many simple procedure cases"

and that the majority of cases that Citizens Advice Scotland deals with are in the civil legal area.

What impact does that have on your ability to help people to gain access to justice? What changes, if any, do you want to propose in that regard?

Gillian Fyfe: Our submission touches on the fact that we consider that the user must be put at the heart of the legal aid system. By "user", we mean the recipient of the service, but we appreciate that the profession is also a user of the system.

On the point about civil legal aid not being available for certain actions, a significant proportion of the legal proceedings issues that come to citizens advice bureaux relate to simple procedure cases.

We have heard during the pandemic—[*Inaudible.*]—understanding the process for that, even although it is meant to be simple procedure and for small claims.

A number of in-court advice projects—funded by SLAB—run in different parts of the country and offer lay representation and in-court advice on issues such as simple procedure. Some of those are hosted in citizens advice bureaux. However, you can get that support if you happen to have an issue in a bit of the country where there is a project, but the coverage is not national. That is one of the reasons why there should be a recasting of the legal aid budget such that there is more of a focus on grant funding, early intervention and prevention. That would allow people to get advice and support early on, including advice on alternative dispute resolution—which will help with early resolution—if they feel that that is appropriate for them.

In relation to simple procedure in particular, during the pandemic, we have heard from advisers that clients have found it difficult to navigate the process without having the supporter in court with them. There is concern about clients not understanding the gravity of the situation and not having the individual present to help them, which has been more difficult over the phone or via videoconference. That is the situation that we have seen in the network over the pandemic period.

Rona Mackay: Will you repeat the part about provision not being national? Is it a kind of postcode lottery, and has that always been the case?

Gillian Fyfe: My understanding is that there was never meant to be national provision. The function is administered by SLAB but the Scottish Government sets the priorities for it. There are therefore different projects in different parts of the country, and other organisations can, and do, bid for that funding.

There is a bit of a patchwork in provision. We would like to see it put on a more national footing so that everybody can get that type of help, rather than people being able to get it only if they happen to be located in an area that has a project that offers it.

Rona Mackay: Thank you—that is helpful.

Jamie Greene: Reform is not a new subject for the committee or, I suspect, our witnesses. It was touched on in each of the four written submissions. It is fair to say that the Scottish Solicitors Bar Association focused more on the fees and financial aspect of reform. The Scottish Legal Aid Board accepted the need for both short and medium to long-term reform. I was quite taken by the submission from Citizens Advice Scotland, which gave more pragmatic suggestions around issues such as triage and early intervention.

Other than reforms to legal aid fees and the funding of the sector, which we have discussed at great length, what practical or immediate reforms could, or should, we make to improve legal aid? That is an open question. I do not want to direct it to anyone specifically, because I am sure that all witnesses have a view on that. Now is their opportunity to share them.

Colin Lancaster: We touched on some possibilities for reform in our submission. A combination of short and long-term structural reforms would be possible. In the short term, as I mentioned, aspects of both the feeing system and the eligibility systems—in relation to the tests for legal aid—can be complex. Some of that could be fixed only through primary legislation and some could be fixed by regulations. We might be also able to consider some of that as part of how we apply the tests and run our processes. Some discretion is afforded to us by the regulations.

We are currently in the midst of a project considering how we express our policies in relation to application of discretion—specifically, how we turn policy into clear guidance for the profession and how that can help us train our own staff to ensure that we have a transparent and consistent service with consistent and predictable decision making, and where we can be held accountable if the decisions that we take do not match up to the policy as we published it.

We launched a consultation on Friday in relation to how we assess accounts. That is always a hot topic with those in the profession, and we would

be delighted to hear its views on how we go about the process, how we apply the test that is set out in the regulations, and the information that we need in order to come to decisions first time and to pay more of the accounts that we receive at the first time of asking, which smoothes the process.

In due course, we will be running a consultation on how we apply the means test, which has come up a couple of times today. It is a complicated issue, and there are various pockets of discretion and uncertainty, so it is a matter of clarifying that and making the system transparent and consistent in such a way that applicants can better understand what we need from them to enable us to make decisions on their cases.

Those are the sorts of short-term things that might make a difference to the smooth running of the system pending the longer-term legislative fixes, which are for ministers and, in due course, for Parliament to determine.

Jamie Greene: Could I therefore make a request? Your written submission was helpful, with its one-page summary of ideas for reform, but it sounds like you had some very specific asks, some of which are legislative, some of which are policy driven and some of which are for the Government. Perhaps the committee has a role to play in some of that. Could you put in writing those very specific ideas and recommendations that you would like to be implemented? Then we could perhaps debate them as a committee.

Colin Lancaster: Absolutely. A number of them were contained in our response to the Government's consultation. We are looking into the other, more immediate, things at the moment. I am certainly happy to keep the committee apprised of our thinking as that develops. As for the live consultation, we can certainly pass details to the clerks so that you can see what we are talking about in that regard.

Jamie Greene: Thank you.

The Convener: I am afraid that time is against us. Mr Moir would like to come in, after which we will close this part of the meeting.

Ian Moir: Thank you. I will not take long, as I am conscious of the time.

I can give one positive example of working closely with the Scottish Legal Aid Board. We were recently able to remove the interests-of-justice test from the application form for sheriff summary cases, because it was felt that, if a case was being prosecuted at that level, it automatically met the test. That speeded up the process, and it is a good thing for the profession and for the Legal Aid Board.

I will highlight one thing that had been on the agenda for some time, although it seems to have dropped off it: a single grant of legal aid, by which I mean somebody having legal aid from the start of a process to the end—other than in the police station, which is separate work. At the moment, we find situations where somebody might have to apply for several different types of legal aid throughout the history of the case—for instance, if somebody is given a community payback order and the court fixes a review. To take an extreme example, somebody in the High Court could get an exceptional disposal of a community payback order, and there would be no cover for that person to be represented at the review.

I would like to see us working on that in the short term: a single grant, so that the lawyer knows that they will be paid for all the work that they do, and so that the applicant knows that they have cover for the duration of the case.

The Convener: I will now bring this evidence session to a close. I again apologise for the lack of time—there is so much to cover. Many thanks to all the witnesses who have joined us today. If there are any outstanding points that you would like to share with the committee, please feel free to follow up with them in writing, and we will of course take them into account as additional evidence.

My thanks again to all our witnesses for attending today.

11:43

Meeting suspended.

11:49

On resuming—

Subordinate Legislation

Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment (No 2) Rules 2021 (SSI 2021/289)

The Convener: Agenda item 3 is an evidence-taking session on a Scottish statutory instrument. I welcome to the meeting Keith Brown, Cabinet Secretary for Justice and Veterans; Tom Fox, head of corporate affairs, Scottish Prison Service; and Jamie MacQueen, Scottish Government legal directorate. For the committee's information, Fulton MacGregor will have to join us online today because of travel disruption. I refer members to paper 4.

When we considered the instrument last week, we agreed to write to the Scottish Government and the Scottish Prison Service with some questions. I thank the cabinet secretary for his written response, which we received earlier this week. We thought that it would be useful to invite him to the meeting to discuss the instrument further and to answer members' questions, and I thank him for his attendance, which is much appreciated.

I invite the cabinet secretary to make some brief opening remarks before we move to questions from the committee.

The Cabinet Secretary for Justice and Veterans (Keith Brown): Thank you for inviting me to come along. I will be brief.

SSI 2021/289 extends the application of certain modifications that were made to the prison rules in response to the coronavirus pandemic by the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020 (SSI 2020/122). The current amendments to the prison rules are due to expire tomorrow, and the instrument's purpose is to extend the application of the changes until 31 March 2022 and to revoke others that are no longer considered to be required.

Given the unique operating environment of the prison setting, the Prison Service considers it necessary to retain some of the flexibility afforded by previous rule amendments that were made during the pandemic to ensure the safe running of our prisons for the pandemic's duration. The Prison Service also considers it necessary to take steps to retain some of the flexibility afforded by previous SSIs that were introduced during the pandemic to ensure that we are prepared and able to focus on any immediate priorities that might arise.

Members will of course be aware that the threat of coronavirus to the operation of the justice system remains. As at Monday this week, there were 136 positive Covid cases spread across nine prisons in the prison estate, so vigilance is vital. I should also say that the Scottish Prison Service's track record in this area is very good compared with the record of other jurisdictions.

The SSI seeks to retain some of the powers that were taken in response to the pandemic, which gave prison governors the flexibility to introduce precautionary and responsive measures to prevent and limit the spread of the virus and, crucially, to ensure the safety and wellbeing of those who live in, work in and visit our prisons.

Among the key powers that are being retained are powers to allow governors to suspend or restrict, if necessary, in-person visits, purposeful activity and recreation in response to local outbreaks; rule 40A and the extended timescales in rule 41, which provide governors and local national health service partners with the means to comply with Public Health Scotland and Scottish Government advice in relation to the isolation of large groups or individuals who are symptomatic or who have been in close contact with a person who is symptomatic or have been identified as a close contact of a person who is symptomatic, or who are new admissions that might present a Covid-19 risk; and the ability for governors to extend the period for which a prisoner is on home leave for up to 14 days from the normal seven days where prisoners advise that they or someone in their home has coronavirus or has developed symptoms of coronavirus.

The committee will be aware that, in advance of laying the instrument before Parliament, the SPS undertook a tailored consultation in July with stakeholders such as the Howard League, Families Outside and Her Majesty's Inspectorate of Prisons for Scotland. In addition, an operational review determined that not all amendments to the prison rules would require to be maintained, due to the majority of the estate returning to a regular two-shift model working day in October 2021, with staff attendance patterns that better support a fuller regime model.

The majority of amendments that are revoked by the instrument are related to administrative processes and associated timescales in areas such as internal disciplinary processes and requests and complaints. The rules that are being retained are intended to remain in force until 31 March 2022 but can be revoked earlier if necessary. Consistent with the wider community, the Prison Service is opening up regimes across the estate and its priority remains to continue transitioning to a full regime in alignment with public health advice.

For clarity, the powers in question are therefore proposed as precautionary measures and will be used only if they are felt to be necessary and proportionate. They will be subject to multidisciplinary input and decision making, and will be kept under review if put in place. Senior SPS headquarters staff and governors will continue to work with the Government and NHS colleagues to ensure that the most up-to-date information available is used to inform their response and contingency planning.

Given the uncertainty that exists as we approach another winter, it is essential that the Government ensures that the Scottish Prison Service can rapidly respond to all eventualities of the pandemic, whether nationally or locally. The draft rules provide for precautionary powers that are essential to the SPS's continuing response to the pressures that prisons face during the pandemic.

I welcome any questions that members may have.

Collette Stevenson: Good morning, cabinet secretary, and thank you for your written submission. My question is to do with the role that the inspectorate will play under the precautionary measures that you are introducing. My concern is the human rights of prisoners, particularly in relation to purposeful activity and recreation. I seek reassurance from you on what role the inspectorate will play and on the mental health of prisoners in the light of the proposed measures.

Keith Brown: Her Majesty's chief inspector of prisons has the powers that are set out in statute to inspect prisons and undertake various other elements of scrutiny of prisons, which Mr Fox might want to speak to.

The Prison Service carried out a human rights assessment prior to the instrument being laid. I understand the concerns that committee members have, but I will describe the way that the system has worked over the pandemic. The governors are not tyrants—I am not suggesting that that has been suggested—and they know that the best way of managing a prison is to allow the maximum possibility for purposeful activity, such as visits. That is why they have worked hard on alternatives to visits. That tends to help to make the running of prisons easier. Sometimes, it is not in governors' interests to restrict such activities, and they would do it only because of health needs.

The safeguards are the conversations that governors have with SPS headquarters. It is possible for legal action to be taken if a governor extends their powers. Plus, there are the inspector of prisons and the European convention on human rights.

The officials might want to speak on any further powers that the inspector of prisons has on the matter.

Tom Fox (Scottish Prison Service): You are right to be concerned about prisoners' human rights, Ms Stevenson. We should all be concerned about that, and the inspectorate has been diligent throughout the pandemic in maintaining as good an inspection regime as it possibly could.

During the pandemic, prisoners have shown staff a remarkable level of co-operation in what have been challenging and difficult circumstances for them. They have done that because they have seen the legitimacy of what we are trying to do, which is to preserve the health and wellbeing not only of the people who live and work in prisons but the people who come to visit. The measures that we have taken to put in place virtual visits, for example, have helped with that. The ability of prisoners to contact families by phone has also been of significant help in maintaining that legitimacy.

Please be assured that the inspectorate is on our case regularly, as it is entitled to be. It takes its job seriously, and we take seriously the comments that it makes to us and respond to them as quickly as we can. The inspectorate has been very diligent in visiting prisons. I assure you that, even when visits were not possible, it was on the case, as we would expect it to be.

Jamie Greene: Good morning—it is almost the afternoon—and thank you for coming. You will note that the committee briefly debated the instrument at a previous meeting.

I have comments and questions on two distinct areas: one concerns the process of deliberation for the instrument and the other concerns its substance. On the latter, I have sympathy with the need to extend some of the powers, for the reasons that you outlined. However, on the former, I have less sympathy with the Government on the way in which we are having to process the instrument. I will start with that.

The current powers expire tomorrow, which leaves the committee in the invidious position of having to either agree or disagree with their extension. Why, cabinet secretary, did the rules come to us only last week, given the likelihood of controversy—questions and concerns have been raised by numerous members across the political spectrum—around the content, nature and extent of some of the powers and the effect that they will have on the prison population?

12:00

Keith Brown: I note from my recent experience at committees that there have been a number of

times during the pandemic when the usual expected patterns of development for measures have been curtailed, for fairly obvious reasons. It was probably not possible, even in July, to predict what stage the pandemic would now be at, although when the powers were due to expire was predictable.

Jamie MacQueen (Scottish Government): The instrument is subject to the negative procedure, and it has been laid in accordance with the Parliament's standing orders. I appreciate that it comes into force before the expiry of the 40-day period for a negative instrument, but we wanted to carry out the consultation in response to the comments of the Justice Committee in the previous session on the previous instrument, which extended the powers. Time had to be built in for that consultation. For that consultation to be effective, we had to have a position on where we wanted to be, and that took a bit of time. It was difficult to do that further in advance.

The instrument was laid in accordance with the various periods that are set out in the standing orders. It was laid on 30 August, and it has been through the Delegated Powers and Law Reform Committee. I think that it came before this committee last week, which meant that there was still time to allow further evidence to be taken at this meeting, which the committee has obviously taken the opportunity to do.

Jamie Greene: Thank you. That was a technical answer to my question. Nonetheless, the powers expire tomorrow, so the committee has very little room for movement—to take further evidence, to scrutinise matters or to interrogate any of the stakeholders who inputted into the consultation. In fact, we learned in the response that we received late last night that the consultation responses will be published in October, which is way after when the instrument will—presumably—have been agreed to and the powers extended for another six months. That does not strike me as acceptable.

Keith Brown: That may have been a technical answer, but it is also a factually correct one. We have observed the standing orders of the Parliament. There is a role for the committees, if they wish to take earlier consideration. This is the second committee of the Parliament to consider the powers, and that is in the context of a pandemic. In addition, the Scottish Prison Service has undertaken a voluntary consultation exercise, which was not required. The SPS has done the right thing in that regard.

If the committee wanted to annul the instrument, it could do that, or that could be done through the Parliament, and the powers would continue until that process happened. I do not think that there is a material loss of benefit to the scrutiny process in that regard.

On the consultation responses, as I tried to explain in my response to the committee, we did not get permission from the consultees to publicise their responses. Work is being done to do that—although some of them are already known to members of the committee. As soon as those permissions have been granted, the responses will be published. You are right to say that that will be next month, but next month starts on Friday. I am not saying that the responses will be published on Friday, but next month starts on Friday, and they will be published as soon as it is possible to do so.

Jamie Greene: Thank you—that answer addresses my process queries and concerns. Those are noted on the record, and other members may have comments to make on that.

On the substance of the powers that are being extended, the cabinet secretary's letter helpfully summarised some of the consultation responses that we have been unable to see. My impression from the three-page letter was that more concern than praise was raised, if I can put it that way.

Concerns were raised, in turn, on rule 40A, on time limits; on rule 41A, on accommodation; on rule 63A, on the suspension of visits; on rule 84A, on purposeful activity; and on rule 88A, on recreation. In effect, that covers the entirety of the powers that the Government is seeking to extend. In their substantive responses, all three organisations expressed concerns about some of the rules. Some of them even suggested potential amendments.

We cannot amend the instrument; in fact, we cannot even vote on it, which is unfortunate. However, given the context, level and nature of some of the concerns that have been raised by us and by stakeholders in the consultation process—I am sure that we can go into those in detail—why does the Government think it appropriate for the extension of the powers in their entirety as they currently exist simply to be nodded through?

Keith Brown: The extension of the powers is not being nodded through. I acknowledge that the consultation process was limited; however, I again emphasise that the SPS did not have to undertake it, although it was right to do so. I am also not sure that it is true that the balance was critical here. Officials might have the exact details, but some who were contacted did not respond at all while others said that they had no comment to make.

You are right to say that the issues raised were significant and probably reflect those that members will raise today; indeed, they are the obvious issues of concern. As a result, the Government did not seek to have the proposed extension nodded through. We talked to the Prison

Service about it and, on balance, believed—for the reasons that I gave in my opening remarks—that allowing the powers to be extended was the right thing to do.

I understand that the extension runs to 31 March next year but, as I have pointed out, the pandemic has changed in nature and, indeed, is changing all the time. I hope that, when we see the figures today, further progress will have been made. I undertake, if the nature of the pandemic changes again—and if the committee so wishes—to come back before that date next year and further discuss the need for the powers. I am more than willing to do that. However, at this point, the Government has considered the consultation responses and believes that, on balance, this is the right way to go.

Jamie Greene: Your offer and undertaking are very welcome. When we granted the Government the emergency Covid powers, we all accepted from the very beginning that they would not be in force for a moment longer than was necessary—indeed, I think that the Government itself used those same words—but despite the welcome commitment that you have just made, reservations remain that that might not happen, even with the virus's lowering prevalence.

On that point, have you done any analysis of the Covid cases that are currently in the prison estate? Where are they? Do they involve staff or inmates? How is Covid coming into the estate? Are the numbers on the rise, levelling out or dropping? I would like to get some context.

The Convener: Mr Greene, I am conscious of the time, and I would like the discussion to remain focused on the SSI. If you have any further questions in that respect, that is fine, but if not, I will move on to Mr MacGregor.

Jamie Greene: Sure.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning, cabinet secretary and officials.

Like most committee members, I am minded to agree to the instrument, but my concerns, which have already been articulated by Collette Stevenson and Jamie Greene, relate to the vulnerability of a lot of our prisoners. We should all feel slightly uncomfortable about extending such powers, but we need to recognise that we are still in the pandemic and that we need to do what is necessary to keep people safe.

Given that—and perhaps going where Jamie Greene was going in his questions—I want to ask about the vaccination status of prisoners. How has that impacted on the Government's decision to go for an extension? I know that, this afternoon, there will be another debate on the important part that vaccines play in allowing us to reopen and live with fewer restrictions. Is there an issue with staff or inmates being vaccinated? I know that the Howard League, for instance, has raised concerns about visits—there is a real human rights issue in that regard—but has vaccination status been taken into account in the Government's decision?

Keith Brown: Given Jamie Greene's previous question, I wonder whether it would be helpful to look at the information that we can provide. I get an update every week—sometimes more often—on vaccination rates for prisoners and staff, as well as on the presence of the virus. As Fulton MacGregor rightly said, that has implications for visiting. In addition, when people come directly into custody as part of the judicial process, there are processes in place to minimise transmission. As far as I am able to, I will get specific figures to you on that. In general terms, it is the same profile as the general population, so the same process is followed in relation to the age that people are when they get vaccinated. From memory, there is a higher incidence of refusals in the prison population but, again, I will get that detail to you.

It might provide further reassurance to say that governors have to act in consultation with health professionals. If a prison governor, for whatever reason, wanted to have a more stringent regime, they could not have one just because they wanted to. They can use the powers under the regulations only if a health professional says that that is required, and it is not likely that health professionals would insist on such measures.

We are dealing with a closed population. We have had a number of outbreaks and, as I said, the virus is currently in nine different prisons. When it bubbles up in a particular prison, the incident management team goes in and takes relevant measures. It is a very real threat, because the virus is able to spread more quickly than it can among the general population. The powers are being extended for the right reasons—and only those reasons. It would not be in a prison governor's interest to use the powers for anything other than health reasons. I will get as much information as possible and write to the convener with that information for the benefit of members.

Pauline McNeill: Good morning, cabinet secretary. I reiterate what Collette Stevenson said about all of us being concerned about prisoners' conditions and rights. Tom Fox also acknowledged that, so we are all coming from the same place.

I acknowledge the cabinet secretary's detailed answer to the committee, which was very helpful, as was the response to the consultation. I am sure that the cabinet secretary acknowledges that, at the end of the day, whatever the rights and wrongs of the processes, the committee has a decision to make. I am sure that everyone acknowledges that

we are decision makers when it comes to SSIs. I might agree with Fulton MacGregor that we should agree to the instrument. I might be minded to lend it my support, but with all the reservations that other members have given about not having the appropriate time to consider it. That is my line of thought.

Am I right in saying that the Government seeks to extend a range of powers that relate to purposeful activity, suspension of visits and detention of prisoners in cells, albeit with all the rules around health professionals and human rights?

Keith Brown: Yes, and the powers that we seek to revoke, rather than extend, are, in large part, to do with internal administrative and disciplinary processes. You are right in identifying the ones that we wish to extend.

Pauline McNeill: Can you confirm that you are revoking the power relating to the restriction of newspapers and reading materials? Will that provision now be allowed?

Keith Brown: The officials have confirmed that.

Pauline McNeill: Thank you. When I first read about that, I did not like to think that there was any reason for the restriction of newspapers and reading materials, particularly for prisoners who are detained.

As I understand it, there are no time limits, although there are caveats to that. Are you certain that that complies with human rights law?

Keith Brown: I think that Tom Fox wants to come in on that point. The Government's lawyers and the SPS have looked at that and are very conscious of taking a human rights-based approach. It is not a hollow threat because, if they were to be in breach of human rights legislation, they could be challenged on that by individual prisoners or their representatives.

Tom Fox: On the general point, it is worth saying that we are trying to begin the process of normalisation as best we can. During the pandemic, staff changed their attendance patterns at work in order to enable the maximum number of individuals to exercise and the like. As we go back to a more normal regime, many of the things that we have restricted should start to normalise over the next few months.

However, it is essential that we retain the capacity to take measures if we need to. As recently as a couple of weeks ago, we had an outbreak in HMP Perth that necessitated significant numbers of people being placed in lockdown as a precautionary measure. We would not normally seek to do that, but we need to retain the ability to take measures as and when circumstances necessitate them.

Over the next few months, prisons should return to much more normal regimes than has been the case over the past 18 months. Visits have resumed everywhere, although uptake, unfortunately, has not been as great as we had hoped. Nevertheless, that normalisation is going ahead, but we need the ability to manage exceptional circumstances as and when they arise over the rest of the pandemic.

12:15

Pauline McNeill: That was really helpful. I certainly acknowledge that the powers might well be needed, but the cabinet secretary should appreciate that we are interested in where the safeguards are. If I am to agree to the instrument today, I need to be satisfied that safeguards exist. Moreover, going back to a comment that you made to Jamie Greene, I am uncomfortable with extending the powers to next March, and the length of time that you are asking for might be reason enough for me to vote against the proposal. I accept a lot of what you have said, and you have told Jamie Greene that you would be prepared to bring the issue back to us before then, but if I am to support the instrument, I need to have that absolutely confirmed. I cannot vote to extend for six months what are quite wide-ranging powers, even with all the safeguards and caveats in place, without the matter being brought back to the committee before next March.

Keith Brown: We are asking for the powers to be extended to 31 March next year. The point that I was trying to make was that the pandemic can quickly change in nature. What if, hypothetically speaking—I have no inside knowledge on this—we saw a very benevolent decrease in the pandemic and a much smaller incidence of the virus in the prison estate and elsewhere? That would inevitably raise concerns among committee members, and in that context—or in some other context—I would be more than willing to come back to the committee to explain things or listen to members' concerns. That is my offer at this stage.

Rona Mackay: I have a very brief question. As we know—and as the cabinet secretary confirmed in his letter to us—virtual visits have been really successful. Will they be retained and, if necessary, escalated? If so, will governors take that general approach throughout the estate?

Tom Fox: Virtual visits are here to stay, because they are a very important addition to what is available in prisons. They have had some windfall benefits; for example, foreign national prisoners are now getting visits that they never had before, because, obviously, they have no family here. They have been a boon for people who live in Scotland's more isolated communities, as they have been able to visit family members

without having to spend two or three days travelling. They have also enhanced prisoners' ability to contact their young families and children. We are therefore committed to continuing to provide virtual visits, not as a replacement for but as an adjunct to physical visits.

Rona Mackay: Thank you.

The Convener: As members have no further questions, I thank the cabinet secretary and his officials for attending. I will suspend the meeting for a short time before we move on to the next agenda item.

12:19

Meeting suspended.

12:29

On resuming—

The Convener: Item 4 is the committee's consideration of the Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment (No 2) Rules 2021. Do members have any comments on the SSI?

Jamie Greene: Thank you for your forbearance, convener. I also thank the cabinet secretary and his officials for attending. That is unusual for a negative instrument but, given the nature of the SSI, it was helpful.

12:30

I do not propose to lodge a motion to annul the negative instrument, but I would like to note it. It will therefore come into force tomorrow, subject to the rest of the committee's agreement, but with the caveat that concerns were raised not only by committee members but throughout the consultation process.

I have two caveats. First, when the consultation responses are released to the committee and the wider public in October, if it becomes clear that there are wider, substantive problems with the powers that we are extending tomorrow, we reserve the right to request that the cabinet secretary, the Scottish Prison Service and perhaps Her Majesty's inspectorate reappear at the committee to respond. Secondly, given the length of the extension, it would be prudent for the committee to review it at a midway point—perhaps in January next year—and determine whether we are still comfortable or whether concerns remain.

I appreciate that that does not change the outcome of today's proceedings, but it is important to put on the record that the committee and wider stakeholders had concerns with the extension of the powers. However, given the cliff-edge nature of the extension and the invidious position that we are in of having to approve or not approve the powers today, we are where we are.

The Convener: That is helpful and will be noted.

Katy Clark: I also do not intend to move a motion to annul but I have significant concerns about the statutory instrument and the length of time that the extension would be in place. Therefore, if circumstances were to change, I would want the Scottish Government to come back.

I also have concerns about the practical implementation of the substantial powers that governors will have under the instrument. The committee should be kept advised on that to satisfy itself not only that individual prisoners' human rights are respected but that the approach is consistent with health guidance that is in place outside prisons.

The committee would have preferred it if the instrument had been in force for a shorter period. It is unfortunate that the Scottish Government does not feel able to do that on this occasion. For that reason, the committee should be kept closely advised of how it is implemented.

Pauline McNeill: I agree with what has been said and will try not to repeat those points.

I would have been minded to support a motion to annul but I am content with what has been said. I note that the SSI includes the power to suspend purposeful activity and visitation rights and to detain prisoners in their cells if a health professional has said that there is cause for concern around coronavirus. I acknowledge that there are reasons to have those powers but I agree with Jamie Greene and Katy Clark that the committee needs to keep a watchful eye on the length of time for which the powers are in force and the consistency of governors' decisions. As the cabinet secretary has indicated to the committee that he would be happy to return to the matter, I am content to do nothing other than to note the instrument.

Russell Findlay: I agree broadly with everything that has been said. As Jamie Greene noted, we are where we are. We were given only a partial picture a week ago and it took the committee agitating for some answers to reveal a much more complex picture. In future, if we can, we should ensure that the authorities with which we are dealing are a bit more forthcoming in respect of such issues, especially when we are on a precipice and there is not much that we can do other than note our concerns.

The Convener: I agree with the comments that have been made, so I will not repeat them. Does Mr MacGregor wish to add anything?

Fulton MacGregor: I have nothing to add to what I said when the cabinet secretary was before us. My points have been summarised well by colleagues. I have concerns, but on balance and with the safeguards that have been mentioned by others, I am happy to note the instrument and acknowledge the cabinet secretary's offer to come back to us if required.

The Convener: For clarity and to recap, the SSI has been laid under the negative procedure, which means that there is no requirement for us to endorse the SSI or vote for it to come into force. The SSI will come into force unless Parliament agrees a motion to annul.

However, we have shared some concerns about the provisions in the SSI. I suggest that the minute of the meeting states that the committee makes no recommendation on the SSI but notes that some committee members have expressed concerns about certain provisions of the SSI and notes that those concerns are set out in the public record in the *Official Report* of the meeting.

Are members content with that?

Members *indicated agreement.*

Jamie Greene: The concerns are not only about the provisions of the SSI but the nature by which we are being asked to deliberate them.

The Convener: Okay. Thank you very much.

In light of our discussion, I propose that we write in due course to the cabinet secretary and the Scottish Prison Service to raise additional points, and that we invite the cabinet secretary back to provide further updates on the situation in relation to the provisions of the SSI.

Russell Findlay: We should also write to the inspectorate.

The Convener: We will also write to the inspectorate.

Control of Dogs (Scotland) Act 2010: Post-legislative Scrutiny

12:37

The Convener: Our final item is post-legislative scrutiny of the Control of Dogs (Scotland) Act 2010. I invite the committee to consider a letter that we received from the Public Audit Committee and I refer members to paper 6.

The Public Audit Committee's predecessor committee carried out post-legislative scrutiny of the Control of Dogs (Scotland) Act 2010 and made a series of recommendations for the Scottish Government. It appeared to be frustrated with the pace of the Scottish Government's response. The session 6 Public Audit Committee has brought the issue to the attention of a number of parliamentary committees, including us. We might want to consider whether there is any merit in repeating the post-legislative scrutiny exercise that was carried out by the session 5 Public Audit and Post-legislative Scrutiny Committee.

Does anybody want to raise any queries?

Jamie Greene: The letter from the Public Audit Committee notes that enforcement of the 2010 act falls under civil law but that the review of the wider dog control legislation falls under criminal law, so it seems appropriate that this committee has a watching brief over progress in that area. Given the predecessor committee's legacy paper, which was clear that the committee was frustrated by the pace of the response to the issue, it is fitting that we raise the issue with the relevant minister, who is probably the Minister for Community Safety, although I am not sure. It would be interesting to ask the minister, in writing or face to face, for an update on progress on the consultations that have been launched and legislative plans in the area.

The Convener: I am happy with that. Does anybody want to raise any other points?

I suggest that we ask for an update from the Scottish Government on its plans and whether it intends to take forward any of the Public Audit and Post-legislative Scrutiny Committee's recommendations that fall within the criminal justice remit. Are members happy with that?

Members *indicated agreement.*

The Convener: As no further members have indicated that they have comments on the specific content of the letter, we will write to the Public Audit Committee and invite further correspondence from the relevant minister.

That concludes the public part of the meeting. Our next meeting will be on 6 October, when we will begin our budget scrutiny.

12:40

Meeting continued in private until 13:01.

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