OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 25 October 2016

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 25 October 2016

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JUSTICE COMMITTEE
7th Meeting 2016, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Mairi Evans (Angus North and Mearns) (SNP)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Oliver Mundell (Dumfriesshire) (Con)
*Douglas Ross (Highlands and Islands) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Sandy Brindley (Rape Crisis Scotland)
Michael Clancy (Law Society of Scotland)
Susan Gallagher (Victim Support Scotland)
Tom Halpin (Sacro)
Stephen Mannifield (Edinburgh Bar Association)
Liam McAllister (Aberdeen Bar Association)
Lindsey McPhie (Glasgow Bar Association)
Marsha Scott (Scottish Women's Aid)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 25 October 2016

[The Convener opened the meeting at 10:01]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning and welcome to the seventh meeting of the Justice Committee in session 5.

Fulton MacGregor is delayed but hopes to join us shortly. I believe that Ben Macpherson has a declaration of interest.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I just wanted to remind the committee of my entry in the register of members' interests as a non-practising member of the Law Society of Scotland, given that the society is giving evidence today.

The Convener: Thank you.

Under agenda item 1, are members content to take agenda items 3 and 4 in private?

Members *indicated agreement.*

Crown Office and Procurator Fiscal Service

10:01

The Convener: For agenda item 2, it is my pleasure to welcome our first panel: Sandy Brindley, national co-ordinator of Rape Crisis Scotland; Tom Halpin, chief executive of Sacro—Safeguarding Communities-Reducing Offending; Marsha Scott, chief executive of Scottish Women's Aid; and, last but not least, Susan Gallagher, chief executive of Victim Support Scotland. I thank you all for your written submissions, which have been very useful.

I refer members to paper 1, which is a note by the clerk, and to annex A of paper 1. Without further ado, I open up the meeting for questions from the committee.

John Finnie (Highlands and Islands) (Green): Thank you, convener, and good morning, panel.

A couple of references have been made to the centralised initial case processing teams. Some of those are positive, because centralisation brings about standardisation, but some are about a lack of local awareness of issues. Could the panel comment on that, please?

Sandy Brindley (Rape Crisis Scotland): On sexual offences, one of the significant improvements in recent years has been a move towards specialisation. I think that that sometimes comes at a cost as regards local connections with communities and organisations. From our viewpoint—certainly in terms of High Court work—that specialisation has been very beneficial in relation to the prosecution of sexual offences.

Tom Halpin (Sacro): Sacro represents all areas of Scotland, and feedback from the workforce on the ground is that there is an obvious great commitment from the Crown Office and Procurator Fiscal Service to work collaboratively and jointly with us. However, the reality is that, as services become centralised, the further away you are from the centre, the risk of communication being less effective increases. That is just a fact that I think everyone recognises. There is no doubt that our staff are reporting that.

On the purposes of the administration of justice, there is obviously the element of holding people to account for what they have done—the punishment element. The other element is more person-centric and is about how we make sure that we heal the harm that has been caused and allow people to return to what for many are potentially very productive lives. With a centralised system, the decision making around that aspect is weaker because the focus is on the process and on

efficiency in the administration of justice. Decisions about, say, diversion from or alternatives to prosecution need a strong link with what is available locally. We would highlight that that needs to be a real priority in terms of where the PFS focuses attention going forward, and community justice planning offers some opportunity there.

John Finnie: Can I push you a bit further on that? In your evidence you say:

"It is believed that in this transition local knowledge has been diminished"

and—this is the bit that I was interested in—

"local collaborative working has become restricted".

By that, do you mean in relation to diversion from prosecution?

Tom Halpin: Diversion from prosecution would be one element but others would be the other facilities that are there to refer people on to. For instance, I mentioned restorative justice in my submission, but that is only one element. Let us say that you are looking at community payback orders—for instance, supervision of unpaid work. People can find it difficult to comply with such orders, and discussions about what happens going forward have to happen at a local level.

John Finnie: Thank you.

Marsha Scott (Scottish Women's Aid): I will echo some of Sandy Brindley's comments about our happiness with the move to a specialist competence within the Crown Office. I think that it is important not to confuse the consequences of that with perhaps the consequences of some of the other changes that have been made in the structure and operation of the Crown Office.

For us, specialism is another way of saying that the Crown Office has built some real competence around domestic abuse in the team that makes decisions about case marking and certainly in the establishment of a special prosecutor for domestic abuse. However, that should not be confused with questions of centralisation and decentralisation.

The Crown Office has had some more and some less successful attempts at trying to create efficiencies by centralising and then decentralising but I think that that is a separate process from the creation of specialist competences within its structures. From our perspective, those are not just to be lauded; they are absolutely critical to on-going improvement and quality assurance in the organisation in terms of the experience of the women and children who experience domestic abuse.

Decentralisation has been tried, and I think that the Crown Office has done a lot of problem solving around how to create structures that make the best use of its resources. It has not always got it right but, as an improvement guru, I will tell you that people learn more from failure than they do from success.

It is really important not to conflate the consequences of centralisation and decentralisation with those of specialisation because they have really been two separate pieces of work for the Crown Office.

I want to pick up on the question of diversion from prosecution. One of the dangers of attempting to move people out of prison is that we have conflated the approaches to crimes of violence, treating them as all one thing. We have noticed that a very quiet process has happened throughout the system, of which the Crown Office is only one small part. An enormous number of perpetrators who are convicted of domestic abuse wind up on community payback orders. Nobody has really had a public discussion about that, but essentially it is diversion. That is possibly a consequence of the need to find ways to move cases through the system more quickly. In the context of domestic abuse, that has had some unfortunate consequences.

Susan Gallagher (Victim Support Scotland): I do not want to conflate the issues that have been mentioned already or even regurgitate what has been said, but I will give Victim Support Scotland's experience of the Crown Office centralisation work over the past 20 years. We welcome that work. The Crown Office has been very positive in respect of issues affecting victims and witnesses in its strategic and policy-making agendas. However, since the decentralisation of some of the victim information and advice teams, we have seen an inconsistency in practice across the board, which has caused issues for us in trying to operate our witness service in the sheriff court and in the High Court.

Specifically on specialisation and the case progress agenda, the witnesses who come into court who are not facilitated through VIA have no access to case progress information, so there is still a gap in terms of knowledge and information being passed to those people.

The Convener: Is it fair to say that there is a divide in how different types of cases are treated following centralisation? For example, the joint protocol on domestic abuse seems to dictate that certain things will automatically happen, although the vast majority of cases do not fall into that category. Sacro may have picked up on this issue, but should there be more of a presumption in favour of prosecution and less autonomy on the part of the prosecutor?

Tom Halpin: Sacro's view is that there is a sense that there is less autonomy for the

procurator fiscal marking the case when the results of marking are predetermined. When every case is looked at in its own light, those closest to the case—the professionals working on it—can make the best decisions about that case. However, if there is a predetermined policy decision that everyone who commits a particular offence will go to prison, those involved cannot take account of individual circumstances or the exceptions, particularly in domestic abuse cases, where prison might not be required. There may be issues around a case that mean that alternatives are appropriate, although those alternatives would have to be specifically risk assessed and their appropriateness agreed by those involved in the prosecution and management of that case. We need to be really careful that we do not impose something that is not the best solution for individual cases.

The Convener: In your submission you talk about local case management and say that some local knowledge has been lost in the move to a centralised system. Other members may pick up on that point. You also noted the large number of procurators fiscal who mark papers. Can you expand on the difficulties that that may cause?

Tom Halpin: I am very conscious that it is hugely difficult for a national service such as the Crown Office and Procurator Fiscal Service to know what is available everywhere in the country. That is a real challenge for the service. However, if procurators fiscal do not know what services are available locally, they will not refer people to those services. Following the centralisation of case marking, we have evidence that, in areas where services have been long established, referrals to alternatives to prosecution—for example, restorative justice for young people—have virtually collapsed. We have then had to negotiate a way back in.

Another example is police fixed-penalty notices and warnings, which have almost become a process flow—if you do such and such, you will get a warning. That is now seen as a disposal, but previously it would have been seen as only part of the decision; the other part would have been a referral to another service to challenge the anger behind the behaviour or otherwise address whatever the issue was. Again, we have had to go back and discuss and negotiate that part of the system with the Procurator Fiscal Service. The service has been responsive to that, but the reality is that when you take the decisions away, you lose that local knowledge. We want to highlight that that is a risk for the service at this time.

The Convener: Liam McArthur has a question.

Liam McArthur (Orkney Islands) (LD): I thought that Marsha Scott was about to say something, so I will tee her up. She made a point about trying not to conflate the specialism and expertise—I think we all agree that those were badly needed—with the loss of local expertise in terms of the local context and relationships. Is there a way to have the best of both worlds? We have the expertise within a centralised structure, but that structure needs to work more effectively and in a more joined-up way with local expertise so that we maintain those relationships and do not lose the benefit of that local knowledge, which if not lost has certainly been diluted through the centralisation process in recent years. Is that achievable?

10:15

Marsha Scott: It is the most important problem that needs to be solved. I disagree slightly with my esteemed colleague, Tom Halpin, because when we talk about the importance of specialist knowledge and competence around domestic abuse, that contradicts the notion that it is the local team that should mark the cases. We are talking about an expert group of folks who have had lots of experience and training, and those are the two key things that are sometimes missing when you move away from specialisation into a more local team.

The answer to Mr McArthur's question is that, as with so many things, the best of both worlds would be to have specialist knowledge and experience at the local level. However, the assessment was that, given the available resources, that was not feasible. I expect that the PFS tried to find a structure that used the extra competence and training and provided it to the local team. We have touched on this in our paper, but that issue makes transparent the fact that no matter how many times you rearrange your structure, there is no way to get around the need for significant and on-going training for people on the ground and at the centre. That needs to be prioritised.

The way in which our system works creates some really difficult problems. For example, the time that a fiscal has to mark a case makes it almost impossible for them to get a significant amount of local information into the process. In West Lothian, we saw that that caused real problems for marking. If there was more flex and more time, there would be an opportunity to use the specialist knowledge in the decisions whether to prosecute and to bring into play the local knowledge about what should happen, taking victims into account, in the process of that prosecution.

Less than 1 per cent of perpetrators convicted of domestic abuse in Scotland go on to serve a prison sentence of longer than six months. The presumption to prosecute is an effort to counterbalance what was seen as a negative

assumption around prosecution and sentencing in domestic abuse.

Liam McArthur: The question is whether there is a risk of specialist expertise outweighing the expertise that can be brought to bear at a local level. I do not know how we strike a balance given the time constraints.

Tom Halpin: I tried to allude to that earlier. Part of the solution lies with the emerging issues of local community justice planning and community planning partnerships. If the Procurator Fiscal Service is fully engaged in that process at a local level, it can start to bring in local responses to situations, recognising the national expertise. However, even with that approach, which is to be welcomed, there are still elements of an imbalance.

At one stage, more than 20 per cent of the men arrested on domestic abuse charges in Glasgow never appeared in court. What happens to those local decisions? Do we just wait? Many of the services that seek to address the behaviour of male abusers only kick in if the man is prosecuted and convicted in court. Do we just allow that percentage of people to go back and carry on with their actions and then intervene later on, or do we look at whether any decisions can be made locally with regard to working with those people and challenging their behaviour as early as we can?

The Convener: That was helpful.

Mary Fee (West Scotland) (Lab): I want to get more detail on capacity in local services, and I am interested in hearing the panel's views on whether there is enough capacity, whether enough resource is being put into it and whether there is enough in the system to allow it to be adapted to different areas. After all, you cannot have a one-size-fits-all approach across the country. Is there enough space, if you like, to adapt and change local services to really fit people's needs?

Secondly, if there is an alternative to custody and people are being dealt with in a local area, is enough work being done with victims to ensure that they know what is happening to perpetrators and why it is happening and that they fully understand and support what is being done?

Sandy Brindley: I do not mind starting with the capacity question. I find the huge increase in the sexual offences case load in particular to be significant. The situation is similar with domestic abuse, and there is no doubt that that has put significant pressure on the whole criminal justice system, not just on capacity in the Crown Office. As most of us have pointed out in our written evidence, that has created issues particularly with communication and information. The provision of the VIA service can be particularly problematic, with complainers feeling that they are not being kept informed either pre or post conviction. There is more that we can do there, and I would like to revisit the Solicitor General's review on that to find out how we can improve things.

Another more general issue is the fact that floating trials are being used more and more for rape cases, which is against the recommendations of Lord Bonomy's original review. Our experience is that there is a huge issue with capacity in the whole justice system; that is impacting directly on people's experience of justice, and I think that it is also contributing to the possibility of victim withdrawal. We must therefore think about how we get the best evidence in what is quite a stretched criminal justice system, and we need to do that through keeping the complainer informed and supported and trying to reduce the delays that are being caused by capacity.

Susan Gallagher: I completely agree with Sandy Brindley. Our experience is that victims and witnesses receive very limited information to keep them up to date, and sometimes that information is written in a language that is indescribable to the public. That in itself is an issue because as an organisation we end up trying to interpret some of the information that was meant to help people. That is, as Sandy has highlighted, giving people an inadequate sense of justice and the feeling that they do not know what is happening in the process at all.

As for consistency and capacity issues, we feel very strongly that, locally, VIA does not necessarily have the capacity, and a lot of that is to do with the fact that the resources have not been put in place to enable it to do its job. That has led to a huge issue with the amount of information that witnesses are receiving before they come to court, throughout the court experience and once they leave. The information that should be provided to people is not necessarily getting through to them.

The Convener: Is your question specifically on this point, Douglas?

Douglas Ross (Highlands and Islands) (Con): Yes, convener. I wonder whether the perception of witnesses is that the delays and lack of information is solely on their side or whether there is a recognition that, as we might hear from our next panel this morning, the accused are similarly frustrated with the information that their defence teams are getting. It is very easy for victims to see that they are suffering in this, but what we are seeing is that both sides of the process are suffering because of capacity issues.

Susan Gallagher: We in the witness service have countless examples of victims beginning to give evidence only for it to emerge that the defence did not have the evidence or information

that it required to look at things prior to the case being heard. As a result, the case has had to be adjourned.

From the victim's perspective that is very difficult, although they can sometimes see that the issue is that the defence has not got the information that they need. To be honest, however, from our perspective it is about the impact on the victim and the witness and their knowledge of the system.

Douglas Ross: I fully accept that, but do you think that it helps in any way if a victim can see that it is not just their side that is affected—that the capacity issues stretch across the court? It is very easy for the victim or the accused to think that only their side is impacted. I am not saying that it would make the situation any better, but could there be a better understanding that the delays and capacity issues affect both sides of the argument? I do not know the answer; I am just asking the question.

Marsha Scott: To be honest, it is apples and oranges. Whereas the accused has a defence lawyer working on his or her behalf to manage his or her engagement with the system, the victim does not. Therefore, for all the reasons that you can imagine, their experience of the system is vastly more difficult because they do not have a professional person advising them. If they are in the right place in the country, in terms of the postcode lottery, they will have a good advocacy service supporting them, in which case they will have somebody who is at least able to explain to them the system and how it works, although they will not represent them in the same way as a defence lawyer would. However, in many places that service is not available. Victims are at the mercy of whether there is an adequate VIA service and whether the witness service gets the information that it needs in a timely fashion. I do not think that any of us could say, hand on heart, that more resources would fix the problems quickly. We do know, however, that more resources are necessary, although probably not sufficient.

Tom Halpin: As you can imagine, my organisation works with both victims and offenders. Although I acknowledge the point that Marsha Scott makes, not having the information also affects those who are accused of an offence. I do not wish to downplay the impact that that has on others, but it is challenging for their life as well. In some cases, we work with someone on their journey but then get a roll-up of cases coming in and that sends them right back to the beginning. If the question is whether not having the information affects both parties, we have to acknowledge that it does, notwithstanding the points that have been made.

Mairi Evans (Angus North and Mearns) (SNP): A few of you have touched on the VIA service, and I would like to get a bit more detail on that. You highlighted that the provision seems to be a bit patchy at best, and evidence that we have heard from victims supports that. What feedback are you getting from people who are using the service about how it operates?

Susan Gallagher: There is some really good practice out there in Scotland. Some VIA officers are working very well in assessing victims' needs prior to their going to court and passing that information through the system. Victims have said that they appreciate the compassion of and the work that is being done by those officers in their local area. However, that practice is not consistent, and some victims tell us that they do not know who their VIA officer is or that the information is not getting passed to them so that they are left not knowing whether special measures will be in place when they go to court. They are walking into court without any knowledge of what is going to happen. They get support from the witness service, but, as Marsha Scott said, the witness service is sometimes not provided with the information to ensure that the special measures are in place and the person ends up getting a default special measure that is not suitable for them.

There are real issues in ensuring consistency, although there are some examples of really good practice out there—the picture is not all negative. Nevertheless, sadly, the situation impacts on the ability of victims and witnesses to give their best evidence.

Marsha Scott: I totally agree with everything that Susan Gallagher has said but I will make one observation, having been relatively close to the coalface for a long time.

Victims get the VIA service in a very tightly defined period, but that is not how victims experience the system—they experience it from the first time that they come to the attention of the criminal justice system. Therefore, we have created something that is almost not fit for purpose, given victims' experiences. The support and advocacy is from a certain person between certain times. If the victim is lucky, they will have someone to help them through the pre-court and court time, but they will have nobody to help them through the post-court time, what happens at sentencing or all of those things. With the greatest will in the world and even if we had all the resource in the world, the way that the service is structured at the moment would not be terribly friendly to victims.

10:30

Susan Gallagher: I totally concur with that. The seamless throughput is not there for victims and witnesses at all.

Sandy Brindley: To add to that, one positive development is that the Government is funding advocacy services for people going through the justice system. Just last year, we received funding to establish an advocacy service across Scotland for sexual offence complainers. Complainers are looking for support from the start, right through the period. For example, it is really important for people to get support in the post-court period. To make advocacy services as effective as possible, we need to ensure that they have decent access to information. Our advocacy workers sometimes struggle to get information from VIA, which makes me wonder how that experience is for complainers who are doing it directly without advocacy support. Therefore, I think that we can do much more. The issue was considered in depth by the previous Solicitor General's review, and we should consider that.

Mairi Evans: Absolutely. I am struck by how difficult it must be for someone who comes into the system for the first time and who, as well as the trauma of what they are dealing with, has to work their way through that system and the different organisations that are presented to them. Thank you for that.

The Rape Crisis submission highlights the use of sexual history and character evidence and states that the most recent evaluation of that was done 10 years ago. Will you give us a bit more detail on that? Are you proposing that another evaluation should be undertaken?

Sandy Brindley: We have legislated twice now in Scotland to try to restrict the use of sexual history and character evidence in sexual offence trials. The most recent evidence that we have about how effective that is, which is now 10 years old, painted a worrying picture. The key fact that came out of the previous evaluation was that seven out of 10 women are virtually guaranteed to be asked about their sexual history or character in the course of a rape trial. That should concern us all. It is potentially prejudicial to jurors and it puts women off reporting. We need look only at the recent Ched Evans case, in which what happened to the woman was in our view a complete travesty.

Our concern is that we do not have an up-to-date picture of what is happening and how effective our legislation is in the area. We have some data from the Scottish Government, which we referred to in our submission. On the face of it, it is worrying to see such a high success rate for applications and such a low level of opposition to them but, really, it is pretty meaningless data without any context, because it is possible that some or many of the applications were legitimate or were made by the Crown, which also needs to apply to introduce that kind of evidence.

We need a proper and independent evaluation of how the legislation is working. My sense is that things are better than they were 10 years ago, certainly with sexual history. However, there is more and more of a focus on complainers' medical records being sought as part of abuse prosecutions, which does not happen for any other crime. We need a much clearer factual base to show what is happening and consideration of whether the legislation is protecting complainers and, if not, what we should do about that. It is a human rights issue.

Marsha Scott: I echo that, especially the point about access to medical records in domestic abuse cases, which is very problematic. We had a call to the helpline the other day from a woman asking for information. She was given it and then she said, "I don't know if I'll call because they'll just lift me, too, and then they'll look into all my medical records," which she was not comfortable with. That has a hugely chilling effect on disclosure.

The Convener: On that point, has the recent judicial review decision by Lord Glennie had an effect? I am told that the approach should be up and running so that advice is available to victims.

Sandy Brindley: The Lord Glennie judgment was welcome, but it applies only to the defence, and we know that many requests to access records come from the Crown Office, so there is still an issue to do with access to legal advice for complainers in those circumstances.

There is access to legal representation if it is the defence that seeks access to medical records. That is one stage, but the next stage is to go through the process under sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, and we need much, much better information about that stage.

There is no point in people having a right if we do not tell them about it. We need to do more in that regard. If a complainer is in a situation in which their records are being sought, they need to be told where to seek help. In one case, a woman was just told, "There is a hearing next week, for all your medical and psychiatric records. You need to get a solicitor". If someone is in a vulnerable position and does not have a lawyer, where do they go?

We need to put proper processes in place. We also need a standardised form, which sets out clearly what is happening, because the system is still confusing for complainers and we are not

consistently telling them that they have a right to legal representation.

The Convener: That is helpful.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I have two brief questions, one of which arises from previous comments about the allocation of resources, and which I will initially direct at Marsha Scott. There are specialist resources centrally and locally. Do you have a view on whether there is sufficient business for some of the specialisms in some of the smaller sheriff courts to enable specialists to keep up to scratch? Banff sheriff court in my constituency is very different from Glasgow sheriff court. I assume that you accept that there is an issue in that regard. Is the right balance being struck? In other words, I suggest that the issue is not just whether there is enough money for resources but whether there is enough work for the specialists.

Marsha Scott: I would not sell myself as an expert on all the business that runs through sheriff courts, whether they are small, medium or large, but I will say that at least 25 to 30 per cent of business is likely to be domestic abuse cases.

No matter the size of the court, domestic abuse will require specialist competence. There can be case clustering and all kinds of things that make the process more efficient, but from a human rights perspective I think that we cannot just decide that people who live in Orkney—or wherever has a smaller sheriff court—somehow have less right to have properly trained specialists and properly marked and prosecuted cases.

Stewart Stevenson: Do the other witnesses have views on that? If not, we can move on. It is not compulsory to comment.

The Convener: We are up against the clock.

Rona Mackay (Strathkelvin and Bearsden) (SNP): We know from previous evidence that a lot of victims and witnesses have found the experience of the prosecution process and being in the justice system very difficult. Much of what today's witnesses have said answers this question, but will you crystallise and prioritise the issues that still need to be addressed if we are to help victims and witnesses through the system?

Susan Gallagher: From our perspective, one of the main issues, which Sandy Brindley touched on, is that victims and witnesses need a single point of contact as they come into the system. They should have to tell their story only once; they should then be able to be put through the system without having to regurgitate to 47 different people everything that they have said. They should be provided with a holistic assessment of their needs so that they can best give evidence.

We feel quite strongly that the justice system in Scotland could do far less—and far more—if it introduced such a system. By saying "far less" I refer to the bureaucratic notions that are in place and the administrative burdens that are on everybody in the system, which are substantial. A lot of inefficiency and ineffectiveness could be reduced if there was meaningful throughput for people.

Marsha Scott: Sandy Brindley's point about advocacy services in sexual assault and rape cases applies across the field. Victims who have robust advocacy support have a better experience, have less chance of becoming part of victim attrition, have a better understanding of what has gone on and are less likely to withdraw, no matter what the outcome of the case is. Advocacy is not the silver bullet that will make the justice system a wonderful experience, but it is the first and most important resource for victims and it helps to make the experience seamless, which it is far from being at this point.

Communication with victims needs to be a higher priority across the system. From our perspective, it is sometimes difficult to discern whether victims' negative experiences come from court processes, prosecution processes or police processes. Because of the way in which the whole system comes together, it is sometimes difficult to unpick exactly where it needs to be fixed. Creating a system that is centred on victims' experiences would make the whole thing work better and be more efficient, as well as being more humane.

Rona Mackay: I want to put the point about good advocacy into perspective. Roughly what percentage of people get that?

Marsha Scott: I cannot hazard a guess at that, but I can go away and try to figure it out. The service changes significantly according to the offence, so I guess that more advocacy is probably available for domestic abuse cases than for cases that involve any other offence, although it is nowhere near adequate.

Sandy Brindley: On what would make a difference for complainers, it is important to acknowledge that the vast majority of people who report rape never see their case get to court. The statistics show that only a very small number of cases are prosecuted, which gives the lie to the notion that the Crown is prosecuting weak cases because of political pressure—that is not borne out in the number of prosecutions for sexual offences. Lack of corroboration is the main reason for not proceeding that complainers who get in touch with us are being given.

For those whose cases are prosecuted, cross-examination is the single most difficult part of the justice process. It is always difficult because we

need to test the evidence—we are not saying that we should put in court women who say that they have been raped and accept everything that they say—but we could do more to get to the truth in our justice process and make the experience less of a memory test. There are delays in cases coming to court and it is often at least a year and a half after somebody has reported a rape before the case is heard in court, yet much of the defence's questioning focuses on specific details and slightly different recollections, which it is completely natural for people to have.

Sometimes, someone has to give evidence on something that happened 20 years ago, and the current process does not enable the best evidence to be given in such cases. In particular, I do not think that it necessarily gets to the truth. This is outwith the scope of the review of the Crown Office, but I think that the evidence and procedure review process that the Scottish Courts and Tribunals Service is leading on is a welcome approach to enable us to get better evidence and get to the truth in such cases.

The Convener: We are looking at evidence and, if delays are causing a problem with evidence being made available at an appropriate time, that goes to the heart of our inquiry into what the Crown Office and Procurator Fiscal Service needs to put in place.

Let us move on. I ask members and witnesses to make their questions and answers succinct.

Ben Macpherson: I thank the panel members for their written evidence. There has been much discussion of communication. I will touch on the provision of support and protection for witnesses, complainers and victims.

Rape Crisis Scotland's submission mentioned the trial process and Scottish Women's Aid's submission commented on the lack of preparation time and the fact that there is not enough time for prosecutors to meet complainers. Scottish Women's Aid also said that there is not enough intervening in the court process to protect people from aggressive questioning. Would Sandy Brindley and Marsha Scott like to comment on that? Susan Gallagher might want to comment, too.

On a separate point, what Sacro's submission said about restorative justice was extremely interesting. Tom Halpin might want to elaborate on that.

10:45

Sandy Brindley: I will be brief. More could be done to protect complainers in court. There have been a number of high-profile cases in which the Lord President has commented on the treatment of complainers during cross-examination. As we said in our submission, it is everybody's responsibility to protect complainers. The judiciary have a clear responsibility to manage what happens in court, but our sense from working with complainers is that the Crown could take a more proactive role. If the Crown objected to how someone was being treated, at the very least that would force the judge to decide on whether to intervene.

Complainers frequently tell us that they feel that no one protects them in court. Notwithstanding the fact that the process is always going to be difficult, we could do more to protect complainers in such circumstances. The most common reason that we hear for not reporting rape to the police is fear of what would happen in court.

Marsha Scott: I echo all those points. Some of the judicial behaviour that we have seen over the past few months in responses to victims of domestic abuse has caused us to come to the view that the system needs to change. No domestic abuse case should be heard in a court in which the sheriff has not had specialist domestic abuse training, because that sets the frame for the treatment of everybody in the room. Although we know that we have limited influence over the training of the judiciary, there must be some way of looking at how we can—

The Convener: I take on board what you say, but we are going slightly off the subject matter, and we are subject to time constraints.

Marsha Scott: That is fine.

Tom Halpin: As some members will know, my background is a career in policing, so I have worked in the justice system throughout my adult life. At Sacro, I work with those in the system who have caused harm. Given where I come from, I am not a soft touch or naive.

In my experience, there is a split when it comes to restorative justice. It is used extensively in youth justice with young people for lower-tariff offences, but it is used sparsely in the adult system. When I started on this journey, I had to do a lot of fact finding to ensure that I had substance to support my approach rather than it being based on intuition. I asked whether there was a lack of evidence of restorative justice's effectiveness. There is a huge point about coercive power and the inappropriateness of restorative justice in domestic abuse cases; I share that view.

We must be careful to ensure that professionals do not become gatekeepers for what people need. We all have experience of those who access our services. There are those who do not feel that our services meet their needs. We in Sacro frequently have to turn away people who ask for restorative

justice—I am talking about victims as well as those who have caused harm.

I feel quite strongly about the issue. Last year, the United Kingdom Parliament published a review of restorative justice in England and Wales, where it was rolled out extensively, that shows where it has proven to be effective and where the shortcomings are. A body of evidence is building up.

We have an opportunity in Scotland. There are two parts to sentencing: one is about the offender recognising what they have done and paying the price for it, and the other is about rehabilitation and redemption, if I can use that word, which provides people with the opportunity to repair the harm, to make peace and to move on in their lives.

It is important that the process is victim led. The whole process is voluntary—anyone can say that they are not taking part. It is not just about benefits to those who have committed an offence; it is about benefiting those who have been harmed. There needs to be a serious discussion in Scotland about where we are going with that approach, because part of our justice system needs to be about repairing the harm.

Ben Macpherson: I have a quick follow-up question for Susan Gallagher. In your evidence you referred to a duty of care when, during a trial, the accused has been let out of the court building at around the same time as victims and complainers have. Will you comment on how widespread that is?

Susan Gallagher: Absolutely—I will also pick up on other points. People who cite witnesses to court need to have uppermost in their minds the protection and safety of witnesses and their experience in the court building. People are being intimidated in that building. For example, if someone is sitting in a witness room and the door is open, they will be able to see someone who they feel is intimidating them outside the door.

As we highlighted in our evidence, we have experience of countless occasions at the end of court proceedings when the accused has been let out in advance of witnesses, who are then intimidated and, in some cases, abused as soon as they walk out of the court building. As a society, we need to consider the protection and safety of everyone when they enter and leave court premises and while they are in those premises.

The Convener: Fulton MacGregor has a question. Is it a follow-up on that point?

Fulton MacGregor (Coatbridge and Chryston) (SNP): Yes—it is a quick supplementary for Tom Halpin. Will you provide information on the areas that are not taking up the restorative justice options to the same levels? Given the time constraints, I would be happy for you to provide that to the committee after the meeting.

Tom Halpin: I can give you Sacro's position, but the question is difficult to answer, because there is no central register of where such services are available. Because of the investment decisions that are made, such services could be there one day and gone the next—they are not seen as a core part of the justice landscape.

Fulton MacGregor: I am looking for Sacro's position, which was referred to in its submission.

Tom Halpin: I can provide that.

The Convener: That would be helpful.

Oliver Mundell (Dumfriesshire) (Con): I know that all the panel members have touched on communication and efficiency, but I am interested in the comments in Sacro's written evidence on the potential for improved information technology provision. Will Tom Halpin elaborate on that? I am also interested to hear other people's comments.

Tom Halpin: I am sure that all the organisations involved have experienced something similar in trying not only to access information but to get it timeously. We work on the principle that justice should be transparent and open and that case progress information and court decisions should be available, so that those who have a role to play can access that information without having to ask, which allows them to intervene expediently. That is essential.

Douglas Ross: My question is for all the panel members. When someone you have worked with has gone through the court process, do you get feedback from them after every case, either immediately or later? Marsha Scott said that there is a range of issues that could put people off, such as a lack of communication. Sandy Brindley was clear that the court experience is the biggest issue that might prevent someone from reporting a crime or appearing to give evidence. How do you go about evaluating the experience?

I do not want to make this sound like a customer survey, but how do you find out how people felt during the process and who do you feed that back to? Do you just store up the knowledge that there is a great concern about the court process and the lack of communication? How do you disseminate that and share it with others, with a view to changing things for the better for witnesses?

Sandy Brindley: The point is important. Significant effort has gone into improving responses in dealing with sexual offences, but we need to ask complainers whether that has made a difference.

We have an automatic referral protocol with the police. Part of that is an anonymous survey in which we go through with complainers their experience with the police and of forensic examinations. We report monthly to Police Scotland to detail the feedback. That works well: the police have a clear overview of what the issues are and, if any issues come up, the police can address them.

Getting practical feedback from complainers and feeding it into practice is a model that works well. We are discussing the possibility of having a similar model with the Crown Office. We should seek feedback more proactively from complainers and feed it into our strategy work, as well as into the direct practice of justice agencies.

Marsha Scott: The protocol is brilliant. I remind the committee that there were almost 60,000 police calls about domestic abuse last year. We cannot take a more centralised approach because the numbers are so big.

I think that Douglas Ross is asking how we create a feedback loop in the system so that local practice can change quickly in response to what victims tell us. That issue touches on a previous question. All the players in the system need to have enough capacity to do local multi-agency working, because change is created by having a responsive system. If a victim has a negative experience—I absolutely take on board Sandy Brindley's point that that can sometimes happen—that could have been avoided through improved communication, more timeous information or whatever it might be, the system can respond to that only if that is fed back locally, because such issues are not usually central strategic considerations.

One of the first things that go in a system that is stretched for resources is multi-agency working, because it takes a lot of time. However, it also delivers the most important improvements in local systems. An important question for us to look at is how we improve and resource engagement with the other agencies, because that is where we get the feedback from. My experiences in West Lothian tell me that when that works it works beautifully, but everybody needs to be at the table.

Sandy Brindley: We have quarterly meetings with the police and the Crown. We bring together all the advocacy workers from across the country so that the police and the Crown have a direct link to the issues that complainers are facing. Sharing information and raising any issues in that forum seems to work really well.

Marsha Scott: Let me add one point—

The Convener: We are getting a bit pressed for time.

Marsha Scott: I will be quick. We work closely with the Crown Office and Anne Marie Hicks. We have had a really good experience when we have fed back to the strategic level of that organisation on problems where we are picking up a pattern. However, there is a disconnect in part between what happens at the strategic level and what follows through at the local level.

Susan Gallagher: We have a range of mechanisms in place. Our witness service is there on the day, so some people feed back immediately. Some people just want to get out of the building, but others feed back on the day to our witness service their total experience, and that is fed into some of the local VIA teams if possible. Alternatively, the information is fed upwards into our structure, and we use it as experience in our evidence and in work that we do at a strategic level with the Crown.

In addition, we as an organisation undertake surveys. I know that the Scottish Courts and Tribunals Service has also undertaken surveys. There is a wealth of experience out there, which we try to use at the different policy and practice levels that we have.

Tom Halpin: Our evidence is much more at the personal level. I do not think that we are doing the analysis that Douglas Ross seeks.

Liam McArthur: I will quickly follow up Oliver Mundell's question about communication, the availability of information and transparency about cases. We have been made aware of one instance in which the information that was provided to the victim on the state of the case was not just slow but incorrect, which is a concern. Through the better use of IT, could information be made available not just to the victim or to witnesses but to anybody? Would that raise data protection issues? To what extent do victims or witnesses expect bespoke communication of the progress on a case? Is the more generic provision of updates and progress on the case sufficient to keep them abreast and to make them feel that they are aware in a timely fashion, which all of you have referred to?

The Convener: That was not a short question, but it was an important one. I ask for brief answers.

11:00

Tom Halpin: There will be both types of information. Everybody will need generic information to see the general progress of a case, but there will always be bespoke information for victims, witnesses and those who are being prosecuted.

Susan Gallagher: The Crown Office, with Victim Support Scotland, piloted a case progress information service in Tayside for a couple of years. The experience of that pilot was that the information was rapidly changing and the IT infrastructure was not in place to enable a smooth transition from the Crown and the Scottish court system into Victim Support so that we were able to update victims and witnesses.

The experience of victims and witnesses was that it was seen as a positive move that they had somebody to talk to about what was happening. However, in reality, our staff member was running backwards and forwards three or four times a day across the road to the court to get accurate information, because the information was changing.

Inaccurate information is out there and people have been provided with it routinely. An IT structure should assist with that, as long as the information is accurate.

The Convener: Before we close the session, I will ask about the decrease in the use of precognition. Susan Gallagher mentioned in her submission that that has led to unsatisfactory outcomes and that sometimes procurators fiscal are not adequately prepared, which leads to adjournments and so on.

Susan Gallagher: We have experience of individuals who have not been able to give their best evidence because they have not talked to anybody about their evidence in advance of coming into the court arena. We know that, when precognition has been in place, people have felt that they have been able to get information across.

In addition, some assessments are not necessarily being carried out by VIA, so people are walking into court without that knowledge and without the PF and the Crown being able to look at that individual's needs. As such, some people are getting special measures that they do not necessarily feel are right.

People have told us that they were unable to give their best evidence because they were terrified. We have examples of people who were so distressed that they were unable to speak. They had expected to give evidence remotely via closed-circuit television but had ended up in court with the supporter and a screen because that was what was provided. They physically could not speak to give their evidence, and cases could have been dropped or adjourned because of that.

The Convener: What is the reason for the lack of use of precognition? Is it a resource or a cost issue?

Susan Gallagher: You would have to ask others about that. In our humble opinion, the issue is about resource and people's ability to do precognition, which relates to the volume of cases that are coming in, rather than any other issue.

Sandy Brindley: I understand that a policy decision was taken to move away from precognition. However, that does not apply in sexual offence cases; in most rape cases, precognition still takes place.

The Convener: That has been helpful. After you leave, if there is anything that you think that you should have mentioned, we will be happy to receive that information. That has been a worthwhile evidence session with people who are familiar with the court and who go into and out of the court. Thank you very much.

I suspend the meeting briefly to allow the next panel to take its place.

11:03

Meeting suspended.

11:06

On resuming—

The Convener: Before I welcome our second panel of witnesses, I believe that Stewart Stevenson wants to make a brief declaration.

Stewart Stevenson: I would like to declare that I sponsor Michael Clancy's parliamentary pass.

The Convener: Thank you.

It is my pleasure to welcome Liam McAllister from the Aberdeen Bar Association, Stephen Mannifield from the Edinburgh Bar Association, Lindsey McPhie from the Glasgow Bar Association and Michael Clancy from the Law Society of Scotland. We have had apologies from Paul Nicolson of the Airdrie Society of Solicitors.

The submissions that we have received have been very worth while and have provided much information about where we can look at making improvements. The Glasgow Bar Association submission makes an apt point that might help us to focus the discussion. It states:

"Whilst it is obviously right that such serious High Court and Sheriff and Jury Proceedings are prepared and prosecuted thoroughly we are concerned that the 'standard' summary cases are also accorded appropriate attention. The public undoubtedly would expect that serial instances of drugs, public order, dishonesty and violent offences are properly prosecuted by well-resourced and properly supported deputes. Whilst the very significant impact upon the public of High Court offences cannot be overstated it is the case that many more members of the public will be affected by such offences generally prosecuted at summary level."

Using that as a starting point, I invite comments on where improvements could be made.

Lindsey McPhie (Glasgow Bar Association): Thank you, convener and members, for the opportunity to address the committee and thank you, convener, for directing me to that paragraph. It is clear from the general tone of the Glasgow Bar Association submission that, although we are extremely concerned that domestic abuse and more serious cases should be prosecuted at a very well-prepared level, our experience in Glasgow is that what I have referred to as standard summary cases are at the moment being very badly impacted by what appears to be a lack of resources. That is the main thrust of our submission.

As I outlined in another paragraph, deputes sometimes try to deal with up to 10 to 12 cases, all of which are scheduled for 10 o'clock, with numerous witnesses. As I indicated, what I have referred to as standard cases, by which I mean non-domestic abuse cases, can include very complex and difficult cases.

I think that I referred to what are colloquially known as benefit fraud cases, and perhaps sexual offences. A standard assault case—I say that to distinguish from domestic abuse—can involve child witnesses, so a standard domestic court in itself is extremely difficult, and we are concerned that those are being overlooked in the current situation.

The Convener: Okay. Would anyone else like to comment on the day-to-day problems that you are experiencing?

Liam McAllister (Aberdeen Bar Association): Thank you for inviting me down from Aberdeen to speak to you today. I echo what Lindsey McPhie said. The resources are there—it is about the effort and where the time that deputes have, which is limited, should and can be focused.

The thrust of the short and punchy approach in the Aberdeen Bar Association's submission, and the fundamental point that the committee needs to understand if we are to have an effective COPFS, is that deputes need discretion to channel their intellect, their critical skills and their evaluation of evidence or potential evidence, and they need to be able to prioritise at the low level in a busy court with a fearsome sheriff breathing down their neck. Deputes need to be allowed the opportunity to do that and should not be confined or restricted by having to go two or three managerial levels above them to get the authority to do it. You should focus your attention on where they think the public interest is. That is important, and I echo what Lindsey McPhie said in that regard.

The Convener: Does the need to go to someone at a higher level arise because people are on short-term contracts, are relatively inexperienced and do not feel confident?

Liam McAllister: That is a factor. The perception of the Aberdeen Bar Association and in the north-east generally is that, as one of the submissions says, we give deputes huge power and authority to prosecute crime in our courts from a young age, but we constrain or curtail that in certain cases. I do not know why we do that. We should either give them the ability to be lawyers, to think analytically like lawyers and to act independently, or we should not.

I do not know if it is the case, but the Aberdeen Bar Association's perception is that there is a fear around short-term contracts, with people not knowing whether they are going to be kept on after a traineeship. Second-year trainees are often thrown into courts up and down the country, including rural courts where there is no one else. In such cases, they have to adjourn courts in order to make calls. That limits the decision-making ability of deputes at a low level and it creates the churn that is so hated by witnesses, complainers and the accused.

The Convener: To explain the term "churn", it is where a case continues to be adjourned and reappear. If the case is dealt with efficiently in the first instance, there are huge benefits as that frees up the court and access to justice.

Liam McAllister: Absolutely.

The Convener: Okay. Are there any other comments?

Stephen Mannifield (Edinburgh Bar Association): Leaving aside policy decisions for the time being and looking instead at resources, I think it is reasonable to say that the types of resource and the time that is allocated for preparation for domestic cases would, in an ideal world, be available across the board. The difference that we see is that the deputes in courts that do not deal with domestic cases—as Lindsey McPhie said, that could involve complicated frauds, drugs cases that include forensic evidence or cases with child witnesses—are not being afforded the same time to prepare, engage and ensure that cases are ready to proceed.

Resources are always finite, but if there is an opportunity to allow more time for those cases to be prepared as well, rather than taking resources away from the domestic cases, that would be ideal.

As I hope is clear from all the submissions that the committee has received, we all consider ourselves quite lucky as far as the quality of prosecutors in this country is concerned. They are a group of dedicated, intelligent lawyers at every level. It is a question of putting them in a position that allows them to do their jobs to the fullest of their abilities, more than anything else.

11:15

The Convener: That is an important point, and it has come through strongly in all the submissions. It is not a criticism of the deputes who are struggling manfully on. The whole point of the inquiry is to see what we can do to help them to do their job as efficiently as possible.

Michael Clancy (Law Society of Scotland): I echo some of the comments that we have heard. Procurator fiscal deputes who work in our courts day in, day out are dedicated, hard-working professionals, who prosecute in the public interest. As citizens, we depend on their hard work and dedication. As Audit Scotland's report shows, they are working to an extremely high degree, with 88,000 cases prosecuted each year in the sheriff courts. That is against a backdrop of a lowering of resource from Government year on year. Between 2010 and 2015, the Government's overall budget fell by 7 per cent in real terms. Over the same period, the overall budgets of the Crown Office and Procurator Fiscal Service and the Scottish Court Service, as it then was, fell by 14 per cent and 28 per cent respectively. That shows that the staff in COPFS are working very hard against very difficult circumstances.

The Convener: That is a point well made.

Ben Macpherson: I wish to ask about a matter that has not been raised directly in the evidence, although I think it is pertinent. It concerns expert witnesses. Would any of the panellists like to comment on the process of calling expert witnesses, the cost involved and whether you think there is room for efficiency and development in that area for those whom you represent?

Stephen Mannifield: As far as the process is concerned, the vast majority of defence work is done under and through legal aid. It follows that the cost of using expert witnesses is also met from the legal aid budget. On the process involved, the particular defence lawyer would be expected to identify at least one expert, depending on cost. A specific request would have to be made of the Scottish Legal Aid Board once the costs for sanction were known in order to meet the cost of employing that witness.

Thereafter, the witness would usually be instructed to prepare a report and, potentially, if there was a trial on the case, to come along and give evidence in court. That is not always the case because sometimes expert evidence can be agreed in advance, which avoids that necessity.

As for the actual cost of employing experts, I do not know whether my friends on the panel would agree with me, but it appears that, anecdotally, the cost of the experts themselves is increasing. Taking a specific example of something that I think is fairly common now, there is a standard allowance for getting a basic medical report from an accused person's general practitioner. There is a set fee for that. For whatever reason, it is becoming a more common experience for general practitioners to respond to requests for reports of that nature by saying, "We're really sorry, but we're not prepared to do the report for that fee." The defence and, by extension, the accused person are then left in limbo, because the report might be absolutely necessary, for one reason or another, in relation to the defence. Because there is a gap between what the Legal Aid Board will pay and what the general practitioner will accept as payment, you just cannot get the report. That is a narrow example.

Ben Macpherson: That is helpful. Perhaps I can refine my question around the potential use of technology in helping to enable expert witnesses to give their evidence more efficiently and in a way that is more cost effective for all involved.

Stephen Mannifield: Are you asking about the possibility of experts giving evidence by live television link or something similar?

Ben Macpherson: Exactly.

Stephen Mannifield: There is plenty of scope for that. TV links have been introduced more and more for court hearings and facilities are now being made available for lawyers to consult clients who are in custody by Skype or TV link—those have to be secure for reasons of confidentiality. I see no reason why expert evidence cannot be treated in that way more often if the expert does not live within reasonable travelling time of the court in which they are due to appear.

It is important to distinguish between dealing in that way with expert evidence and a normal—if there is such a thing—eye witness. The court has more emphasis on assessing the demeanour and credibility of the witness in giving evidence; there is probably not such an issue when dealing with an expert. There is scope for dealing with expert evidence in that way more often.

Michael Clancy: The evidence from the three medical examiners—Dr Cumming, Dr Henderson and Dr Jamieson—gives the sense of a cri de coeur that those experts are being put upon to do superhuman tasks. One person talks of trial location as a qualification for the job. Another talks of an incipient crisis—he predicts that there will be fewer and fewer doctors who will do that work. He chooses to remain in the job.

We have to be aware of the nature of expert evidence, which is important for complex cases that revolve around difficult issues across a range of points that are not necessarily medical but related to other forensic areas such as forensic accounting.

We must also be prepared for the future. Now is the time to invest to get the right level of evidence and the best evidence on which courts can make their decisions.

The Convener: Do you have a follow-up question on this point, Mary?

Mary Fee: It is on a point that was made earlier. I want to come back to evidence in the submissions—in particular from the Aberdeen Bar Association—about fiscals not being able to "exert their judgment". The evidence from the Edinburgh Bar Association spoke of the "leeching" of the ability to use judgment. I wonder whether the witnesses could explain what they mean by that. Is the removal of the use of judgment done by diktat or is there a lowering of the level required for evidence to take cases forward in particular types of prosecutions? On the back of that, if you are taking forward cases that you think should not go ahead, what impact does that have on the perception of justice, for the victim and the person accused?

Liam McAllister: That is the fundamental issue that the Aberdeen bar wishes to reflect and convey and it is important. Unfortunately, the reality of our criminal justice system—in particular, the lower level courts—is that pragmatism and flexibility are essential for the system to work. There is a perception from the defence bar in the north-east that there is an eradication of a willingness to have decisions made at a low level and to allow discretion. The more readily available that is—the sooner that it can be filtered down to the lower level—the sooner that perception will be eradicated. Therefore all stakeholders, including the accused, will have a better idea—or a better viewpoint—that justice is being seen to be done. I think that that can only be done as it filters down to a very low level.

It is a very difficult decision to make, at times, where you are being asked to be critical of witnesses or to look at a case from a purely legal sense when you have the pressures of public perception behind you. However, I think that what is fundamental to our prosecution service is ensuring independence and someone who can back prosecutors up all the way if that decision has been a justifiable one. That can only come from within—from those higher up the ladder backing them up.

Mary Fee: Can I just ask you something, on the back of that—if you do not mind, convener? When you say "back them up", are you talking about all the victim support services? They should be on board with the reason for a case not being taken ahead and with the support that victims will need to be given. They will need to be fully on board with the whole process to be able to support someone if something is not taken ahead.

Liam McAllister: Yes, I think that it would make the decision-making process easier. The previous panel all conveyed that communication is fundamental. The more involved that witnesses, complainers and victims are in that decision-making process, the more they understand what the legal constraints are and what our law actually is. It may then be easier for them to understand why certain decisions have been made. That might often be the decision that no prosecution is made. Unfortunately, that is the reality of our system—it is just a practical reality. The more informed people are as to why such a decision is made, the better.

The Convener: That is a very useful line of questioning. However, it was not a follow-up, so I will be more strict next time someone jumps the queue.

Fulton MacGregor: Each of you has said today that you feel that the summary court process could be improved. What are the real-terms outcomes for the public under the current situation in which summary courts are not given priority? Do you feel that there are miscarriages of justice or that justice is not being done? Are victims or accused people not getting the proper service?

Stephen Mannifield: Delays resulting from lack of resource are the main thing that I want to mention. That has probably been mentioned in everybody's response.

In a summary prosecution in which there is a plea of not guilty, some months down the line there is a procedural hearing called an intermediate diet. Its purpose, assuming that the accused is still pleading not guilty, is largely to check that both prosecution and defence are prepared for trial. If they are, the case would be carried on to trial in what should be a matter of a few weeks later.

One of the principal issues that the court would deal with at the intermediate diet is whether prosecution witnesses have been cited to attend the trial. It is extremely common—certainly in Edinburgh; I am sure that it is in other jurisdictions, too—that the information that is given to the court at that stage is that witnesses have not been cited, or that citations are out to be given to witnesses, but continuation to trial is sought in any event. The problem that that creates is that lawyers often arrive at trials to find that witnesses—or a sufficient number of them—have not been cited, which means that the trial cannot proceed. As a result, either the prosecution will be adjourned to a later date or, depending on the procedural history of the case—how many cycles of that procedure have been gone through—the prosecution might be brought to an end by the sheriff.

Just from looking at that narrow issue, you can see that justice for the complainer or the accused—depending on the facts of the matter—witnesses and others who are involved in the case is delayed for several months, and that a prosecution that is entirely properly founded may be brought to an end simply because the procedure for citing witnesses has not been carried out correctly.

That would apply equally to a case in which a piece of evidence is not disclosed or a report has not been obtained—although that is not always the fault of the Crown because it relies on other agencies to get such reports. Those are among the types of problems that we face.

11:30

Fulton MacGregor: The last panel told us a wee bit about diversion schemes and pointed to inconsistency in their use throughout the country. Can the panel give a brief view on diversion and whether, if it were used more regularly and robustly, it could free up summary court prosecutors?

Lindsey McPhie: It is probably for members of the Crown Office and Procurator Fiscal Service to answer that question—I presume that it is up to them to decide which cases are appropriate for diversion from prosecution. In the summary courts at the moment we are finding a range of cases—including on racial, homophobic and sexual offences—that would not, because of current policy, be deemed to be appropriate for diversion. I return to the point that a standard summary court can deal with a wide array of cases that have been deemed to be not appropriate for diversion.

I will go back to answer another point. In order to alleviate some of the pressure on the summary courts, if the Crown Office and Procurator Fiscal Service had a clear structure that said how senior a person has to be in order for them to take a decision to discontinue proceedings, we would not have relatively young deputes saying that they cannot make a decision and so have to ask someone more senior. If there were a structure in place that would enable a defence agent to identify in advance that they had to make their submission for a decision in their case to someone of the rank of senior depute, that might alleviate some of the pressure on the deputes in court.

The Convener: I will just clarify that we are not really talking about freeing up court time but about making a more appropriate referral and disposal, so that the case is dealt with adequately, properly and efficiently. The point is about how best to meet the individual's particular needs, so that they do not reoffend and do not appear back in court. People are not aware of the referrals and diversions that are available at local level, which is a huge waste of resource.

Stephen Mannifield: That is right, convener, and takes us back to the problem of having rigid prosecution policies. I will use domestic cases as an example, because it is a type of crime that is a problem across Scotland and is a huge resource issue.

Let us take, for example, a 70-year-old man with no previous convictions and no history of police call-outs to his house for domestic complaints. Neighbours might overhear a loud and aggressive argument between the gentleman and his wife—who is of equally good character and age—and decide to call the police. The police attend, the married couple explain to the police what has happened—they have no reason not to because they think that neither of them has done anything wrong—and the matter is then classified as a domestic incident. The issue that stems from that is that the policy is that the man will be arrested and, if it is a Friday evening, he will be held in custody all the way through to Monday, while a person who has three or four criminal convictions and who has been arrested in the centre of town for being involved in drunken violence might simply be released on a police undertaking or even just kept overnight at the police station until they sober up.

It is entirely right and proper that domestic crime is taken seriously, that such cases are prepared for properly and that the perpetrators are prosecuted to the fullest extent of the law. However, the problem in having rigid policies about how cases are dealt with is that situations such as the one I mentioned arise. I know that it sounds extreme, but such situations are not as uncommon as you would perhaps like to think.

Michael Clancy: Diversion was identified in the Audit Scotland report last September: it identified police officer alternative measures as well as decisions by the COPFS, and it gave statistics showing that something like 50 per cent of all cases involve such disposals. The police had dealt with 250,000 individuals, and over 50 per cent of them—126,000—received non-court disposals. It is quite obvious that if all those cases went to court there would be considerable difficulties.

Lindsey McPhie: As the union of the Crown Office and Procurator Fiscal Service—the FDA—has indicated, the profile of cases that are now reaching court and proceeding to trial can be complex and difficult, with many more cases proceeding to trial in which there is not a ready acceptance of responsibility. In such cases, diversion would be more difficult.

The Convener: Okay. I will bring in Douglas Ross, followed by—

Mary Fee: Could I come in, convener?

The Convener: Not after the last experience. You can keep it and bring it in at the end.

Douglas Ross: I want to ask about centralisation in respect of communication. All the submissions mention—the Glasgow Bar Association submission mentions it specifically—the cost of the hotline to contact solicitors. You all mention—certainly the Edinburgh Bar Association did—that you take it for granted that your first letter will go unanswered, which I think is despicable. That is unacceptable, and I am particularly worried to read it. I also read in the Glasgow Bar Association submission that there have been discussions about the issue and that you are trying to resolve it, but those discussions have been going on for five years. How can we believe that any changes will happen if the issues have been highlighted and the discussions have been going on for so long? Can you expand on the difficulties that you experience because of those issues?

Lindsey McPhie: I would echo Stephen Mannifield's comment that we have a massively positive working relationship with the staff of the Crown Office and Procurator Fiscal Service in Glasgow—they are all extremely hard-working, dedicated professionals and we have a great deal of professional respect for them. As I highlight in our submission, it is difficult for a young depute to stand before a sheriff and explain why a letter has not been answered or a phone call has not been returned. The depute is sometimes unaware that the letter has even been sent.

There is a will to resolve those issues. The plea hotline was set up following discussions: it works well for a while, but deputes are assigned to other business—they have to go to court—so there is nobody there to man the phones or to deal with the numerous pieces of mail.

This may seem like a very basic and pedestrian point but, unfortunately, we have to use a business-rate line and we have to call a call centre, and we are told specifically by the call centre operator that they are not allowed to give out the direct-dial number of any procurator fiscal. I stress that if we meet the fiscal in court the following day, they will give us their direct-dial number or promise to text it to us—there is no unwillingness on their part. However, that makes it difficult—

Douglas Ross: I am sorry, but it is difficult for me to understand why there has been an on-going problem for five years when both sides seem to agree that direct contact is the best way forward. It would save the fiscal depute being embarrassed in court when a letter has been sent to them and scanned into some central reserve that they never see. The situation has been on-going for a long time and both sides agree on the way forward, but someone sitting in a call centre is not willing to give out information. Surely, it should not be difficult to identify the problem area—the business-rate number—then take away that function and contact the fiscal deputes directly.

I presume that once you have dealt with a fiscal depute you would not in the future call the hotline number, but would call the fiscal depute directly?

Lindsey McPhie: Yes, that is correct. We just store the fiscal depute's number.

It would involve a much wider policy decision to say that the direct dial numbers can be given out. It clearly can be done. As I highlighted in relation to the solemn case structuring, the COPFS in Glasgow came along in advance of the practice note and we now have a sheet of numbers, so we can call the designated fiscal on their contact number, which makes a world of difference.

There should not be any reason why that cannot be done in summary cases. I fully agree that it is puzzling that the issue has not been rectified before now.

Douglas Ross: Is the willingness of fiscal deputes to give out their own numbers replicated across the country?

Lindsey McPhie: Yes—I would say that it is.

Stephen Mannifield: That is certainly the case in Edinburgh. It often feels as though the switchboard is a deliberate barrier that you have to get through to communicate with somebody about a case. I do not think that it has helped at all. I am not sure what the costs of having it are. I suspect that it might be more expensive to have it than simply to have people deal with their local offices. I do not have the figures, but the hotline does not seem to serve any useful purpose.

Liam McAllister: I would echo all the comments and observations that have been made by the panel regarding centralisation of communication: it does not work. It has to be done on a regional or local level because our system is based on a defence lawyer and a prosecutor standing up in court and communicating with each other, in whatever form that may be.

Again, I echo the fact that procurators fiscal want to interact with defence agents; they want to resolve matters quickly for everyone concerned, if they can be resolved. Communication is a major factor.

The CJSM—criminal justice secure mail—email system has been introduced. The Aberdeen Bar Association's experience of it has not been overly positive. If we send letters by first-class mail, they may not get placed in the relevant files when

deputes appear in court. We are finding that exactly the same is happening with what is supposed to be a far more secure and far more technologically advanced system, such as we all want to move towards. A more sensible option is to use email—we all use it now. In our private practice, it is becoming so important, yet there are breakdowns in the CJSM system. Emails that have been securely sent are not finding their way to a procurator fiscal depute who can analyse their contents and make a decision that will help to avoid churn and to avoid cases going to trial that do not need to go to trial—a decision that will resolve things for everyone concerned, not just the accused but the complainers, witnesses and victims.

Douglas Ross: I will move on to another issue that was mentioned in the Edinburgh Bar Association submission. The backlog in the court system was reported in the press over the weekend, including the impact that that has on witnesses—the victims of crime and police witnesses—and on the accused and suchlike. In response to the criticism, the point was made that management is as good as it can be and that the courts try their best to manage the cases, but the Edinburgh Bar Association submission says:

> "when it appears that five or even six 'back-up' cases have been called in, it is clear that mismanagement is at play."

I know that that point is particular to the two-week period.

Can you give a bit more information on the management side generally in courts across your areas? This question may be more for the Aberdeen Bar Association, although perhaps it is also for the Edinburgh Bar Association. What has been the impact of the closure of local courts, whose case loads have gone to other courts?

11:45

Stephen Mannifield: I will deal first with the last matter that Douglas Ross raised. The closure of Haddington sheriff court in the EBA's jurisdiction has had a massive effect. I think that you quoted earlier from the portion of the Edinburgh Bar's submission that talks about mismanagement of solemn cases. Edinburgh is now dealing not only with all the sheriff and jury and more serious cases for the Edinburgh area but with all the more serious cases from East Lothian. Those cases—or, at least, the majority of them—would previously have been dealt with at Haddington.

As far as general mismanagement is concerned, it is self-evident that there are big differences between the procedures for summary cases and procedures for solemn cases. When it comes to summary cases, overloading of trial courts is a problem. We did not raise that issue specifically in our submission, because it is linked to not only the COPFS but to the Scottish Courts and Tribunals Service and the court resources that exist. It would not be fair to criticise the COPFS for that.

As far as sheriff and jury cases are concerned, there might be 10 or 12 cases marked down for a two-week sitting of the court. I know that the deputes are under pressure to run trials during that two-week period, but there is almost a scattergun approach, whereby four or five cases are called in and one is picked to crack on with on the basis of what witnesses are there. The fact that I used the word "scattergun" in that description gives members an idea of the type of problem that is involved.

Douglas Ross: I would be interested to hear about the position in Aberdeen.

Liam McAllister: In Aberdeen, we have been affected by the closure of Stonehaven sheriff court, as the volume of business has increased. The court service has a good approach to handling that, but I do not think that the apparent saving from the closure of Stonehaven sheriff court has been fed back into the resources that COPFS should have to tackle the increased volume of business in Aberdeen. I would say that the majority of that volume of business is at the lower end of the scale—it is justice of the peace and sheriff summary court business. The perception of the Aberdeen Bar Association is that COPFS has not been given the additional support to deal with the increase in business that the closure of Stonehaven sheriff court has caused.

Before the closure of Stonehaven sheriff court, the sensible recommendation was made that it would have been an ideal court to sit permanently. The fact that there is a significant amount of jury business in Aberdeen—this relates to Stephen Mannifield's point—means that there would have been enough business for Stonehaven sheriff court to sit regularly, or daily, to conduct jury trials. That would have taken the strain off the Aberdeen Mercatgate building. As Aberdeen is a centralised area, there is a High Court sitting in Aberdeen almost all the time, and that is another court that is not available to hold sheriff jury court business.

There has been an effect on the volume of business in Aberdeen. Has that been reflected in COPFS being given the resources to manage that? On behalf of the Aberdeen Bar Association, I respectfully submit that the answer to that is no.

Douglas Ross: I have a final, brief question on agreeing evidence. What is the biggest challenge to agreeing evidence? Is it the issue of communication that was mentioned earlier? How do we overcome that? It seems that there should be will on both sides to agree evidence, as that

would speed things up and save some witnesses having to come in. Rather than being out on our streets, police officers spend a lot of time waiting around courts just so that they can read out from their notebooks evidence that should have been agreed beforehand. I notice that the Edinburgh Bar Association gave the example of CCTV evidence. If such evidence was presented earlier, that could often do away with the need for a trial.

Could you give a brief answer to that?

Lindsey McPhie: As you said, communication is the main issue. As the earlier witnesses said, when it comes to keeping witnesses and complainers informed, the earlier the Crown and the defence communicate to resolve issues, the better that is for the witnesses and the complainers. The CCTV example that the Edinburgh Bar Association gave is highly appropriate. As the EBA indicated, as soon as the item of disclosure is available, it will often decide the issue one way or the other. If the Crown and the defence could speak to each other about the agreement of evidence as soon as possible, that could save a huge amount of court time and a huge amount of witness expense and inconvenience.

Again it returns to the issue of resourcing and communication. There have been significant improvements in communication around solemn business in Glasgow because resources have been directed there in advance of the practice note being issued by the Lord President and the Lord Justice General, who was the Lord Justice Clerk at that point. There is now a focus on pre-trial preparation prior to the first diet and on issues of agreement of evidence so that it can then be reported to the sheriff at the first diet that witnesses 5 to 9 are no longer necessary for the trial. If similar resources were directed to the summary courts, similar savings could be accrued.

The Convener: A late production could cause problems and mean that not all the benefits are realised. Whose duty is it to make sure that CCTV is available and has been got from the police?

Stephen Mannifield: Are you asking about the process?

The Convener: Yes.

Stephen Mannifield: Ultimately, COPFS is obliged to ensure that the evidence is available. However, again, it is reliant on the police, who have to ingather the CCTV evidence from the witness or the location where the footage was filmed. There is a chain of responsibility, but ultimate responsibility lies with COPFS.

On this point, it is only fair to mention that it is plain that COPFS is aware of the problem. I know that inquiries are being made into the viability of—forgive me if I do not get the terminology absolutely right—a virtual evidence vault. When the police take possession of CCTV footage, it will be uploaded to a secure system to which access can be allowed at an early stage for the Crown and the defence. Of necessity, the Crown would get first access. If that can be brought into existence, and it is very much only at the talking-shop stage, it would help.

The Convener: Those are good practical examples of things that we can focus on and highlight.

Liam McArthur: Douglas Ross has helpfully gone over some of the ground in relation to centralisation and the closure of sheriff courts, which has given rise to some concerns.

Following the point about the opportunities to encourage more agreement on evidence prior to cases coming to court, a view has been expressed to us in recent months that there is quite a bit more scope to make improvements there. From what Lindsey McPhie has said, I get the feeling that she does not necessarily share the view that a great deal more can be done or that it would have a great deal of impact on improving the efficiency of the work of our court system. Is that a fair conclusion to draw?

Lindsey McPhie: It probably depends on the nature of the case. If a case depends on eyewitness evidence and the perception of witnesses and their demeanour, that will not be capable of agreement. If it is a case in which expert witness evidence might be to speak to specific issues of fact, that could be ripe for agreement.

It might be helpful to explain that, in every summary case, the trigger for disclosure of the Crown case is what is called the letter of engagement. As soon as the procurator fiscal receives the letter of engagement, which denotes that a defence agent is instructed for the accused, the disclosure is then uploaded and we can receive it. When it is received, the areas of evidence that are capable of agreement can be identified.

I do not see there being any difficulty with more use of agreement of evidence, depending on the nature of the case. It comes back to the trigger of everything being available for the intermediate diet, which is the calling of the case before the trial. At that stage, it is the case that the procurators fiscal will ask whether the evidence of witness Y is capable of agreement. Provided that the disclosure is in your hands and you have had an opportunity to discuss things with the client, an answer can be given then and there and it will not be necessary for that witness to be called.

Liam McArthur: So, in a sense, some of the problems that the court system is struggling with at the moment would defeat some of the aspirations for earlier disclosure, as things stand.

Lindsey McPhie: Yes.

Stephen Mannifield: Lindsey McPhie makes the good point that the earlier in proceedings a defence solicitor has the evidence in their hands, the better able they are to assess whether the evidence is capable of agreement. For example, if you arrive on the morning of the summary trial and are passed a note across the table that says that a certain witness cannot attend that day, for whatever reason—perhaps a police officer is on other duties—and you are asked to agree their evidence, you are almost duty bound to say that you cannot do that, unless the matter is something that is extremely straightforward. That is because, in such a circumstance, you will not be in a position to have properly considered it in the context of the evidence, whereas, if you had had it before the intermediate diet, you could have dealt with it. For example, if the evidence could not have been agreed, you might have been able to postpone the trial at that stage rather than getting all the way to a trial with witnesses having been cited and attending court, with all the attendant expense and worry involved in that.

To cut a long story short, the sooner we have the evidence, the better able we are to consider agreement and the more evidence could be agreed.

Liam McAllister: I would make a final observation on agreement of evidence. From the previous panel, the committee has already picked up on the issue of precognition—or, rather, the lack of it in the majority of cases that COPFS deals with. There is a duty on not only defence agents but the Crown to agree evidence, including the defence evidence. Often, however, there is not enough time for deputes to consider defence evidence properly. That might sound perverse, but they are focusing on their own case. A lot of court time could be cut down if they were given the time to precognosce and to consider the defence evidence—defence productions, witnesses and experts—and if, as Mr Ross alluded to, police officers were not called to give evidence in situations in which it does not seem as if there is a lot of dispute about what they are saying or adding. It might be that there are some matters in relation to which a short precognition by the depute might avoid the need for that police officer to have to come to court at all. That precognition could be drafted in the form of a joint minute that clarified a matter in a paragraph or so, and that would mean that that witness was no longer needed.

There is an onus on the Crown and the defence to agree evidence. However, often, we forget that fiscals do not have the time to consider the defence evidence and they simply say that the onus is on the defence to lead the evidence.

Michael Clancy: Although the concerns that we have heard are genuine and immediate, we ought not to forget that there is an on-going evidence and procedure review that is looking at smartening up the summary justice system. The use of technology is going to be a key issue in all that. If I can inspire colleagues to look to the sunny uplands of the future, the use of digitally captured evidence—documents, photographs, CCTV recordings and so on—would improve the agreement of evidence procedure immeasurably. We must encourage the Scottish Courts and Tribunals Service to take on the challenge that the Lord President issued to have clear-sky thinking. That would also involve changes to procedure and to the way in which the evidence of children and vulnerable witnesses is captured and used. I think that we are not yet at a point at which the courts are more efficient. That is not happening at the moment, but we have hopes it will happen in the future.

The Convener: We have talked to the Crown Office and Procurator Fiscal Service and, informally, there are high hopes for IT. However, it is not a panacea. Mr McAllister mentioned that you are doing more with email, but that it needs people to direct that—there is still a resource issue involved in using the technology properly and having the manpower to do that.

12:00

Michael Clancy: Absolutely, and I refer to my comments at the start of the meeting, because we are talking about cuts in the budget, rather than an expansion of the budget. It might be that through the proper use of IT by people who are trained appropriately and a complete buy-in by those who collectively participate in the process, efficiencies will be made in the future, which can be applied elsewhere.

The Convener: I am letting this part of the meeting go on, because the evidence that we are getting from you—people who use the courts and are at the coalface every day—is absolutely essential. I will let the questioning continue until members are satisfied.

Douglas Ross: Thank you, convener. Mr Clancy, I am more encouraged by what you have just said than by what you wrote in your submission. You seem very much in favour of the use of technology, yet your written submission includes the caveat about issues such as internet poverty and disadvantaging certain groups in

society. Can you marry up your positive comments from a couple of minutes ago with that point in your submission and tell us how significant you think such issues are?

Michael Clancy: Internet poverty is quite significant. Citizens Advice Scotland carried out a survey of internet poverty in deprived areas of Glasgow and found that 42 per cent of the study's respondents had never used the internet. That is a remarkable statistic.

Douglas Ross: How does that compare with statistics on people who are involved in the court process? We are looking at how to use technology to improve efficiency in the court process, rather than examining general issues about access to the internet and broadband—we have those issues across the Highlands and Islands. We seem to be slightly confusing the issue. As I said, when you speak to us, you sound as though you are very much pro the use of IT, yet you have raised the caveat of the CAS findings on internet poverty.

Michael Clancy: There is always a caveat—I have to give myself some wriggle room. The discussion that we have had about the evidence and procedure review and the use of IT is about court users, such as my colleagues here and the Crown Office and Procurator Fiscal Service itself. If we look at the engagement of victims and witnesses, we can see that the application of technology, particularly when there are court closures across the country, could allow greater participation by people in that group, but that is where the caveat applies. It is about how technology is used right across the board: there will be high use by those who are engaged in the justice system daily, such as solicitors, procurators fiscal, advocate deputes and so on, whereas we will have to up the game for those whose engagement is more periodic. That is the relevance of the reference to internet poverty.

John Finnie: My question is for Mr Mannifield and relates to disclosure and what he referred to as a "notable minority" of cases. You talked about a situation in which there may be two statements noted from someone, but only the statement of evidence that is less than helpful to the defence client is disclosed, and then it is subsequently discovered that there is beneficial evidence in the second statement, which has not been disclosed. That seems very sinister and worrying.

Stephen Mannifield: I do not think that it is as sinister as it might appear to be at first blush. I suspect that there is a natural focus on the part of the police and the COPFS to ingather what might be considered to be helpful prosecution evidence, and—

John Finnie: But that flies in the face of the disclosure of all evidence, beneficial or otherwise, that police officers have to do.

Stephen Mannifield: If I can continue with what I was saying, I do not think that there is a lack of willingness to provide exculpated evidence where it exists. Again, I am speculating, because I am not part of the prosecution system, but it often seems—certainly in less serious cases—that crimes are investigated until the quality and quantity of evidence that is required potentially to prove a crime has been obtained. That evidence is disclosed and, thereafter, any inquiries that are to be made in relation to the defence position are left to the defence.

A specific example of that might be where a suspect is interviewed by police prior to being charged. This does not always happen, but during that interview the suspect might lay out their position, which might incorporate an alibi, or in the case of an assault, they might say that they were defending themselves. Often, the information that is provided by the accused is not followed up by the police unless it is potentially useful to the prosecution in disproving what the accused might have said, for example in relation to an alibi.

Like most of the criticisms of the COPFS in the written and verbal submissions, I suspect that the problem largely lies with staffing and resourcing issues. I would not like to cast doubt on the integrity of the prosecution service.

John Finnie: Are you casting doubt on Police Scotland?

Stephen Mannifield: Or indeed Police Scotland. I was referring to—

The Convener: Or anyone else.

Stephen Mannifield: Yes.

John Finnie: You go on to say that when the defence inquires about issues with the COPFS, the response comes back in the form of a memo rather than a statement, and memos are not necessarily disclosed.

Stephen Mannifield: That is a fairly narrow issue. It was important to raise it in the submission but it is not a common feature of prosecution cases. Again, it might come down to the time available to police officers. As far as the prosecution is concerned, a memo is simply an email that is passed to the prosecution with a response from a police officer, whereas if a statement is to be provided, the officer has to sit down and formally prepare a written statement that has to go through the channels with COPFS, and thereafter would be disclosed.

I suppose that it is a question of defence solicitors' assessment of what might be relevant to

the defence being different from that of the COPFS.

John Finnie: On one level, it seems immaterial whether it is called a statement or a memo. If it is information that is pertinent to the case, it should be disclosed.

Stephen Mannifield: I would agree with that, and the defence would agree with that, but if a formal witness statement is received into the Crown Office or a particular procurator fiscal's office, it is a red flag that it is something that should be disclosed. I know that it seems a narrow distinction, but if it arrives in the form of an email, it is just a response to a request for information and it might not automatically be treated as something that should be disclosed. That is where we have a difficulty. However, I cannot stress enough that that is a fairly narrow issue within the broader problems that might exist.

The Convener: It may be an issue for us to raise with the fiscals when they come before us.

John Finnie: Yes, indeed.

If it is a pertinent issue locally, is it being followed up? You used the term "notable minority".

Stephen Mannifield: As luck would have it, I am scheduled to have a meeting on behalf of the association later today with our local COPFS management, so I will follow it up then.

The Convener: It is very pertinent, then.

John Finnie: Perhaps you could let us know how you get on.

Stephen Mannifield: I will do.

Rona Mackay: I was quite concerned to read in the Edinburgh Bar Association's submission about the issue of whether non-appearance warrants should be enforced by police officers. You explained that, historically, if there was a good reason, the COPFS would arrange an invitation and set a date. That practice has stopped, so vulnerable people are basically being arrested.

Stephen Mannifield: We were advised some time ago—I cannot remember exactly when, but it might have been more than a year ago—that the practice of offering invitation warrant appearances was being brought to an end. By and large, that has proven to be the case. The Crown might have decided to stop issuing them because it was felt that unreasonable requests were being made. Again, this is educated speculation, but the COPFS might have been getting too many requests to deal with. However, we have now gone too far the other way. It is fair to say that now and again—I stress that it is occasionally—the odd invitation appearance might be offered, but far too often the response is, "I'm sorry, but there's a policy that we don't do that".

Rona Mackay: What is the timescale? When did the policy start?

Stephen Mannifield: It was over a year ago. I am sorry that I cannot be more precise.

Rona Mackay: Are a significant number of cases affected?

Stephen Mannifield: Oh yes, absolutely. It is a regular problem faced by defence agents and people who are subject to warrants, as described in our submission. When I sought the views of the members of the association in preparing the written submission, the issue was raised on several occasions. We would describe it as a problem.

Mary Fee: I will be very brief. I want to return to Mr Mannifield's comment about the rigid policy in relation to domestic abuse cases. Does such policy apply only to domestic abuse cases, or are there other types of crime that are subject to the same kind of policy?

Stephen Mannifield: That is a very good question. Our submission refers to offences that have a racial element of some kind. Other categories of case included in the same bracket would be those where there is an allegation of prejudice against someone's sexual orientation or religious persuasion of one type or another.

I was careful in my description of the policy in the written submission. I call it a "stated policy", rather than a published policy. Across the country, if you were to approach a depute about a case involving one of those types of behaviour—or the example that I gave much earlier of the 70-year-old man who had never been in trouble—and to point to good evidential reasons why it would not be in the public interest for the case to proceed, it would be fairly common to receive the response, "I'm sorry, but my hands are tied. You know the policy in these cases".

When you hear from COPFS, you might want to raise the issue of when a policy is not a policy. As I understand it, procurator fiscal deputes have guidelines, but the consequences for deputes who make a decision that is not in accordance with those guidelines and do not prosecute in line with the guidelines are that they would not be treated very kindly. That means that the guidelines amount to the policies that I have described.

Mary Fee: Who would not treat them kindly?

Stephen Mannifield: Their superiors.

Mary Fee: What would the consequences be?

Stephen Mannifield: That would be speculation on my part. Our submission refers to a fear culture and to the short-term contracts that are offered to young procurator fiscal deputes. If you are constantly concerned with the renewal of your

contract, you have a natural disinclination to not follow guidelines.

Lindsey McPhie: The impact of the perhaps perceived lack of discretion is that the accused will then just proceed to trial on a narrow point, whereas the exercise of discretion could have saved the trial happening altogether.

I am not saying that there should not be protocols and guidelines. As I said earlier, it would perhaps be helpful if defence agents were aware of the level of seniority that applies before that decision can be taken, because we sometimes find ourselves in the difficult position of saying to a respected but young colleague, "Would you mind terribly if I tried to go above your head?" That seems like professional discourtesy when in fact you greatly respect their abilities and are simply trying to identify who you should be approaching.

The anxiety about these cases is also applicable to the accused. Cases involving aggravation, sexual offences and child witnesses are complex cases to prepare and in due course the Justice Committee might want to extend its inquiry to the wider criminal justice system and the resourcing that is available for the defence in respect of the difficult and complex cases that defence agents deal with.

12:15

The Convener: I am conscious of time, and we have not yet covered the issue of the Inspectorate of Prosecution in Scotland. It is a little-known independent statutory inspectorate and a lot of the submissions that we have received either do not comment on it or otherwise show that people have not heard of it. However, the Law Society made some helpful comments about possibly increasing the inspectorate's effectiveness, and I ask Michael Clancy to speak about that.

Michael Clancy: Certainly, convener. We have not had much contact with the inspectorate—and I use the word "much" advisedly. With regard to the relevant legislation, we believe that it was a good idea to create such a body. However, on considering the issues closely, we decided that there were ways to improve transparency and independence and that bringing on board people who were not procurators fiscal or employees of the COPFS would be a good idea.

There is a February 2014 memorandum of understanding between HM chief inspector of prosecutions in Scotland, the director general of justice in the Scottish Government and the Lord Advocate. It behoves us to be aware that the inspectorate exists and issues reports to the Lord Advocate. There might be advantages to a broader appreciation of its role.

The Convener: The issue of the transparency of terms and conditions of appointment is important.

Michael Clancy: Indeed.

The Convener: At the moment, the Lord Advocate is under no statutory duty to consider the inspectorate's recommendations. Perhaps that is something else that could be considered.

Michael Clancy: I am sure that the Lord Advocate considers them and would act on something that the inspectorate found to be worrisome.

We live in a world that is much more transparent than it used to be. The transparency agenda has shone a light on other areas of the justice system, and this is an area that might also benefit from that.

There was talk of post-legislative scrutiny, and this is an issue that could be covered by that. Certainly, when Mr Stevenson chaired the Standards, Procedures and Public Appointments Committee, there was an examination of the legislative process and we were very much in favour of post-legislative scrutiny at that point. We remain so, at the risk of giving Parliament more work to do.

The Convener: We are keen to do more post-legislative scrutiny, so we welcome that suggestion.

I have let this question-and-answer session run on because your submissions were so helpful that I wanted to get as much as possible on the record. I thank everyone for attending. We appreciate it.

The next meeting of the committee will be on 1 November, when we will continue taking evidence as part of our Crown Office and Procurator Fiscal Service inquiry. We will also have an evidence-taking session on the future of the British Transport Police in Scotland.

12:19

Meeting continued in private until 12:46.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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