JUSTICE 1 COMMITTEE

Wednesday 8 October 2003
(*Morning*)

Session 2

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JUSTICE 1 COMMITTEE
9th Meeting 2003, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Mr Stewart Maxwell (West of Scotland) (SNP)

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)
*Marlyn Glen (North East Scotland) (Lab)
*Michael Matheson (Central Scotland) (SNP)
Margaret Mitchell (Central Scotland) (Con)
*Mrs Margaret Smith (Edinburgh West) (LD)

*attended

COMMITTEE SUBSTITUTES

Roseanna Cunningham (Perth) (SNP)
Helen Eadie (Dunfermline East) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

THE FOLLOWING ALSO ATTENDED:

Hugh Henry (Deputy Minister for Justice)

THE FOLLOWING GAVE EVIDENCE:

Professor Christopher Gane (University of Aberdeen)

CLERK TO THE COMMITTEE

Alison Taylor

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 3

Scottish Parliament

Justice 1 Committee

Wednesday 8 October 2003

(*Morning*)

[THE CONVENER *opened the meeting at 10:03*]

Item in Private

The Convener (Pauline McNeill): Good morning everyone, and welcome to the ninth meeting in session 2 of the Justice 1 Committee. As usual, I would be grateful if members would turn off their mobile phones and pagers. I have received only one apology, from Margaret Mitchell.

Agenda item 1 is to ask the committee to agree to consider item 7 in private. Item 7 relates to the consideration of candidates for the post of adviser to assist the committee in its deliberations on the bill to reform the High Court of Justiciary, the Criminal Procedure (Amendment) (Scotland) Bill. Is that agreed?

Members *indicated agreement*.

Subordinate Legislation

Victim Statements (Prescribed Courts) (Scotland) Order 2003 (draft)

10:04

The Convener: Although we have quite a lot on this morning's agenda, the number of papers is probably slightly disproportionate to the amount of business, so I ask members not to be put off by that.

I welcome the minister to this morning's meeting. I know that he was not feeling well yesterday, so I am pleased that he has been able to make our meeting today.

I refer members to the note prepared by the clerk and call the minister to speak to and move motion S2M-421.

The Deputy Minister for Justice (Hugh Henry): As the committee is aware, the Criminal Justice (Scotland) Act 2003 introduced a new right for victims to make a written statement to the court about the impact on them of the crime. It sought not to erode the rights of the accused but to bring a better balance to a system in which victims sometimes feel alienated and do not have a right to tell the court, in their own words, how the crime has affected their life.

We realise that that is an important and unprecedented development and so we intend to pilot victim statement schemes for two years. It is important that we test the procedure and are convinced that it will work in the way in which we intend it to. The pilot scheme will inform our decision on whether the schemes should be rolled out across Scotland.

The instrument before us prescribes the courts in which victim statements will be piloted. There will be two pilot schemes: one covering Edinburgh sheriff court and the High Court; and one covering the sheriff courts in Kilmarnock and Ayr and the High Court on circuit in Kilmarnock. The victim statements steering group, which is overseeing the detailed operational procedures for and implementation of the pilot schemes, agreed the pilot areas and took into account the need to: ensure that the throughput of cases is likely to be high enough to produce a robust evaluation; pilot in areas with sheriff courts and High Courts; pilot in a semi-rural area as well as in an urban area; and avoid piloting in areas that were operating other pilot schemes.

The Procurator Fiscal Service will operate the pilot scheme covering Ayr and Kilmarnock. In Edinburgh, the victim information and advice office will operate the pilot scheme, working closely with

the Procurator Fiscal Service. There is on-going discussion with staff in the pilot areas and local liaison arrangements are being finalised.

The pilot schemes will be closely evaluated, which will help to inform the decision on whether victim statement schemes are rolled out across Scotland following the pilot period. In other words, the Scottish Parliament will have the opportunity to reflect on the success or otherwise of the scheme before it is implemented elsewhere. The affirmative nature of the instrument will ensure that Parliament has the opportunity to debate and approve any future roll-out.

I move,

That the Justice 1 Committee recommends that the draft Victim Statements (Prescribed Courts) (Scotland) Order 2003 be approved.

The Convener: The minister has agreed to take questions of clarification if that would help members before they comment on the order.

During the passage of the Criminal Justice (Scotland) Bill, some organisations expressed reservations about the usefulness of victim statements. I think that the Executive's response to those concerns has been correct. You said that the Procurator Fiscal Service will be in charge of the scheme in Ayr and Kilmarnock, but I did not catch who you said would run the scheme in Edinburgh.

Hugh Henry: The Edinburgh victim information and advice office will operate the pilot scheme in Edinburgh. It is part of the Crown Office.

The Convener: Is the reason for having two pilot schemes to allow us to assess the effectiveness of implementing the scheme in different ways?

Hugh Henry: It is more to do with management than it is to do with assessment. We wanted to run the pilot schemes in places with the necessary resources and expertise. The evaluation and monitoring will be the same irrespective of who manages the service and must be rigorous. As you indicated, there was controversy during the passage of the bill and some people expressed concerns about the impact of the proposals and about whether victim statements would give victims an unfair advantage over the defence.

Not only are we continuing to monitor what is happening elsewhere with regard to such schemes, but we will examine closely the results of the two pilots. We would not wish to go ahead with the schemes if there were serious difficulties with them, nor, I am sure, would the committee and the Parliament. We do not expect there to be any great difficulties, although there will, no doubt, be some teething issues. It is right that we reflect on the success of the scheme and learn any lessons. We should evaluate the pilots carefully and then move on. The question of who operates the scheme is more one of management than one of scrutiny and evaluation.

The Convener: Does that mean that, once the Executive has assessed the pilot and is satisfied about the best way to run it, the scheme will be delivered in one particular way throughout Scotland?

Hugh Henry: And managed by one particular part of the service?

The Convener: Yes.

Hugh Henry: Not necessarily. I am sure that we will reflect on the day-to-day experiences at Ayr, Kilmarnock and Edinburgh sheriff courts. I would not suggest that there is any predisposition towards one part of the service or another. Local circumstances will be reflected, and we will consider those as part of our evaluation.

The Convener: So the operation of the scheme could be the duty of the Procurator Fiscal Service in one part of the country and up to victim information and advice in another.

Hugh Henry: In theory, that could be the case. Victim information and advice and the Procurator Fiscal Service work closely with each other, and will continue to do so, but the victim information and advice service has not yet been rolled out across Scotland. Once it has been, we will have an open mind as to how the scheme will operate best. No doubt, the committee will wish to return to that. It will wish to ascertain whether some of the suggested potential consequences have, in fact, occurred and to assess who is best placed to look after the management of the scheme.

Mrs Margaret Smith (Edinburgh West) (LD): I have not had previous involvement with this, so I seek clarification. Generally speaking, the proposals for victim statements are a good idea, but I wonder about their purpose. Are they intended to offer people a chance to have their say, as part of the process of coming to terms with what has happened in their lives or in the lives of those around them, or are they intended as a substantive statement, which, alongside the evidence led in court, will influence the sentencing decision? If the latter is the case, has the judiciary been given any guidance on what weight should be given to victim statements, especially in relation to other evidence?

Hugh Henry: We are not considering the principles of the scheme today; Parliament has already decided on those. The order before us today determines in which courts the scheme will operate.

When it considered whether or not to introduce the scheme, the Parliament was influenced by the

need for the circumstances, the plight and the feelings of victims to be given some proper weight. All too often, victims felt alienated and marginalised, and that their voices were not being properly heard.

The Sheriffs Association expressed concerns about whether the statements would place more of a burden on the victims. Guidance will be given on procedural matters, for example the stages at which the statements will be lodged and when they will be considered. There will also be guidelines on when the statements should be brought into the public domain. If the procurator fiscal discovered something in a victim statement that was in conflict with evidence led during the case—notwithstanding the fact that the victim statement would not normally be considered until after conviction, but before sentencing—the procurator fiscal would be under an obligation to ensure that any such conflicting information was made available to the defence. In general, the weight that the statement would carry and the influence that it would have would be a matter for individual sheriffs.

10:15

The Convener: If it helps members, we have a policy statement on the principles behind the measure from Jim Wallace, who was the Minister for Justice at the time. My recollection is that, at present, sheriffs can use the information for the purposes of sentencing. That will not change. The principal change will be that the victim will have a right—or not, as the case may be—to write down a statement and the duty to collect one will be reinforced. The policy statement gives the exact position on that.

Mr Stewart Maxwell (West of Scotland) (SNP): I understand that the scheme is a pilot and that pilots differ from full schemes, but transfer between courts is an issue. I believe that, if a case starts in an area in which the pilot scheme does not operate and ends up in an area in which the scheme operates, a victim statement cannot be considered at the point of sentencing. Is that correct?

Hugh Henry: If the case starts in Edinburgh, Ayr or Kilmarnock sheriff court and is then transferred, the right to have a victim statement considered will transfer with the case. If the case starts in a court in which there is no right to make a victim statement, there will be no right to introduce such a statement at a later stage if the case is transferred to Edinburgh, Ayr or Kilmarnock. Because the scheme is a pilot, we want to ensure that it works as smoothly and cleanly as possible. The introduction of the right to make victim statements in areas other than those specified would cause more difficulty than it was worth. It is right that the demarcation should be fairly rigid.

Mr Maxwell: I accept what you say about the pilot and that there are always anomalies. However, when cases end up in the courts that you mentioned, people might feel slightly aggrieved if the victims in the cases before and after theirs are not allowed to give a statement because the cases happened to start just across the border in another area, whereas the victim in their case is allowed to give a statement.

Hugh Henry: That might well happen and it would be an unfortunate consequence, but the issue cannot be resolved easily. We must ensure that the pilot is robust, works effectively and efficiently and is properly evaluated. I hope that we will demonstrate that the system works well and that it should be applied elsewhere in Scotland.

Mr Maxwell: The Executive has consulted on the categories of prescribed offences. Originally there were only three categories, but the category of racial crimes was added as a result of the consultation. Why was it decided to have categories in the first place, rather than having a catch-all provision under which victims of any crime would be allowed to make a statement? Why are some crimes included and others excluded?

Hugh Henry: It was felt that some types of crime have greater consequences for the victim than others do. The schedule to the Victim Statements (Prescribed Offences) (Scotland) Order 2003 contains a fairly wide list of offences, which covers most offences that involve some degree of trauma for the victim. The categories include non-sexual crimes of violence, sexual crimes of violence, indecent crimes, housebreaking and, as you say, racially motivated crimes, which were added following the consultation.

Road traffic offences have also been included. I am sure that most MSPs have come across cases in which the family of a person who has been injured as a result of a road traffic offence feels aggrieved. There have been some high-profile cases in which the victims' families have felt that insufficient attention was paid to their circumstances. There is a good reason for including road traffic offences.

It is worth reflecting on the fact that, following the pilot, there will be the power to prescribe all offences, if that were considered appropriate. In other words, once the committee and the Parliament have had an opportunity to reflect on how successful the pilot has been, they might well decide that, instead of just a certain list of offences being prescribed, they want any offence to be covered.

Mr Maxwell: I thought about an example that did not seem to fit into the list—crimes against

shopkeepers or shop workers. Such crimes are not necessarily violent and do not fall easily into other categories, but many shop staff are the victims of quite traumatic robberies. I do not know whether that kind of crime would fit within any of the prescribed categories.

Hugh Henry: Assault would certainly—

Mr Maxwell: I appreciate that, but I am talking about crimes against shop workers that do not involve an actual physical assault.

Hugh Henry: I accept what you say. Once the pilot has been completed, there will be the opportunity to widen out the scheme.

You are aware that the Victim Statements (Prescribed Offences) (Scotland) Order 2003 (SSI 2003/441) is being considered under the negative procedure rather than under the affirmative procedure. There are several offences in several categories in relation to which people will, I am sure, see the benefit of having a victim statement. I hope that that will strengthen our determination to extend victim statements throughout Scotland and perhaps to extend the list of offences.

The Convener: As the minister said, the instrument in which the prescribed offences are listed is a negative instrument.

I concur with Stewart Maxwell's view that it is worth considering including in the list the crime of robbery. If someone is held at knifepoint and there is no assault, that would be the crime of robbery, which is not listed, even though the episode is perceived as being violent.

Hugh Henry: We will reflect on what the committee has said and will consider whether there is any justification for extending the current list. At any rate, there will be the opportunity to widen it out at the end of the pilot.

The Convener: Thank you very much. I do not think that there are any further comments or questions.

Motion agreed to.

That the Justice 1 Committee recommends that the draft Victim Statements (Prescribed Courts) (Scotland) Order 2003 be approved.

Victim Statements (Prescribed Offences) (Scotland) Order 2003 (SSI 2003/441)

The Convener: Under agenda item 3, we will deal with a number of instruments subject to the negative procedure, which is different from the procedure under which we have just considered the draft Victim Statements (Prescribed Courts) (Scotland) Order 2003. We are grateful that the minister has agreed to stay to clarify any points that arise.

We have had some debate on SSI 2003/441 already. As there are no further comments on it, are members happy to note it?

Members *indicated agreement*.

Victims' Rights (Prescribed Bodies) (Scotland) Order 2003 (SSI 2003/440)

The Convener: Are

Members *indicated agreement*. members happy to note SSI 2003/440?

Children's Hearings (Provision of Information by Principal Reporter) (Prescribed Persons) (Scotland) Order 2003 (SSI 2003/424)

The Convener: The order is reasonably straightforward. Are members happy to note it?

Members *indicated agreement*.

Gaming Act (Variation of Fees) (Scotland) Order 2003 (SSI 2003/403)

The Convener: Agreeing the variation of fees for gaming is an annual event. As there are no comments on the order, do members agree to note it?

Members *indicated agreement*.

Criminal Justice (Scotland) Act 2003 (Transitional Provisions) Order 2003 (SSI 2003/438)

The Convener: Is the committee happy to note the order?

Members *indicated agreement*.

The Convener: I thank the minister for coming along to our meeting.

Petitions

Road Traffic Deaths (PE29)

Dangerous Driving Deaths (PE55)

Road Accidents (Police 999 Calls) (PE111)

Dangerous Driving Deaths (PE299)

Dangerous Driving Deaths (PE331)

10:25

The Convener: We move on to item 4. We have agreed to consider petitions on a quarterly basis, and we have a number of petitions before us. The first petition, PE29, is from Alex and Margaret Dekker; PE55, PE299 and PE331 are from Ms Tricia Donegan; and PE111 is from Frank Harvey. I refer members to the various lengthy papers on the petitions.

I ask whether members are content to consider the petition from Frank Harvey separately, as it raises separate traffic issues in relation to police attending 999 calls. Is that agreed?

Members *indicated agreement*.

The Convener: I open the discussion for comments on petition PE111.

Michael Matheson (Central Scotland) (SNP): The Justice 1 Committee has been pursuing this issue for some time, but we still have not got to the bottom of some of the matters that we have been trying to address. I am broadly in favour of what is proposed in option 9 of the paper. We should probably pursue all three of those objectives.

I note that the papers contain a copy of a letter of 30 January 2003 from the Lord Advocate to Christine Grahame, in which the Lord Advocate undertakes to keep the committee updated. I do not have a copy of any further correspondence from the Lord Advocate. Has he kept us up to date on the issue?

The Convener: The committee has received nothing further.

Michael Matheson: There are several loose ends that need to be tied up. Option 9 and the three objectives that it contains will address those issues. I am keen for us to continue to pursue the matter, as we have not got to the bottom of the issues that we are trying to consider.

The Convener: Thank you, Michael. The petitioner has helpfully attached several press articles that we have probably all read. Seeing them all together highlights the fact that there is a particular issue to address. [*Interruption.*] Sorry, are you talking about the Dekker petition, Michael—PE29?

Michael Matheson: Yes, I am.

The Convener: Members might be aware of a report on that issue, which has been out for several months. I do not know whether members have had a chance to look at that. Does anyone dissent from Michael Matheson's view that we need to keep the issue live?

Mr Maxwell: I do not want to dissent from Michael Matheson's view. I concur with what he said. However, I seek some clarification. As well as the three suggested actions under option 9a), there is also a suggested option 9b). Are we talking about all those suggested actions? I think that we should take all those actions, not just the three suggested actions in option 9a).

The Convener: When you say option 9a), are you talking about the list that begins with the suggestion to write to the Executive?

Mr Maxwell: Yes. I am just seeking clarification.

The Convener: Okay. We will write to the Executive, asking for an update on when the steering group will have reached its conclusions on the decisions in the Department for Transport, Local Government and the Regions report. We will also ask whether the ISCJS—what is that? Could somebody please clarify what those initials stand for? [*Interruption.*] I am advised that it is the integration of Scottish criminal justice information systems—what a mouthful. We will ask when the ISCJS will hold data on serious injuries caused by dangerous driving. We will also ask about the time scale and outcome of the survey of convicted careless and dangerous drivers. We can also write to the Lord Advocate to request an update on progress with a report that contains 80 recommendations. Is that agreed?

Members *indicated agreement*.

Michael Matheson: Will that request cover the Lord Advocate's letter of 30 January?

The Convener: We can refer to his letter to Christine Grahame, who was then the committee's convener, and ask him to follow that up.

10:30

The Convener: As agreed, we will deal with Mr Harvey's petition separately. Do members have comments on the petition?

Mrs Smith: I am sorry, but I would like to return to petition PE29. The Lord Advocate's letter of 30 January says:

"I have decided that there should now be a presumption that offences under Sections 1 and 3A of the Road Traffic Act 1988 will be prosecuted in the High Court".

That is one measure that people have called for. However, our papers said that a problem in the past was that sheriffs had not referred cases to the High Court. Can we ask the Lord Advocate to clarify that comment in his letter? Do fiscals now send such cases to the High Court and not to the sheriff court as a matter of course, so that making that judgment is not in the hands of sheriffs?

Michael Matheson: Two separate issues are involved. Procurators fiscal are meant to take offences under sections 1 and 3A of the Road Traffic Act 1988 to the High Court. It is worth checking that that is happening. It must also be ensured that cases that have been tried in a sheriff court but for which referral to the High Court is thought to be appropriate for sentencing are being referred to the High Court. I understand that several cases that should have been referred to the High Court for sentencing after being tried in a sheriff court have not been so referred, although an undertaking to do that was given.

Mrs Smith: Can we ask the Lord Advocate to clarify those matters?

The Convener: We have returned to petition PE29 by Alex and Margaret Dekker. You would like the Lord Advocate to clarify whether the presumption that offences under sections 1 and 3A of the 1988 act should be referred to the High Court is in operation.

Mrs Smith: That relates to paragraph 5 of the Lord Advocate's letter of 30 January, which says:

"there should now be a presumption that"

those offences

"will be prosecuted in the High Court."

The Convener: We will leave petition PE29 now.

Petition PE111 by Frank Harvey concerns police officers and road traffic accidents. I presume that police officers who drive dangerously are dealt with in the same way as everybody else is. The question is whether, in emergency blue-light situations in which the police can legally operate outwith the speed limit, any additional measures should be taken to prevent such incidents as we have read about.

Michael Matheson: The question could be applied equally to the fire service and the Scottish Ambulance Service. Why has the police service been singled out? We have newspaper clippings about cases that have involved the police, but firefighters have been involved, too. It may help to consider whether an on-going issue exists. Sadly, incidents will occur, but I do not know whether they have a pattern or whether there is a problem. It may help to have a statistical background and some information, as paragraph 7a) in our briefing paper suggests. We need to find out whether there is an issue that needs to be addressed before we go off and try to find out what the Executive and the Lord Advocate are doing about it. We should ask about all three emergency services rather than just the one.

Bill Butler (Glasgow Anniesland) (Lab): I agree with Michael Matheson that we should go for the option that is given in paragraph 7a). There is no point in proceeding with the other options unless we establish that there is a troubling statistical pattern. After that, we could consider the options that are given in paragraphs 7b) and 7c).

The Convener: Does anyone dissent from that?

Mr Maxwell: No, but we should adopt option 7a) only with the proviso, which Michael Matheson mentioned, that we should ask about all the emergency services and not just the police. The same law applies to all the emergency services.

The Convener: We are clear that we are talking about all the emergency services.

It might be worth asking all the emergency services about their guidelines for blue-light emergencies. Obviously, the emergency services can operate outwith the speed limit when they judge that a blue light has to be used, but I am interested to know what guidance they are given for situations in which, for example, they are chasing a criminal. We need to know a bit more about what guidelines police officers have. I presume that the ambulance service guidelines deal with life-or-death situations, but the police service guidelines might be a lot wider than that.

Bill Butler: I am sure that the guidelines advise when to engage and when to disengage. We might want to look at that spectrum.

Michael Matheson: The police sometimes operate only with blue lights rather than with, as they put it, blues and twos. They do not always use both siren and lights. I understand that the fire service always responds to a 999 call with blues and twos, whereas that is not the case for the police. For the police, it depends on the nature of the call.

Mr Maxwell: From personal experience in the fire service, I would say that Michael Matheson is right. Under fire service legislation, there is a statutory obligation to treat all 999 calls in that way, but the situation for the police and ambulance services is different. Perhaps we need proper clarification from all the services before we can debate the issue properly.

Michael Matheson: For example, the fire brigade will turn up even to a street bin fire with the full monty, whereas the police would probably put just the blue lights on to get there. That is the

difference. I have heard the police say that that issue needs to be addressed.

The Convener: Perhaps we can debate that a bit further during this afternoon's debate on the fire service.

Does the committee agree that we should write separately to the emergency services to ask for any information that they can give us on what guidance they give to their drivers?

Members *indicated agreement*.

Children (Scotland) Act 1995 (PE124)

The Convener: For petition PE124, we have a paper that sets out the background to, and correspondence on, the issue of grandparents' rights of access to their grandchildren. The paper presents a number of options. I invite Bill Butler to comment.

Bill Butler: I am very keen that the committee agree to the proposed action that is laid out in paragraphs 13, 14 and 15. In the previous parliamentary session, various organisations made submissions to the Justice 1 Committee that said, basically, that they were content with the current legislation. The action that is proposed in paragraphs 13, 14 and 15 would ensure that the petitioners' concerns—with which, I am sure, we all have sympathy—were progressed in some fashion.

I would be grateful if the committee would agree to make a slight change to paragraph 13. If we agree to write to the petitioners, we should say that the current legislation "would seem to be sufficient". If we say that current legislation "is sufficient", why should we adopt the proposals in paragraphs 14 and 15?

There is no evidence that the legislation is insufficient. However, the Grandparents Apart Self Help group has raised concerns, with which I sympathise. If we are minded to support the proposed amendment to paragraph 13, I suggest that we add the words "notwithstanding the above" to paragraph 14. We could advise the petitioners of the Executive's plans to consult on its forthcoming family law bill and suggest that they may wish to make representations at the appropriate time.

In the previous session, the Justice 2 Committee suggested that a review of the effectiveness of the Children (Scotland) Act 1995 could be conducted. We should consider undertaking further work in that area, if there is a time slot for it. I ask members to consider taking all the action that is proposed in paragraphs 13, 14 and 15 of the note from the clerk.

The Convener: Margaret Mitchell, who is not here today, asked that I mention to the committee that, in her view, if we are to widen access under the 1995 act we should do so to include fathers. I do not know what members think about that suggestion.

I note the points that Bill Butler has made. I am never clear about what GASH wants from the law. I understand that in the petition the group's members are saying that, as grandparents, they feel excluded from the system. The Justice 2 Committee's preliminary report on the petition indicated that people believe that they must pay for any action that they want to take in the justice system. Although there is provision for fathers, mothers or any person to apply for access, if that is in the welfare interests of the child, we do not know whether people believe that the costs of paying a solicitor and getting through the courts act as a barrier to that element of justice.

Bill Butler: Part of the problem is that there may often be a substantial cost to be met. As I understand it, GASH members want the automatic right to have contact with their grandchildren. That change has been seen as unnecessary, because people are content with the law as it stands. However, it is still a matter of concern to the folk in GASH to whom I have spoken. Perhaps they should make a submission to the consultation on the forthcoming family law bill, to ascertain whether there are ways in which their problems may be addressed. I do not know whether that would be possible, but we should at least suggest to GASH that it may wish to explore that option.

Michael Matheson: I have dealt with a number of cases of people seeking representation in relation to this issue and recently I have been in correspondence on the matter with the Minister for Justice. The cases that have been brought to me suggest that it tends to be the parents of the father who have lost access to the child, because the father has also lost access.

The minister has suggested that, under Scots law, if the parents are not married when a child is conceived or born, the father has no rights or responsibilities in relation to the child. A fortnight ago, the minister told me in writing that the Executive intends to address that issue in the family law bill and to ensure that if, at the time of birth, someone registers that they are the father of a child, they will be granted responsibilities and rights. That may deal with part of the problem.

The other main difficulty that I have identified in the cases that have been brought to me is access to justice. Under the welfare provisions of the 1995 act, grandparents can go to court to request a right of access. However, there is a problem with legal aid and the cost of going to court. The family law bill may not address that issue, which relates to legal aid provision more generally. However, the matter may be addressed as an aside to the family

law bill. If we are to give responsibilities and rights to fathers, we ought to consider giving access rights to grandparents. The main issue is provision of legal aid that would allow grandparents to seek access rights through the courts.

10:45

The Convener: That is the key issue. Indeed, we should specify to the Executive that we think that the issue is worthy of examination.

That said, the question of granting an automatic right of access is difficult to resolve, given that no one—not even the mother or father—has such a right.

Bill Butler: With respect, convener, I am not suggesting that. Instead, I think that we should go ahead with the proposed action as set out in paragraphs 13, 14 and 15 of the paper.

The Convener: Yes, but I am simply addressing your comments about GASH's call for an automatic right of access to grandchildren.

We need to respond to the petitioners. Like Bill Butler and Michael Matheson, I am very sympathetic to their aims; however, I would like to pin them down a bit more. If we were to legislate in this area, we would need to give more thought to the precise provisions that would be required. For a start, we would not be able to legislate for an automatic right of access. Instead, we might be able to widen access for a range of family members or other people who are important to a child. In doing so, we could obtain better justice for grandparents, aunts, uncles and other family members and the principle of the interests of the child would remain. Moreover, we could examine the experiences of grandparents and others in trying to use the 1995 act. I have absolutely no information about that subject.

Mrs Smith: I concur strongly with Michael Matheson's comments. However, I know of cases in which it was found to be in the child's interests not to allow the father access, which meant that the grandparents were not allowed access. As a result, there would be problems with giving grandparents an absolute right of access.

If members feel able to do so, we should perhaps write to the petitioners about the upcoming family law bill and also ask the Executive to consider the *Official Report* of this meeting and some of the other work that has already been done by the Justice 2 Committee. That would make it clear that we feel that there is a presumption of support for the arguments that we have heard from grandparents. However, we should point out that we understand that we cannot pursue an automatic right of access for the reasons that have been discussed, but that we are quite keen for the Executive to address the matter in the proposed family law bill and to find out whether we can secure an extension of access rights. That would go some way towards assisting the majority of grandparents in such situations instead of perhaps helping cases that raise issues of child safety.

Bill Butler: Michael Matheson and Margaret Smith have made excellent suggestions. We should incorporate their comments, particularly Margaret's comments, in any action that we take.

The Convener: I just need to go through all the action points to make everything clear.

Although I know that there are some additions and amendments to make, I think that in principle members are happy with the proposed action that is outlined in paragraph 13 of the clerk's note. I think that Bill Butler suggested an amendment to that paragraph.

Bill Butler: I suggest that we change the phrase "is sufficient" at the end of the paragraph to "would seem to be sufficient". I know that the current legislation is sufficient, but we should not send such a bald statement back to the petitioners. It is simply a gentler way of putting the matter.

The Convener: As far as paragraph 13 is concerned, we should write back to the petitioners to explain what has happened and give them an update on the situation. We will also forward to them a copy of the *Official Report* of this meeting, which will contain our discussions of the matter, and include a summary of our proposed actions. Does that sound all right?

Bill Butler: Yes.

The Convener: Paragraph 14 of the clerk's note mentions that

"the Scottish Executive plans to consult on its forthcoming bill on family law".

We will advise the petitioners of that avenue. In addition, however, we could write to the Executive with some action points. Margaret, could you specifically state the action that you would like to be taken?

Mrs Smith: Work has been done by the former Justice 2 Committee and we acknowledge that the reasons why the right of grandparents to have access to their grandchildren cannot be absolute have been expressed. However, the committee is generally supportive of the group's main aim, which is to ensure that the majority of grandparents have on-going access to their grandchildren. We should ask the Executive to consider the issue in the context of the family law bill and to consider whether it might be possible to extend the rights of grandparents—and perhaps other people, as the convener said—in the way that the petitioners suggest.

The Convener: That suggestion encompasses a number of points that have been made by others. We could write to the Executive to say that we would like it to consider this issue in the drafting of the family law bill and to examine the question of access to justice, which Michael Matheson and I raised, and the question of whether the law could be strengthened in relation to grandparents and other groups to ensure that they had easier access to the children, which Margaret Smith raised.

Bill Butler: I agree with that suggestion, but I think that we should also write to the petitioners to say that we strongly advise that they consider not so much the automatic right of access, which seems to be a dead end, but the issue of wider access for a range of family members and access to legal aid. We must give them a steer, but whether they take that steer is entirely up to them.

The Convener: I propose to include Bill Butler's comments in the letter that we discussed in relation to paragraph 13 of the note on the petition.

We could say that our view is that an automatic right to access might be difficult to secure and that the petitioners might want to consider framing their request differently.

It has been suggested to me that we might want to ask the Executive to review the 1995 act as part of its work in relation to the family law bill. In effect, that is what we have said we should do.

Bill Butler: Are we simply amending the wording of the proposed action as outlined in paragraph 15 of the note? Are we going to ask the Executive to consider the matter but not undertake work ourselves?

The Convener: Our comments will be contained in a letter to the Executive. We are asking it to do the work but we will have to keep an eye on the situation. We might get a response from the petitioners as well.

Are we agreed that we will follow that course of action?

Members *indicated agreement.*

Carbeth Hutters (PE14)

The Convener: I have to declare a sort of interest in the petition from the Carbeth hutters, which calls for protection for hutters, as I think that it was the first petition that I ever dealt with, away back in the days of the original Justice and Home Affairs Committee.

The background papers on the petition will bring you up to date with the situation. I have had a number of letters from groups in a similar position to that of the Carbeth hutters, in that they have semi-permanent homes and their landlord has offered renewal of their lease at extremely high terms that they are unable to meet. This seems to be a general issue affecting semi-permanent homes. The committee will know that in, I think, 2000, the Executive completed a report on the position across Scotland. Nothing further has happened, although the committee made some recommendations that further action should be taken.

I have been involved with the Carbeth hutters, as have other MSPs. There is an update on the situation at paragraph 7 of the paper. If the committee wanted to recommend legislation, it would have to broaden that out to encompass the Scotland-wide situation rather than just a local case.

Mrs Smith: I have had constituents to whom the same thing has happened. Their rent has been put up to such an extent that they have been forced out of places where they have lived, at least partially, for 20 years or so. There is a great sense of grievance at such action. I was a bit dismayed by the report on what the Executive has done, or not done, on the issue. Obviously, practices are going on that may be within the letter of the law but which are outwith the spirit of the law. There seems to be no recognition of that in the Executive's action. Can we have clarification on what action the previous committee asked the Executive to take, because you said that some outstanding issues had not been addressed by the Executive?

The Convener: Yes, we can get clarification on that. I wrote to the minister, and I recall that there was scope for some kind of regulatory regime over leases and rents. It is a difficult area, because we are talking about owners of land who have granted leases on certain terms that have now run out. The question is whether there should be measures in law to prevent landlords from having unfair terms in the first place.

We already have that principle in Scots law, because a person cannot sign up to a contract if it contravenes the Unfair Contract Terms Act 1977. There are minimum provisions in that act that prevent a person from signing such a contract and contractors have to abide by that. That was the principle that we had in mind at the time. There is no doubt that it is a difficult area in which to legislate, because every situation is slightly different.

There has been a lot of negotiating over Carbeth. I have no doubt that negotiations have been strengthened by the fact that Parliament has discussed legislation. The parties may have satisfactorily negotiated an end to the situation.

We have had correspondence from chalet owners in Lochgoilhead on the Drimsynie estate.

Action is being taken there to evict chalet tenants and demolish their chalets without their permission. It is grossly unfair.

Michael Matheson: It is outrageous that in this day and age anybody is behaving in such a fashion. I am pleased that there has been progress with the Carbeth case, which looks to be in the interests of all parties. However, when I go through the report I cannot help but feel that the Executive is fobbing us off. It is not doing anything about the issue. We have a moral responsibility, given what has happened to the folk on the Drimsynie estate, to ask the Executive whether it is happy that this sort of thing is happening. If not, something has to be done to deal with it. I know that it might be complex, but something has to be done when a landowner can behave in such a high-handed fashion.

Bill Butler: I am pleased to say that, following negotiation, the Carbeth situation seems to be reaching a positive resolution. However, as Michael Matheson said, the Drimsynie situation is, on the face of it, outrageous. We are duty bound to write to the Executive asking whether—notwithstanding the fact that it is difficult to legislate in this area—it has any thoughts on what it might do to resolve the Drimsynie situation and to prevent any other such outrageous situations from occurring. We must do that at the very least.

11:00

Mrs Smith: One of my constituents owned one of the chalets, as their property on someone else's property. They were told that, unless they got their property off that other person's property, it would be destroyed. That situation leaves people with the cost of moving their chalet and the problem of where to put it. It really is a totally impossible situation for people to find themselves in.

The Convener: The owner has a right to determine what they want to do with their land. However, when they contract with somebody else for the use of their land—whether as a site for a chalet or something else—there should be some framework to protect the person who enters into that contract. The only other option would be some kind of rent control. I cannot think of another measure that would protect somebody in that situation. I presume that, in the cases under consideration, the people have signed something.

The history of Carbeth is that part of the land was gifted to the people of Clydebank. The people have huts on the estate that have no running water or electricity, but they are perfectly happy with that. However, three generations on, the new landowner obviously thinks that they can do something better with the land. The Carbeth situation is, therefore, slightly different. The Carbeth people faced dramatic changes in their lease terms—extra charges for roads that were not up to scratch, and for this, that and the next thing—which would price them out of the market.

Mr Maxwell: On the question of what can be done, you suggested that some sort of legislation dealing with the rental situation might be one of the few options. However, in the light of what has happened at Carbeth, perhaps there is a role for slightly tighter regulations on compulsory arbitration between parties in such situations. Perhaps there should be a presumption that, when such a situation occurs, the case should go before a body that will arbitrate between the two parties. That may not resolve all situations, but it has done so in the case of Carbeth. Rather than going into the problems of land ownership and rent control, perhaps forcing the two groups to come face to face through professional arbitrators may resolve such situations, as it has in the Carbeth case. Perhaps that avenue could be explored by the Executive.

The Convener: For the record, I am not opposed to that suggestion. However, although we can threaten to legislate if the parties do not sort the matter out, once we have done that, we cannot do the same for anybody else. The fact that we have resolved the Carbeth situation does not necessarily mean that we could get a resolution in all situations, unless we pursue Stewart Maxwell's suggestion that, as part of the legal process, the two parties would be forced into arbitration. We would have to think about what would be the conclusion of that and how it would be enforced.

Michael Matheson: I am familiar with the Drimsynie estate, as I used to be an instructor at the outdoor centre in Lochgoilhead. I do not know the exact situation, but I am familiar with the estate. It is a large, commercial development with a hotel, chalets and a caravan park. I am not sure what has happened, but I suspect that—for commercial purposes—the landowners have decided to get rid of the wooden chalets that used to be near the foreshore and to do something else there. That is very different from the Carbeth situation. If the landowner thinks that a commercial interest is at stake, I do not think that he will be open to arbitration. I also know that, historically, the landowner in question does not have a reputation for dealing with things in the best of ways.

The Convener: That is helpful. How does the committee feel about writing to the Executive, saying that it should pick the matter up again? Our suggestion would be that it consider compulsory arbitration—as suggested by Stewart Maxwell—and/or some regulatory framework that would apply fairness to leases, along the lines of the Unfair Contract Terms Act 1977. The UCTA could

be used as a model. Those two suggestions are not mutually exclusive and could be used together as a way forward. We would have to make it clear that they would have to apply in a number of situations, rather than be tailored to the specific situations at Lochgoilhead and Carbeth. Is that agreed?

Members *indicated agreement*.

The Convener: I propose that we break for five minutes, for coffee.

11:06

Meeting suspended.

11:18

On resuming—

Work Programme

The Convener: Item 5 is our work programme. Members have quite a number of papers to refer to. We agreed previously that we should examine European law specifically regarding alternative dispute resolution. It is suggested that we could seek written and oral evidence to inform our consideration in advance of the formal production of any text on that legislation. Members will know that we chose that subject because it would give us a chance to get in early on in the procedure and see how we progressed with it.

It is suggested that we could, if there is time, take oral evidence from the relevant European Commission official. Alternatively, we could take oral evidence from an academic with an interest in the subject. There is also the Law Society of Scotland, which has an interest in European matters. Also suggested are Citizens Advice Scotland, Family Mediation Scotland and the Scottish branch of the Chartered Institute of Arbitrators. Those are some organisations that might have an interest in alternative dispute resolution. The main thing is for us to kick things off somewhere. I am happy to receive any suggestions, so that we can get started.

Mrs Smith: The list of organisations seems reasonable to me.

The Convener: We will seek oral evidence from the relevant Commission official, and from Paul McKell and Jane Scoular of the University of Strathclyde, who are specialists in family mediation. We might have to prioritise some witnesses on the list if we do not have enough time to hear from them all.

Mr Maxwell: If it turns out that we are tight for time, I would prefer to hear from the academic side first, on the grounds that the European Commission has not really started off down the alternative dispute resolution road yet. There will probably be value in hearing from the Commission official, but I would rather hear from the academic witnesses first.

The Convener: Does anyone dissent from the view that we hear from Paul McKell and Jane Scoular first, if they are willing to attend?

Having spoken to the clerk, I should clarify that Paul McKell is the Commission official and Jane Scoular is from the University of Strathclyde. If we follow Stewart Maxwell's suggestion, we will ask Jane Scoular for evidence first. We will then seek to arrange for Paul McKell to give oral evidence. Is that agreed?

Members *indicated agreement.*

The Convener: We move now to the European Union white paper on divorce. We expect the white paper to be published in November.

If we could go back to alternative dispute resolution for a moment, I presume that the committee also wishes to receive written evidence.

Members *indicated agreement.*

The Convener: Sorry—we return now to the EU white paper on divorce. It is an interesting issue. I wonder why we have got to the stage of legislating on divorce at the EU level. I would really like to ask why we need to do it at all, rather than simply getting into the issue, examining it, ascertaining whether the white paper is compatible with our law and so on.

Bill Butler: Perhaps we should shunt it into a siding at the moment.

Michael Matheson: Are you talking about the white paper on divorce?

The Convener: Yes.

Bill Butler: We could come back to the matter at an appropriate time.

The Convener: We need to keep an eye on what is going on with the white paper. I wonder whether there is a mechanism through which we can ask why it might be necessary to legislate on divorce. Perhaps there is a specific matter at stake, such as access to children.

Mrs Smith: I think that we have informally asked why Europe looks as if it is meddling—for want of a better word—in something that falls within Scots family law. My recollection is that the white paper concerns such matters as child abduction across borders and differences in the legal positions of husbands and wives in different countries. If the proposals fall within that range, I can understand why the law is being examined. I can understand why we might want to take measures to protect parental rights with respect to a child who has been abducted. However, I share your concern that this might be the thin end of the wedge. We have to keep a careful eye on things and ensure that that is not the case.

Bill Butler: We should perhaps wait until the publication of the white paper. We can consider its terms and decide whether it is appropriate for us to consider it.

Michael Matheson: I wonder whether we need to consider the EU white paper, when it is published, in the context of any Scottish family law bill. There might be some crossover between the proposed Scottish legislation and the white paper from Brussels. We should keep an eye on it and bear in mind which committee might be pursuing the family law bill. It might be more appropriate if the Justice 2 Committee takes on this issue.

The Convener: I will try and pull that together. When the white paper is published, the committee will want to see what it looks like, although it might be better if we have a summary note of it. We could then examine it and see whether there is a big European dimension to it and decide from there. If there is not, we can decide whether it could or should be challenged. Is it agreed that that is what we will do for now?

Members *indicated agreement*.

The Convener: I am keen that the committee see the end of the process of the regulation on parental responsibility so that we can decide on the approach we are going to take and whether we are happy with the regulation. Colin Imrie gave evidence that UK and Scottish officials are happy that enough changes have been made to the regulation and that it is compatible with UK law. I would like to see the Executive note on the regulation, although I do not know whether we have to write to the Executive to ask to see the note.

I am told that the note is on its way.

Members have got some information on how we could begin the sentencing inquiry. It is suggested that we take initial evidence on 19 November from Professor Neil Hutton, who is deputy head of the law school at the University of Strathclyde. We heard from him at the committee's away day.

We have secured a debate on the previous committee's report on alternatives to custody. That will take place on 12 November. We have not yet received a response from the Executive although we will have one, and that will allow Parliament to debate the issue. The debate will be in the name of the committee, although we decided that we would not formally adopt the report because it is not ours but the previous committee's.

Are members content to kick off the sentencing inquiry by hearing from Professor Neil Hutton? Are there any other suggestions?

Bill Butler: That seems to be a reasonable way to proceed.

The Convener: It is quite important that we hear from the Parole Board for Scotland, which could give some detailed information on how the licensing system works and on how it makes decisions. We do not have a lot of information on that at the moment. That could be our second choice for oral evidence. It would set the scene.

I do not think that there is anything further to say on alternatives to custody unless Michael Matheson has something to add. He was on the

previous committee and can provide some continuity.

Michael Matheson: After Neil Hutton gives evidence, we can decide how to progress if we choose to do so. It might be helpful to have a paper following on from his evidence and telling us what our options are.

The Convener: We move on to civil partnership registration. I invite the committee to consider whether it wants to have any input into the work of the Equal Opportunities Committee, which is conducting a consultation on civil partnership registration. The committee might decide that it is satisfied that the Equal Opportunities Committee should conduct the consultation without any involvement from ourselves, or it might be pertinent for us to appoint a reporter. Thankfully, we have two members who sit on the Equal Opportunities Committee and who may be prepared to play that role, although I do not know. I think that Margaret Smith wants to say something—I am not prompting her.

11:30

Mrs Smith: I am happy to be a reporter, if members agree to that. To bring members up to date, we have received the consultation document from the Executive after a delay in which we waited to find out what would happen. The Executive has decided to go down the Sewel route, although the devolved aspects of the legislation will be drafted in Scotland and will be based on Scots law. The Equal Opportunities Committee will take evidence at the beginning of November from lesbian, gay, bisexual and transgender groups; Couple Counselling Scotland; faith groups, including the Roman Catholic Church, the Church of Scotland and the Muslim community; the Law Society of Scotland; and one or two academics. The evidence-taking session will be pre-legislative scrutiny, because we will have only the consultation document to go on.

The Justice 1 Committee should keep an eye on a few issues. Sections of the consultation are on substantive parts of the law, but they do not receive much attention. For example, the section on aliment, property division on dissolution, intestacy, inheritance and damages is only seven lines. The evidence to the Equal Opportunities Committee on the basis of the consultation will be a shot in the dark because we will not know what will end up in the bill, which will probably contain around 70 to 100 clauses relating to devolved matters and to Scots family law.

To make the Sewel motion effective, we must ensure not only that the Equal Opportunities Committee considers the proposals in the consultation document, but that the Executive and the Westminster Government give the Scottish Parliament enough time between the introduction of the bill at Westminster and the debate on the Sewel motion to ensure that any loopholes or mistakes are picked up. Mistakes have already surfaced in the consultation document. I will not go into detail, but three or four points have been noticed. The document was published with at least two paragraphs that related to English divorce law—they mentioned decrees nisi and decrees absolute, which are part of English divorce law but which do not apply in Scotland. That mistake has been pointed out to the Executive. Another paragraph said that a divorce cannot take place within the first year of a marriage, which is not the case under Scots law, although it is true under English law.

The Equal Opportunities Committee will do its best and it is reasonable for the Justice 1 Committee to appoint a reporter, but it is also reasonable for us to have a specific locus on the matter, because the complexity of the legislation will make it difficult to proceed through a Sewel motion. In the several conversations on the issue that I have had with ministers and civil servants, I have been reassured that the process will work. However, we must make it clear to the Executive that, once the bill has been published, we will need time to ensure that if issues similar to the ones that I mentioned pop up, people can comment on them and the bill can be changed.

Reassurances were sought and given from the Executive that if substantive amendments are made to the bill as it goes through Westminster and the House of Lords—I suspect that that is where such changes will be made—the bill can be recalled to and debated in the Scottish Parliament to find out whether the amendments are acceptable. As far as I understand the situation, that procedure has a precedent, but it has been carried out only in relation to fairly minor technicalities. The complexity and size of the relevant part of the bill will involve us in a completely different way of working.

I am happy to be a reporter on the issue, if members think that that would be helpful, but the Justice 1 Committee should keep a watching brief on two or three points. I will do my best to keep people informed if I think that there are any points of family law on which we are going down a route that is against Scots law as it stands.

The Convener: That is very helpful. As Margaret Smith said, we are talking at this stage about a Sewel motion, which means that there will be no lead or secondary committee. However, it is right that the Equal Opportunities Committee should in effect be the lead committee in relation to the Sewel motion process.

Whether the Justice 1 Committee or the Justice 2 Committee is involved, it is important that we be kept informed, although I do not suggest that that commits us to doing anything in particular. At some stage, I am certain that a justice committee will have to be involved if we are to consider the technicalities of Scots law in relation to intestacy, inheritance, degrees of prohibition and a host of other areas that we have not yet discovered that might connect with UK legislation. I am sure that interested parties will make strong representations to us. People will be quite happy for the UK to legislate on civil partnerships as long as they feel that they are being involved, informed and consulted and that there will be a way for them to influence matters. That is the crucial thing.

Mrs Smith: The timing is crucial, too.

Marlyn Glen (North East Scotland) (Lab): I would be happy for Margaret Smith to take on the role of reporter. That might be quite onerous, so I would be willing to help out, especially as I am a member of both the Justice 1 Committee and the Equal Opportunities Committee. Such reporting could turn out to be a huge piece of work, but it would be interesting to see how matters progress from both points of view. In my view, if the Justice 1 Committee were to proceed with consideration of the issue, it would be sensible if Margaret Smith and I were involved because we are both members of the Justice 1 Committee and the Equal Opportunities Committee. Is that possible?

The Convener: I take that as an expression of interest. Does anyone dissent from that suggestion?

Members: No.

The Convener: We agree to that suggestion. I have been advised that the convener of the Justice 2 Committee, Annabel Goldie, will be quite happy for us to pick up that work; however, we might not feel the same way in two months' time. It would be helpful for Margaret Smith to be the reporter and to have Marlyn Glen assist with that. Do members agree to that?

Members *indicated agreement*.

Mrs Smith: I would like some clarification. Is it the case that we are happy to keep the issue in abeyance until it is decided that the Justice 1 Committee will be involved, and that we will consider it again when the bill has been published?

The Convener: I thought that we had agreed that, if there is scope for a justice committee to examine a specific area on civil registration, we will express an interest in doing that.

Mrs Smith: It would be up to me and Marlyn Glen to flag up such issues to the committee.

The Convener: We would pick that up if you reported to us that it would be appropriate to timetable it in. Perhaps you should keep in touch with the clerks to let them know when it would be appropriate to have the report on the formal agenda.

We now turn to the Freedom of Information (Scotland) Act 2002. When we pass legislation in the Parliament, it is often the case that the code of practice has greater importance than the legislation itself. I have a strong view on that subject. If we are dealing with legislation to which codes and guidance are attached we must, as a general rule, be able to scrutinise them. Given that the code can affect the meaning of the legislation, there is no point in our scrutinising legislation if we cannot scrutinise the code.

We are being asked to consider the draft code of practice that will accompany the Freedom of Information (Scotland) Act 2002. I think that the Executive has made an oversight in formally notifying the committee of the draft code. Members will see that the draft code is dated July. That is unfortunate, because we would have wanted to consider the matter properly.

I would like to hear from Michael Matheson on the issue. I am sorry for asking him to contribute again, but he is the only member who was involved in the previous Justice 1 Committee's consideration of the Freedom of Information (Scotland) Bill. I am conscious that an increasing amount of work is being loaded on to members. However, as a point of principle we must ensure that we are happy with the code.

Michael Matheson: The code is fundamental to the effectiveness of the legislation. In effect, the Freedom of Information (Scotland) Act 2002 is enabling legislation. The code plays a key part in determining how effective a new freedom of information regime will be, so we need to consider the issue.

Rather than our simply taking written evidence, it would be worth appointing a reporter to examine the matter. I have concerns about the time scale for the consultation, because I am conscious that we are about to enter a fortnight's recess. In effect, that leaves the committee or a reporter with just over a week to consider the draft code in detail. Given that it was an oversight on the part of the Executive not to flag up the issue to the committee earlier, we probably have good grounds for asking the Executive to consider extending the consultation period to provide a reporter with sufficient time to gather evidence for the committee to consider.

The Convener: I see that members are nodding in agreement. If members support what Michael Matheson and I have said about the importance of

codes of practice, I would like to make that point in our response.

Mrs Smith: Having been involved in consideration of the Regulation of Care (Scotland) Bill, I agree totally.

The Convener: If the Executive says that it will stick to its timetable, how might we respond? I suppose that we will simply have to write a very strongly worded letter.

Bill Butler: I hope that the Executive will see sense, as it usually does.

Michael Matheson: Public dissent is part of the committee's role.

The Convener: Bill Butler said "as it usually does".

Bill Butler: Nobody is perfect.

The Convener: These things happen. However, the Freedom of Information (Scotland) Act 2002 is important legislation and we do not want to set any precedents. We will write a strongly worded letter in the hope that we will get a little more time.

Is Michael Matheson prepared to act as the reporter on the issue?

Michael Matheson: Yes, but I do not want members to think that I do so with conditions attached. However, it would help if the Executive agreed to extend the time scale. I have a range of things lined up during the fortnight of the recess, so it would be very difficult for me to dedicate to the issue the time that I would need to do it justice.

The Convener: I thank Michael Matheson for agreeing to act as reporter on the matter. Once we receive a reply to our letter, we will ensure that it is sent directly to him so that he knows how the Executive has responded. If the response is negative, we will bring the matter back to the committee for further consideration.

High Court of Justiciary (Reform)

11:43

The Convener: Item 6 on our agenda concerns the bill to reform the High Court of Justiciary, the Criminal Procedure (Amendment) (Scotland) Bill. Members will recall that they agreed to invite Professor Christopher Gane to be one of our advisers on the bill. I now notice that he is here—I could not see him because he was sitting too close to me. I thank Professor Gane for agreeing for the second time to act as the adviser on a bill.

As I requested, extracts from the Criminal Procedure (Scotland) Act 1995 have been circulated to members. I do not want members to be put off by that, but in the past, when amending legislation, we have not had the relevant act in front of us. The extracts will provide members with the most up-to-date position on the 1995 act as they scrutinise the bill.

Members also have a note that has been prepared by the clerk. We will seek members' views on the list of possible witnesses and any other items that they believe the committee should consider when scrutinising the bill. Would members like to make any general points about how we should scrutinise the bill?

11:45

We usually appoint advisers, draw up a list of witnesses, schedule meetings, take evidence from witnesses and issue a stage 1 report. I was wondering whether there was any way we could reach High Court practitioners to refamiliarise ourselves with their—albeit anecdotal—views about how the High Court operates. That might mean that we have to hold meetings outside this committee room. As a result, it has been suggested that holding some kind of seminar might meet our aims—we could play around with the idea. It is not as though the High Court reform bill will be lengthy; however, we really need to get it right. I think that we should feel free to open out our approach to certain subjects if doing so means that we feel that we are better informed.

Michael Matheson: What is the time scale for stage 1 of the bill?

The Convener: The Parliamentary Bureau has yet to agree the timetable. However, at the moment, we are looking to complete the stage 1 report by mid-January 2004. In the past, we have agreed with the Parliamentary Bureau a timetable that we think we can meet, but sometimes we have had to reassess things in the light of evidence that we have received. As convener, I feel strongly that we should try to meet the terms and the timetable that we agree with the bureau; however, I also feel equally strongly that we

should not be tied to a timetable if something comes up that we as legislators think merits further scrutiny. If that happens, we will simply have to renegotiate our position with the bureau.

Although we try to assist everyone in the process, we have just as great a responsibility to ensure that the committee is satisfied. Given the October recess, the time scale is quite tight, because the recess means that we will have to start in the last week of October and work through November. In fact, even as I speak to members, I am beginning to doubt whether we will have enough time. I open up the discussion to members.

Bill Butler: You said that flexibility must be built into our scrutiny. If we feel that the time scale is not long enough, we have simply to say so. I think that it will mean that we have a packed programme.

The Convener: We can, depending on what members decide initially today, draw up a temporary programme, which would allow us to defer discussions about the timetable until we see how things look on paper. We can then decide whether the programme is achievable.

We should move on to discuss the witnesses that we want to speak to and the kind of information that we will need in order to scrutinise the bill.

Michael Matheson: I know that we have already lined up a visit to the High Court in Glasgow. As I have never visited the High Court before, such a familiarisation visit will help me to understand how it operates.

I should also say that I found our discussions with procurators fiscal and sheriffs during Monday's visit to be very informative; they helped me to understand some of the issues that they face. I wonder whether it would be possible to factor in meetings with similar parties in the run-up to our consideration of the High Court reform bill. Such meetings might give us further background information that we could utilise effectively in our evidence-taking sessions.

The Convener: Yes. For the record, I should say that, although our official visit was to a sheriff court, we started off at a procurator fiscal's office. Michael Matheson is absolutely right: informal discussions allow us to get to the root of issues and to understand them. If members feel that we should hold some informal evidence-taking sessions, that is okay.

Michael Matheson mentioned that we will visit the High Court in Glasgow on 27 October. That is quite neat, because that is when we will kick off the inquiry. As I recall, we have visited the High Court in Glasgow—we have some figures, statistics and a report of that visit, which it might be quite important to dig out. The reason why I suggest that is that I am pretty sure that there was opposition among the courts administration to the introduction of preliminary diets. It might be useful for us to see that report. We could ask at the High Court about that in the light of what we will examine, which is the introduction of preliminary diets. Chris, do you have any advice?

Professor Christopher Gane (University of Aberdeen): It is critical that the committee see what happens in the High Court in order to get some feel for the practical difficulties that Lord Bonomy was trying to address and which the Executive is trying to address in its bill.

If possible, some members of the committee should also visit a High Court outside Edinburgh and Glasgow. The experience of High Court practice on the circuit in some of the other major centres in Scotland can be quite different. There is a perception that circuits are sometimes prone to collapse when late guilty pleas are submitted or when cases simply do not go ahead. The experience might be different in Dundee, Arbroath or Aberdeen from the experience of the High Court in Edinburgh. That is something to bear in mind.

The Convener: That is helpful. The High Court moves around the country and we should perhaps see it elsewhere.

The programme for that day is still to be considered. Now is the time for input if members have any ideas about what we can do on that day. I would be interested in speaking to members of the Faculty of Advocates who spend a lot of their time in the High Court. I wonder whether there is a structured way of shadowing them on the day.

Michael Matheson: We could ask them.

The Convener: Have not we had an offer to shadow them?

Michael Matheson: We could just inform the devil.

The Convener: Yes, could we be devil's advocate for the day? We could obviously sit in the High Court and see the processes, but we might also want to speak to people there about what goes on behind the scenes.

Mrs Smith: We will want to talk to the people in the court service, the advocates and so on about what we are trying to do. We should try to get a mix of formal and informal input and we can see what suggestions that produces. Monday's visit to the sheriff court worked very well, in that respect. It was helpful to get an informal briefing before we saw formally what happened. That would be a good way in which to approach our visit to the High Court. We should ensure that we are not just thrown in cold.

Michael Matheson: Some individuals may interpret the idea of informal briefings as being a way of keeping information out of the public domain. We should emphasise the fact that informal briefings would help to ensure that we were better informed in considering the legislation and taking evidence. If any organisations were to suggest that informal briefings were a way of hiding things, we should make it clear that that is not our intention.

The Convener: Yes. We will state our intentions once we have summarised what we want to do.

We will make a visit to the High Court, and the committee feels that, as well as having information on the record, it needs some informal input. The important point is that all the information that we will receive will be included in a report, which will form part of the stage 1 evidence. That report will be open to any member of the public to see, so no one will be excluded. The only difference will be that it will not be an *Official Report*—it will not be verbatim. Nonetheless, the information that it will contain—which we will use—will be available to the public.

Mrs Smith: For clarification, I will give an example of what I thought was very useful when we visited the sheriff court. In the morning, we were able to sit with the fiscal and were told exactly how many cases were coming up in the custody court. We were then able to talk to the fiscal who was going to deal with those cases in the afternoon.

Such an informal meeting can be had away from the Parliament. It does not have an *Official Report*, but it gives us background information about what we will see when we enter the formal court situation. For many of us, our previous visit was only the first, second or third time that we had been in such a situation. An explanation on the day of what will happen, and an opportunity to talk to some of the participants, will represent the mix of informality and formality that I have in mind.

The Convener: That suggestion is good. In principle, we will design the programme to be like that as far as possible. My initial feeling is that we will be constrained by members' available time and by other matters. However, I wonder whether it would be a good use of time to spend one day in the High Court with the Crown and one day with the defence. I know that that would take two days but, in the long run, that might give members a sharper and quicker understanding of both sides.

Mr Maxwell: I support that, whether or not the visit takes two days. One great aspect of the visit to the sheriff court was our talking to the PF in the morning and to the sheriffs at lunch time, because that gave us the two sides of the debate. It was enlightening to hear those two angles. I agree entirely with the suggestion, whether the two elements take place on the same day or on different days.

Marlyn Glen: Could the idea of visiting the High Court outwith Edinburgh or Glasgow be incorporated? That would take up a second day.

The Convener: Yes.

Professor Gane: I take groups of students to the High Court regularly and the judges there have always proved to be extremely helpful in providing information that committee members would like, such as explanations of why something happened in a particular way. For a variety of reasons, it is important that we involve judges.

The Convener: I thought that judges would be mentioned at some point. I am sure that they would more than welcome our visiting their courts, given that they have a direct effect on the courts.

We could work up the detail on Marlyn Glen's suggestion. We could visit the High Court in Glasgow and in one other place. I am happy to be guided if members have a preference.

Professor Gane: Somewhere other than Glasgow or Edinburgh should be visited. The simple thing to do is to talk to the Scottish Courts Administration or the justiciary office about what circuits are likely to be happening at that time to get an idea of official timetabling.

The Convener: We could choose two venues. The best places to go to have to be confirmed. We could all go or we could split up. In principle, we have decided that we will spend two days on the visits. If we go to Dundee to spend a day with the Crown, should we return to the same court to spend a day with the defence? Does that matter?

Michael Matheson: I wonder whether, rather than spend one day with each side in the same court, we should split one day so that time is spent with the defence in the morning and with the Crown in the afternoon. On the other day, the committee could visit an outlying High Court to find out the general issues there.

The Convener: So over two days we would make one big visit and a visit to an outlying court to see what is going on generally.

Michael Matheson: Rather than spend two days in one court, we should use one day and split into two groups that could swap round. One group would spend time with the defence in the morning and with the Crown in the afternoon while the other group did the opposite.

Bill Butler: That would be a better use of our time. If we spend the morning with one side and the afternoon with the other, that will have a more immediate impact and it will allow us to compare and contrast them.

Michael Matheson: The second day would involve a visit to the High Court outwith the central belt.

The Convener: Is the idea that we would all go to both places?

Michael Matheson: Yes.

The Convener: What do members feel about the suggestion that we should hold a seminar with practitioners and others? Again, that would not be an *Official Report* scenario, but we would have a report drawn up for that.

Bill Butler: That would be a good thing. People feel more relaxed in an informal setting, so they are more liable to express their views in an unadulterated way. We would be able to listen to those views and engage in a constructive dialogue.

12:00

The Convener: I detect a general view among members that they would quite like to spend a bit of informal time on the matter. We might set up the seminar so that we get to spend time with people in smaller groups. I think that those who have an interest in the bill would welcome such an opportunity because we cannot call everyone to give oral evidence to the committee. We will draw up a proposal with some dates. Members will be able to influence the proposal further at that stage.

Mr Maxwell: Although the bill obviously deals with reform of the High Court, it might be worth inviting sheriffs and other representatives of the sheriff court to the seminar. There is a proposal to increase the sentencing power of sheriffs from three years to five, so the bill will have an impact on them. It might not be the best use of that seminar time if we were to take evidence from High Court practitioners in isolation.

The Convener: That is a good suggestion.

I know that Stewart Maxwell is particularly interested in plea-bargaining, which is referred to in the policy memorandum. Perhaps the seminar could cover a range of subjects. We might be more likely to get information on such issues informally. That is agreed to.

If anything else occurs to members about good subjects to include in the seminar, they can contact the clerks, who will draw up suggestions that will come back to the committee for final confirmation.

We should consider asking sheriffs and judges whether they want to have an input. I have already written to Lord Cullen to ask him whether and how he would want to do that. I have also written to Lord Bonomy—who is, by and large, the author of the proposals—whether he has any suggestions about how we should go about doing that. As members will know, the Scotland Act 1998 prevents us from calling judges in front of the committee. I do not feel that there is a need for us to do that anyway, but there may be a need for us to talk to the justiciary, if it responds. Again, we would draw up a report on that.

Finally, we need to consider whether we want an informal briefing on the bill, during which we would just go through the bill's contents. Do members want such a briefing?

Members *indicated agreement*.

The Convener: The paper before us contains a list of suggested witnesses. As time goes on, members may think of other witnesses who would be more appropriate, but the list in the paper certainly gives us a start.

Mr Maxwell: We already have quite a long list of witnesses and I understand that we may want to invite others. At this stage, do we know how much time we will have for oral evidence sessions?

The Convener: That will depend on the timetable and the number of witnesses, but I will be guided by the time the committee thinks that it needs. At the moment, I think that we are talking about having four general evidence-taking sessions and one with the minister. That is an extremely short timetable.

Mrs Smith: Is that four sessions plus a session with the minister?

The Convener: Yes—five sessions in total.

When we get a witness list we try to ascertain in advance the likely areas of interest and to determine timings, so when we start we know roughly when we will finish, although we cannot always predict that. However, with the budget process I found it difficult to question in any depth. For example, Chief Constable William Rae had a lot to say when he gave evidence, but the session could not have been completed in much less than an hour to make it worth while. It is clear that we are up against the clock.

We can work with the list that we have just now and programme in all the events that we have talked about. We will let members see that information, then we can estimate how much time we can programme in. That would give Stewart Maxwell the opportunity to say whether he thinks that there is insufficient time.

Mr Maxwell: On the face of it, it does not look like enough time, but it is difficult to be sure. What you suggest is fair enough. We can play it by ear, and if the timetable looks tight we can revisit the issue.

The Convener: If members let us know in advance that they want to spend more time with a

particular witness, that will assist us in working out if we can do what we want to do in the timetable.

Are there any suggestions for additions to the list? I am not closing the matter. If members feel strongly two or three weeks into the scrutiny that they have to hear from somebody else, we will just have to do that. We will agree the list for the time being, as that will allow us to start to shape the timetable. Members can come back to it later.

Michael Matheson has given notice that he wants to mention something before we go into private session.

Michael Matheson: I had to leave yesterday's evidence-taking session on the budget process—I left when we went into private session to discuss the issues that we will raise in our report on the draft budget. I was impressed by Brian Main's paper, which gave us detailed questions and background information.

I confess that, in the course of taking evidence from the Minister for Justice, I was struck by how well prepared she was in her responses to our questions. It occurred to me afterwards—and it went through my mind at the time—that the minister may have had sight of our questions prior to the meeting. I have absolutely no evidence for that, other than my own instinct. Some of the questions that we asked were detailed and focused, and I noticed that the minister always appeared to have ready a response to them, which I found a little surprising. I noticed the change in tone when the Lord Advocate came before us.

Anyway, I purely flag the matter up because I have a hunch—although it may just be the cynical side of me coming out—that the minister may have had sight of our questions. If so, that is a serious matter, which I am sure members would consider to be an issue of concern. I was not sure how to raise the matter, or how to determine whether the minister had sight of the questions, but I had to flag it up, because it concerned me during the meeting. It may be that the minister was just very well briefed. If so, so be it, but she seemed a bit too well prepared for my liking.

The Convener: Thank you for that bombshell. I was aware that you were going to raise the budget process; I was not aware of the specific issue. It is sensitive: a serious allegation has been made that a member handed over a private paper to a minister. Does any member wish to speak?

Mrs Smith: I will not mention any names, because it is not fair to mention other members in their absence, but somebody else raised the same issue with me yesterday. They felt the same as Michael Matheson, and when it was pointed out to me, I understood what they were talking about. I do not think that Michael Matheson was alone in feeling that it was possible that the minister had sight of the questions. It may well be simply that the minister was extremely well briefed—I thought that she did a good job—but, as I say, someone else made a similar suggestion.

The Convener: The difficulty with this issue, particularly as it is controversial, is that it has not been flagged up to the public by being placed on our agenda. It is therefore difficult to have any further discussion about it today. I therefore propose that we close the discussion at this point; I will then consider what the response might be.

I do not know what you are proposing at the moment, Michael. Are you saying that you want me to raise the concern of the committee? What else might you expect me to do?

Michael Matheson: To be honest, I am not sure what can be done. I simply felt that I had to notify the committee of my suspicion. Perhaps you could consult the convener of the Justice 2 Committee to find out whether that committee has similar concerns. If so, perhaps something can be done.

The Convener: I am happy to do that. However, as the matter is now on the public record, I think that we have to alert the minister to what has been said to allow her to respond. That is the least that we can do. Once we have done that, we can decide whether the matter should be on the agenda of a future meeting.

Bill Butler: We have just heard a serious allegation, but one that is based purely on a subjective impression. The impression that I had yesterday was simply that the minister was well briefed, as I would expect her to be.

I do not know whether there is a precedent for a member raising a matter that is not on the agenda, especially something that is as controversial as this. I would therefore suggest that the best thing to do would be to take some advice on the issue after the close of the meeting and proceed from there.

The Convener: Bill Butler is right to point out that we are in danger of starting to debate an issue that is not on the agenda, which we should not do.

I will have to take advice on this matter. For the record I should say that, listening to the minister, my thoughts were not similar to Michael Matheson's thoughts. I thought that she gave good answers. I suppose that, having sat through five budget processes, she can probably anticipate some of the lines of questioning—our areas of interest would be quite obvious to anyone who reads the *Official Report*. However, if two members of the committee have some concern about the situation, I think that the minister should be made aware of that.

The problem is that I cannot now rewind and take back what has been said during this meeting.

Bill Butler: With respect, convener, only one member has said that he has a possible problem with the situation. No one else has said so.

The Convener: I picked up from Margaret Smith that someone else had voiced their concern.

Mrs Smith: Michael Matheson raised the issue with me earlier—however, I thought that he was going to raise it with you privately, convener; I did not think that he would do so in public. When we spoke, I told Michael that someone had already intimated a similar concern to me; I had not raised the issue with someone else.

The Convener: Without entering into a discussion that we should not really be having, can you say whether you are concerned about the issue?

Mrs Smith: On balance, I would say that I am probably not concerned.

The Convener: Okay.

12:15

Mr Maxwell: I do not want to enter into this debate as I agree that this is neither the place nor the time for it, but I have to say that the thought that Michael Matheson has expressed went through my mind yesterday as I listened to the responses. Being a new member, however, I was not aware of the procedures and did not know how much information the minister might or might not have. I am not saying that she must have had the questions in advance, but the thought that she might have already seen them went through my mind. I did not raise it with anyone, however, as I was not aware of the rules concerning the minister's preparation for the meeting.

The Convener: I must close the discussion down at this point. It should not have got to this stage.

I do not mind members raising matters that are not on the agenda but I should really know about it in advance if the matter is controversial. I would have preferred notice, given that this matter is sensitive. I remind members that we publish the agenda of our meetings in advance to ensure that people are aware of the matters that we are to discuss. That is the protocol.

We have agreed to deal with item 7 in private. It concerns discussion of some information in relation to the second adviser to the committee on the reform of the High Court of Justiciary.

12:16

Meeting continued in private until 12:19.

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