JUSTICE 1 COMMITTEE

Wednesday 3 December 2003
(*Morning*)

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

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JUSTICE 1 COMMITTEE
15th Meeting 2003, Session 2

CONVENER

*Ms 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)
*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 GAVE EVIDENCE:

Gerry Brown (Law Society of Scotland)
Norman Dowie (Scottish Court Service)
John Ewing (Scottish Court Service)
Patrick Fordyce (Scottish Law Agents Society)
Anne Keenan (Law Society of Scotland)
Michael Meehan (Law Society of Scotland)
Janice Webster (Scottish Law Agents Society)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Wednesday 3 December 2003

(*Morning*)

[THE CONVENER *opened the meeting at 10:15*]

Criminal Procedure (Amendment) (Scotland) Bill: Stage 1

The Convener (Ms Pauline McNeill): Good morning everyone and welcome to the 15th meeting of the Justice 1 Committee. I apologise for the late start. It would be helpful if members would turn off mobile phones and so on. All members of the committee are in attendance so there are no apologies to read out this morning.

Item 1 is our consideration of the Criminal Procedure (Amendment) (Scotland) Bill. I welcome the committee's advisers on the bill, Christopher Gane and Paul Burns. The committee is grateful for their advice. I welcome also the team from the Scottish Court Service: John Ewing, the chief executive; John Anderson, the principal clerk of session and justiciary; and Norman Dowie, the deputy principal clerk of justiciary. I thank them for attending.

Mr Stewart Maxwell (West of Scotland) (SNP): One of the main aims of the bill appears to be to bring certainty for all parties into the High Court procedure, particularly in relation to the trial process, to ensure that everyone is certain about when things occur, so that everybody is there and ready. Will you go back a stage and explain how High Court cases are scheduled at present?

John Ewing (Scottish Court Service): I will ask Norman Dowie to give you the detail on that but, broadly speaking, the High Court operates with a series of sittings, the length of which varies depending on the part of the country—in Glasgow, it is a fortnight; in most other parts of the country it is a week. The Crown Office schedules a number of cases to take place within the sitting. Precisely when a case takes place within the sitting depends on the circumstances at the time.

Norman Dowie (Scottish Court Service): In essence, that is correct. During the summer of each year, we sit down with the Crown Office and plan the business of the High Court for the following year, which means that we locate the High Court in different areas. In Edinburgh and Glasgow, the High Court runs on a full-time basis; in areas such as Inverness, Aberdeen and Dunfermline, we negotiate with the various sheriff clerks and the Crown Office. We consider the general trends of business throughout the year. Once that has been done, we fix up the various sittings throughout the year. The sittings run for a two-week period.

The Crown then prepares a list of cases for allocation to a particular sitting and the names of the cases, the charges and so on. It also prepares two other pieces of information: the time bar—when the case has to be called in court—and a provisional date on which the case will be due to be called. The latter is very much a provisional date; the actual date will depend on how the circuit's business runs.

As members know, there is an element of uncertainty about cases. Sometimes, there will be pleas in the morning that the cases be set down for trial; other cases have to be adjourned or postponed to a later date. Then, some time during the day, the Crown considers the business of the court and establishes which courts have disposed of their cases—Glasgow, for example, is a multi-court system and has six courts—and which business can be brought in, first taking account of the provisional dates allocated for those cases. That is generally how the system works, or does not work.

Mr Maxwell: If all the parties are ready and a trial proceeds, in what way does the current set-up fail? Much of what the bill proposes is predicated on the failure of current practices to meet the requirements of those involved.

John Ewing: If parties are ready to proceed and the accused and all the witnesses are present, the trial will run. One might get into situations in which there is slippage or spillover as one sitting merges into another. That can cause complications and can mean that we cannot accommodate the trial within a particular sitting. More commonly, what causes the churning of cases is that an issue involving the Crown or the defence arises in the preparation of the case and there needs to be a debate about something. In the worst-case scenario, that could involve having a trial within a trial about the admissibility of evidence, for example. If various legal steps that should have been taken in advance have not been dealt with, there can be an exchange in front of the judge about those points. In the meantime, the witnesses, the accused, the victims and the jurors—who are a concern for us—must wait to see what happens.

In other cases, key witnesses might not be available. Sometimes it might have been known for a while that the witnesses would not be available, but the first time that the court can be made aware of that is on the day of the trial. If the accused is on bail, they might fail to trap, as we

put it—they do not turn up. Those are the most common reasons why cases do not proceed on the day.

Mr Maxwell: Given those unknown factors within the current practices, how will the new practices improve the situation? It seems that much of what you have just said could apply just as much to the new system.

John Ewing: It is a possibility that those things could happen under the new system. When we say that there will be increased certainty about trial diets, we are not saying that there will be 100 per cent certainty; we are saying that there will be a significant improvement on the present position. We will give the court an opportunity to review the position—to have the Crown and the defence before it to test their levels of availability and preparedness in advance of the trial date.

As we see it, the principal beneficiaries will be the victim and the witnesses, who otherwise would be called to court. I hope that we will be able to sort out many of the issues that take up the first day or two—or another part—of the sittings and deal with them more expeditiously. The preliminary hearing also creates an opportunity for the accused to tender a plea of guilty at that point, if they believe that that is the right choice. At present, the plea of guilty is tendered on the day of the trial in about 60 to 65 per cent of High Court cases, whereas the figure in the sheriff court or in sheriff and jury cases is about 30 per cent, because guilty pleas are made at the equivalent of the preliminary hearing.

Mr Maxwell: If it remains the case that the Crown is the master of the instance in criminal proceedings, is it not true that the new procedures will ultimately be subject to the Crown's decision on whether to proceed with a trial? If the Crown moves the court to desert pro loco et tempore, is it likely that the court would refuse that motion?

John Ewing: It is unlikely that the court would refuse it.

Mr Maxwell: You do not think that it would. Does that ever occur?

Norman Dowie: To my knowledge, I cannot remember a case being refused before the start of a trial, but there may be circumstances in which the court has a greater right to exercise discretion in a trial—for example, if evidence has been tampered with. As you say, the Crown is generally master of the instance before the trial starts and, if it wants to desert the case, it has a right to do so. There is also the question of the extension of statutory time limits, which tend to impact on such matters. Those are matters of balance for the court.

Mr Maxwell: Will that change under the new procedures? Will the fact that the Crown is currently the master of the instance change in any way? Will the new procedures affect the balance?

John Ewing: The Crown's right as master of the instance will not change, but we would expect the Crown to exercise it slightly differently. If the Crown was going to have to desert a case before the trial started, we would look to it to do that at the preliminary hearing rather than on the day of trial.

Mr Maxwell: Are we saying that a desertion or a change of mind by the Crown when we get to the trial will be less likely because of the preliminary hearing?

Norman Dowie: We have to be careful what we mean by desertion. Desertion pro loco et tempore usually occurs when something has happened that means that the Crown is not entirely certain when it will be able to run the trial again. Under current procedures, a trial can usually be adjourned or postponed until a later, fixed time. Desertion is a slightly different tool, and the procedure is not used that regularly in the High Court. As the chief executive said, with the introduction of the preliminary hearing, we are trying to filter out of the system the unexpected elements that we face at the moment, and I hope that there will be less of them under the proposed new procedures.

The Convener: May I press you on the point about the Crown being master of the instance? Some of the evidence that we have received so far questions whether that can remain if we move to a more judicially managed system. Will the Crown remain master of the instance or will that function shift to the judge, who will manage the procedure?

John Ewing: There are different elements to the role of master of the instance. It is the Crown's decision whether to proceed with a prosecution and that will not be affected, so the Crown will remain master of the instance in that respect. The interpretation of the term "master of the instance" as being the one who determines when the trial will proceed will change as a consequence of the legislation. The court will set the trial date rather than the Crown.

The Convener: Do you accept that the management of the High Court will shift away from the Lord Advocate and the Crown?

John Ewing: There will continue to be a partnership, but the weighting will shift towards the court and judicial case management. However, if the Crown decides not to proceed with the charges, for whatever reason, the case will not proceed.

Michael Matheson (Central Scotland) (SNP): What evaluation have you made of the impact of the mandatory preliminary hearing on your department's resources?

John Ewing: We estimate that management of the process will require the equivalent of two to two and a half judges with support staff. As the financial memorandum says, we quantify that as £0.5 million in judicial costs and £150,000 costs to the Scottish Court Service. That £150,000 includes an element for developing information technology systems to underpin the operation of the new regime.

Michael Matheson: Are you confident of those figures?

John Ewing: They are our current best estimates.

Michael Matheson: Have you been able to assess the number of cases that are more likely to go to trial on the set date with the introduction of the preliminary hearing? It is claimed that the preliminary hearing will create more certainty; have you been able to quantify that?

John Ewing: We have not quantified it in terms of the number of cases that will go to trial. At the moment, we are considering the programming implications in consultation with the Crown. We estimate that, at present, first instance crime consumes 13 to 14 judges every week. We hope that the new regime will use 10 to 11 judges to deal with first instance crime. That is a significant resource saving for us because we can transfer that judicial resource, plus the support staff, to other business such as civil cases and criminal appeals. We reckon that there will be real resource benefits with the new process.

Michael Matheson: Will you refresh my memory? How many cases in the High Court proceed on time at the moment?

Norman Dowie: There are no figures on that. When you talk about cases being on time, you must consider the way in which the current sitting system is set up. Trials are rarely fixed under the current system and that is one of its great weaknesses. There is a list of cases—for example, in Glasgow there are six courts dealing with 60 cases with provisional dates assigned for trial. Many of those cases either plead or are adjourned so there are simply no figures on that.

10:30

Michael Matheson: There will be a lot of scope for judicial management to improve the preliminary hearings' effectiveness. How will that happen?

John Ewing: As I said, there will be an opportunity for judges to test the parties' state of preparedness to ensure that steps have been taken to identify opportunities for agreeing evidence, for ensuring that witnesses who are going to appear have to appear, and for dealing with other issues, such as determining whether a need exists for special provision for vulnerable witnesses. The Judicial Studies Committee is drawing up a checklist of issues on which the judiciary will want to be satisfied at the preliminary hearing, which will give judges a format to follow.

It is a question of judges having people in front of them so that they can be tested. The situation is a bit like this one: giving evidence to the committee can be daunting or relaxing, depending on the questions, but the experience is more telling than simply submitting a piece of written evidence. That is one of the drivers behind the preliminary hearings. The culture change that we seek must happen.

Michael Matheson: What sort of training will judges receive?

John Ewing: The Judicial Studies Committee is looking into that. The Lord President—the Lord Justice General—will consider how the programme of preliminary hearings should be structured. It is likely that the hearings will be in the hands of a number of experienced judges, rather than the work being spread across all judges. The model is being developed as we speak.

Michael Matheson: But judges will have formal training.

John Ewing: That is the expectation.

Michael Matheson: Just an expectation.

John Ewing: Judges organise their own training.

Michael Matheson: So the decision to receive training or not will be in their hands.

John Ewing: Yes—but all the indications are that they see significant advantages in adopting this approach to managing the business.

The Convener: You have talked about the resources required being equivalent to two and a half judges. Will those appointments be temporary?

John Ewing: I think that permanent judges will take responsibility for managing the preliminary hearings process, to provide the continuity and certainty that we want. Their role will be backfilled by the use of temporary judges.

The Convener: How long will additional temporary judges be required in the system?

John Ewing: In the financial memorandum, the budgeting assumption is two years. I hope that it will not be as long as that, but that is the current estimate.

The Convener: Why do you think that the system will settle down in that time?

John Ewing: By that time, we should be seeing results. As old cases leave the system and new ones come in under the new procedure, we would hope to see a turnaround within a year or 18 months. The two years that I mentioned would be at the outside.

Mr Maxwell: I was surprised by the answer to Michael Matheson's question on the number of trials under the current arrangements that take place on time or in a sitting. If we do not know how many trials are being properly dealt with on time, how can you say that you expect an improvement under the new system?

John Ewing: At the moment, some trials have multiple adjournments. Alternatively, cases may be deserted by the Crown, or otherwise not proceed, on that indictment. The cases could then be re-indicted. All of those things complicate giving a simple answer to your question.

In Glasgow, 50 or 60 per cent of cases, or more, tend to be adjourned and then churned back into the system. We hope that the changes that the bill will introduce will tackle the degree of churning.

The Convener: I would like some detail on how you envisage the mandatory preliminary hearing system working. How long will a preliminary hearing take?

John Ewing: At the moment, the planning assumption is for an hour, although that will vary from case to case depending on the circumstances.

The Convener: How many preliminary hearings will be required in any given period?

John Ewing: There will be one for every case.

Norman Dowie: In Glasgow, it is estimated that around 1,150 preliminary diets will be required in the High Court in 2004.

The Convener: Are you considering that parties might not be ready at the preliminary hearing? There does not appear to be any sanction available to the judge, other than to agree to meet in three days' time to find out whether the parties are ready then. Potentially, a further preliminary hearing could be arranged at that meeting if the parties are not ready.

John Ewing: That is possible, but it will depend on how individual judges approach case management. If they feel that counsel has good reasons for the requests at the preliminary hearings, that is one matter; if they feel that counsel is messing the court about—to put it bluntly—the court has ways of making that known. If it really felt that counsel was messing it about, ultimately the court could start thinking about contempt of court. I would not underestimate the impact of the exertion of judicial influence on the professionals involved.

The Convener: Surely counsel will always have good reasons? They come up with good reasons for a living.

John Ewing: And judges make their living by testing those good reasons, which they do not always take at face value.

The Convener: But you can see the point: the bill requires a culture change in everyone's approach to the High Court system. We are relying on people to change how they do things, but there is no sanction to force people to present themselves as ready. If we do not get the culture change, is not it likely that we could have a series of preliminary hearings before the trial date?

John Ewing: I do not think that that will become the habit. There is a risk that it might happen and we will monitor that and take appropriate action if required.

It is difficult to come up with a sanction. Lord Bonomy thought about it, but it is difficult to invent something that would be effective on the day without it spawning delays. One option that the court could consider is that, if counsel cannot proceed because they are otherwise engaged, they could be told that they must transfer the case to someone else. However, one would then get into all kinds of conflict about the right of the accused to choose their defence. Identifying an effective sanction is problematic.

The Convener: There is a 30-day period from the preliminary hearing in which the trial date must be fixed. Is that correct?

John Ewing: Yes, for the operation of the change to the 110-day rule.

The Convener: Will it be your job to prepare the paperwork for the written record that requires to be submitted two days before the hearing?

John Ewing: No, that is a matter for the two parties.

The Convener: I understood that you would send out a pro forma on which parties could tick boxes to indicate whether they have lists of witnesses. You will not be sending out anything.

John Ewing: There is discussion at the moment about how the detail will operate. We are working on possible models for consideration by the Lord President. When he is satisfied in broad terms, I expect that he will want us to engage in a consultation on the detail with the Faculty of Advocates, the Crown and others.

It is possible that we will produce a pro forma that parties will be free to use, but we will not be responsible for submitting it to the court. As part of the process, the parties will submit the pro forma to the court and it will then be the responsibility of my office to ensure that it is before the judge. However, we will not tick the boxes for them.

The Convener: I was not suggesting that. If you are expecting parties to come with prepared paperwork, I would have thought that someone would have to send out some sort of pro forma. In fact, the Law Society of Scotland suggests that the lack of any formalised system is a concern.

John Ewing: I would expect the procedures to be set out in an act of adjournal made by the Lord President, which would specify what information needs to be made available to the court. If there were broad agreement to do that by way of a pro forma, that could be specified. As a minimum, the information that was required would be spelled out. However, those are points of detail that we would want to pursue in discussion, assuming that the Parliament approves the principle of the bill.

The Convener: I hope that you can appreciate that those are points of detail that the committee requires. We have been asked to scrutinise whether preliminary mandatory hearings can potentially change the culture in the system. Without that detail, it is difficult for us to judge whether resources should be spent on changing the system to that extent.

John Ewing: I can understand the problem.

Margaret Mitchell (Central Scotland) (Con): You have already said that, under the provisions of the bill, the judge who presides at the preliminary hearing will manage the trial date. How realistic is that?

John Ewing: It is realistic in the sense that the judge will say that the trial will proceed on 2 December or whatever.

Margaret Mitchell: What are the implications for the judge? What will he have to know to make that decision?

John Ewing: He will have to know what the state of preparedness of the two parties is, what their estimate of the duration of the trial is, what the availability of counsel is and whether those elements can be accommodated within the diary that will be available to the court.

Margaret Mitchell: Is that all-new territory for the judge, with which he would not have had to concern himself before?

John Ewing: It is not totally new territory, as it is a process that sometimes happens informally at the moment. It is not necessarily the judge who makes the decision, but, at present, there is a dialogue between the Crown manager, who is responsible for managing a sitting with the various defence agents who are present, and my colleague Norman Dowie and his colleagues in the individual courts. In that dialogue, the length of time that particular cases are likely to take is identified and an attempt is made to decide whether they can be accommodated. We distil that information and make it available to the judge.

Margaret Mitchell: Do you honestly think that the trial date that is specifically named by the judge will be the date on which a case proceeds?

John Ewing: There will be a greater degree of certainty in that regard than there is now. We cannot rule out the possibility that, when we reach the trial date, the trial will not proceed because the accused tenders a guilty plea, a witness falls ill or is unavailable or the accused fails to appear. However, we hope that we will avoid the situation that sometimes arises at the moment in which counsel and others find themselves double-booked. As I said earlier, the kind of issues that have to be debated at the beginning of any sitting will have been dealt with, but we cannot eliminate the possibility of an act of God preventing someone from appearing.

Margaret Mitchell: Could such an act of God be as simple as a previous trial overrunning in the court in which the trial was set to take place?

John Ewing: That could be a problem if cases become overloaded. In that case, we would have to consider using additional judicial resources to find an additional courtroom.

Margaret Mitchell: So the bottom line is that, despite a specific trial date being set, the same problems that previously existed are still likely to affect the trial date.

John Ewing: Potentially, they could still affect it. We are reducing the likelihood of that happening rather than eliminating it altogether.

Margaret Smith (Edinburgh West) (LD): The bill makes provision for the extension of established time limits, including the 110-day rule. We have heard evidence that that is particularly helpful in complicated cases such as frauds and those involving experts in forensic evidence and so on. However, the Law Society's written submission says that the provision will not be necessary in relation to all cases. Do you consider that such a departure from existing procedures is justified?

John Ewing: That is a matter for the Crown rather than for us.

Margaret Smith: Do you feel unable to discuss the matter?

John Ewing: Our experience is that there has been an increase in the amount of business being extended for a variety of reasons relating to the complexity of the case. That adds to the problems for the defence in being adequately prepared for a case. The package of changes that is proposed, including matters such as the Crown disclosing more information to the defence, will assist in ensuring that the defence is better prepared on the day.

Margaret Smith: So the measures will go some way towards reducing the number of adjournments with which you have to deal in managing the courts.

John Ewing: Yes.

10:45

Marlyn Glen (North East Scotland) (Lab): The bill provides for detention of a witness who has failed to appear following citation. In your experience, is there a significant problem with witnesses failing to attend court when they have been cited to attend?

John Ewing: Yes, that can be a significant problem. It must be borne in mind that not all witnesses are happy to co-operate with the process. I make a distinction between the witness who is reluctant because of nervousness, anxiety or concerns about intimidation, and the witness who has a history with the court and who is unwilling to co-operate. The measure is directed more towards the second category than the first.

Marlyn Glen: Some concern has been expressed that that might be seen as coercion of witnesses. Do you have a view on that?

John Ewing: We do not have a view. That issue will be in the mind of the court in determining whether the approach is the right one to take in dealing with an individual case.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, gentlemen. I have a question on sentencing. The Executive has stated that it intends to implement section 13(1) of the Crime and Punishment (Scotland) Act 1997, so that the sentencing powers of sheriffs in solemn procedure will be enhanced. Is it possible to estimate the impact that that will have on the work load of sheriff courts?

John Ewing: We are currently evaluating that in detail across the country. Broadly speaking, it will translate into an increase of about 7 to 10 per cent in solemn business. The impact on individual sheriff courts will depend on the way in which business is handled. We anticipate that the impact will be negligible in the majority of courts, because the work will be well within the margins that they deal with at the moment. There will be one or two extra cases a year in some of the smaller courts, but no more than that. It is likely that there will be a greater impact on the six larger courts, which we estimate could range from three or four extra indictments a month in Paisley to 20 extra indictments a month at Glasgow.

We are currently evaluating the matter and in doing so we are trying not just to rely on historical figures. We are asking what would happen if the change happened today. The initial analysis told us that the work load was not an inhibiting factor in making the change, which is what we advised ministers. We are trying to project to the level that cases might reach on the basis of the general growth in serious business but, as I said, the preliminary indication is that the process would be manageable.

Bill Butler: Would the measures result in more certainty in the court system in, for example, Paisley and Glasgow?

John Ewing: In what sense?

Bill Butler: Would there be an improvement in the system?

John Ewing: Broadly speaking, it is accepted that the sheriff and jury courts work more effectively than the High Court at present, so we would consider a move from the High Court to the sheriff and jury court to be beneficial.

Bill Butler: Is the increase in sentencing power to a maximum of five years imprisonment an appropriate level for the sheriff court?

John Ewing: Yes, we see no reason why the sheriffs cannot handle that.

Bill Butler: What types of cases will be dealt with in the sheriff court if the change is implemented?

John Ewing: That will be a matter for the Crown and how it operates its marking policy, in the first instance. As I understand it, the Crown expects that some cases will involve fairly low-level drugs offences that do not currently go to the sheriff court. There will be other cases—which I suspect will be more common—of repeat offences, where the Crown feels it has exhausted the potential in the sheriff and jury court in terms of the sentencing maximum. Extending the sentencing power to five years will give the court another chance to deal with the offender. That kind of case will be in the transition but, ultimately, it will be a matter for the Crown.

Mr Maxwell: I want to take you back to the question of the degree of certainty in the fixing of trial dates. You said that you certainly hope for—indeed, expect to see—an improvement. Will you quantify that statement? What level of improvement do you expect in the fixing of trial dates and in ensuring that the trials proceed on those dates?

John Ewing: As I said, we expect the measure to release three or four judges, which would mean that between 20 and 25 per cent of cases could be dealt with without the problems of churning. However, we hope to do better than that.

Mr Maxwell: So, you would expect to see about a 25 per cent improvement.

John Ewing: We would expect at least that level of improvement. However, we have to translate that into other areas. Improvement of the plea rate and ensuring that pleas are made earlier will also have benefits. Given that on average something like 25 witnesses are cited per case, a plea rate of 20 to 25 per cent in the High Court at the preliminary diet would mean that between 7,500 and 10,000 witnesses would not have to attend court. That would be a big benefit, particularly because many of those witnesses would be policemen. Experience of the intermediate and first diets in the sheriff courts shows that the principal beneficiaries are the witnesses, who no longer have to attend court to deal with the matter.

Mr Maxwell: Is it your expectation that that level of improvement will be achieved, based on the experience in sheriff courts?

John Ewing: Yes.

Mr Maxwell: Given the obvious differences between sheriff court cases and High Court cases, is it reasonable to assume that just because 25 or 30 per cent of people make their pleas at the preliminary hearing in the sheriff court, the same thing will happen at the High Court? Is it more likely that people will hold out until the last minute—if I can put it that way—because of the nature of the crime of which they have been accused? Such a level of seriousness might mean that they are less likely to plead at the preliminary hearing.

John Ewing: Although there will inevitably be an element of that, it will be countered partly by the extent to which the courts use the sentence discounting option as an incentive for people to make early pleas. Of course, that will be part of any cultural change that takes place.

The Crown Office's annual report contains a useful table of statistics on the outcome of cases at different parts of the disposal. According to that table, a plea of either guilty or innocent is accepted in about 60 per cent of High Court disposals; however those pleas are tendered on the day of trial. With respect to solemn sheriff and jury trials, 30 per cent of pleas are accepted at the first diet and 30 per cent are accepted on the day of trial. As a result, we will still receive a significant number of pleas on the day of trial, but I hope that we will make inroads into that.

Mr Maxwell: Would it be fair to say that the matter is still an unknown?

John Ewing: Yes. However, based on current experience, we know that we need to create such an opportunity, because it does not exist at the moment.

Margaret Mitchell: On the plea rate, it has been suggested that the certainty of mandatory hearings that fix everything will encourage early pleas. After all, the person concerned will realise that they have nothing to gain, because the trial will go ahead. If the mandatory hearing is postponed either because the parties are not ready or because it is uncertain that the managed meeting will take place, or if the hearing is not given the kind of status that makes people realise that it is their final chance to get ready and makes the accused realise that the trial is going ahead, will not that affect the incentive to plead early and, in turn, the ability to set a specific trial date?

John Ewing: Yes.

Margaret Mitchell: So judicial management must make it clear that unless there are exceptional circumstances—from what you have said it seems as though the usual excuses will be made—strong sanctions will imposed if all the parties do not comply and are not ready for the mandatory hearing. That approach must be the key to the whole bill.

John Ewing: No—the key is in ensuring that all the parties involved in the process recognise the purpose of the mandatory hearing and co-operate to ensure that the trial proceeds for the benefit of the accused, the witnesses and the victims.

Margaret Mitchell: Do you have a view on how trials should proceed? Should there be a managed meeting at which they would meet face to face? Would not that be the best way to ensure that all parties were prepared?

John Ewing: Part of the proposal is that there will be a meeting in advance between the Crown and the defence to resolve some such matters.

Margaret Mitchell: We heard in previous evidence that that could be done by phone call, e-mail or fax. I have concerns about the preparedness of people for the mandatory hearing being decided at the managed meeting.

John Ewing: Sometimes, the meeting may require only an exchange of e-mails or faxes, but that will be a matter for the defence and the Crown to resolve. I have no doubt that, if it appears to the court that the preparations for the preliminary hearing are not satisfactory, the court will make that known to the appropriate people.

Margaret Mitchell: You are shifting your position—you are now saying that there does not have to be a face-to-face meeting, but that there could be a phone call or a fax.

John Ewing: That would depend on the circumstances of the individual case. Our experience of operating in the sheriff court is that, when the relevant fiscal can get together with the defence—even for just five minutes in the margins of the court—it can lead to better transaction of

business. However, it is ultimately for the Crown and the defence to resolve what works best for them. The court's judgment will be based on the quality of what appears before it at the preliminary hearing. If that is sustained on the trial diet and if we find out that there are difficulties, the matter can be raised with the Crown and the defence.

Margaret Mitchell: A snatched five minutes sounds a bit airy-fairy, and the evidence suggests that it is quite difficult to pin down fiscals. I am concerned about that.

John Ewing: When I talked about a snatched five minutes, I was talking about the typical summary court case in which there is often only one issue to be resolved. The issues in a High Court case will be more complicated and will require greater input of time and effort. I know that the Crown Office is preparing and resourcing itself to handle that and I have no doubt that the Faculty of Advocates will discuss with the Scottish Legal Aid Board how it is able to engage in that process.

Margaret Mitchell: In an ideal situation, however, a face-to-face meeting would be preferable.

John Ewing: Yes, that is my feeling.

The Convener: Let us return to the fixing of the trial diet—I want to understand how this is all going to work. The judge hears the parties at the preliminary hearing and is content that the parties are ready to proceed. A date is then fixed for a trial. Will that be done at the preliminary hearing?

John Ewing: Yes.

The Convener: How will that be done? How will diaries be synchronised to suit the Crown and the defence and ensure the availability of the judge?

Norman Dowie: We are looking to develop software for an electronic diary. We already have electronic diaries in the commercial court—for instance, in the Court of Session. The clerk or the managing clerk will see what dates, times and courts are available for the allocation of the work, and there will probably be a certain amount of negotiation between the Crown and the defence, concerning the dates that are available for the trial, before the case calls in court. By that time, the Crown and the defence will, it is to be hoped, have noted which witnesses will be required for the case and what dates are available for it. It will then be a question of finding a suitable date to accommodate the Crown, the defence and the witnesses. In the vast majority of cases, it will be possible to reach consensus; however, if either counsel or a witness is unavailable, it will be the role of the managing judge to sort the matter out.

The Convener: What would happen if the defence said that they would be available on a certain date but double-booked themselves and were not available?

Norman Dowie: One would expect the managing judge to take control of the situation and say, "That is not acceptable. You will need to pass your papers on."

The Convener: How would the judge do that? Would he call the parties to another meeting? I presume that that has happened after parties have fixed a date and gone away but it has transpired that somebody is not available. Would the judge have to call them back in again or would the matter be resolved by another means of communication?

Norman Dowie: We would need to arrange another diet and have the case called before the court again to have it fixed.

The Convener: Sorry, could you repeat that?

Norman Dowie: Yes. We would need another preliminary diet.

The Convener: You were asked earlier which cases you think might be referred from the High Court to the sheriff court to be dealt with under section 13(1) of the 1997 act and you said that that is a matter for the Crown Office. Has the Crown Office discussed with you the types of cases that it envisages transferring?

John Ewing: Yes.

The Convener: Can you tell us about those discussions?

11:00

John Ewing: We discussed the Crown's assessment of the impact that its case marking policy would have had on the distribution of business between the High Court and the sheriff and jury court, if the latter had been operating under the five-year sentence limit. That assessment identified a number of categories of cases, some of which I have mentioned. I cannot recall the specific statutory offences off the top of my head, but the Crown could advise the committee about that.

The Convener: Are you able to tell the committee which types of cases are likely to be referred to the sheriff court?

John Ewing: I do not recall the precise details. I know that the Crown believes that some offences that are currently dealt with in the High Court, such as certain drugs offences, could be dealt with appropriately in the sheriff court. A range of cases are taken in the High Court because the sentencing powers of the sheriff court have been exhausted; as I understand it, such cases will provide the bulk of what is referred. Other offences, such as various categories of assault,

might be dealt with in the sheriff court, but that will be for the Crown to decide.

The Convener: How can you make a judgment about the administration of the new procedures, when you cannot say which cases the High Court is likely to refer?

John Ewing: We have worked with the Crown to establish a broad estimate of the proportion of High Court cases that the Crown thinks will be referred to the sheriff court. The working estimate is about 20 per cent of cases, but we are also modelling the possible consequences of a third of cases' being referred, which would still be manageable. Difficulties arise because the offences will vary; the decision whether to send someone to the sheriff and jury court for an assault with a knife may depend on the extent of the victim's injuries. I cannot give the committee a list of statutory offences that will be referred, because everything depends on the circumstances of the case and the fiscal's marking decision.

The Convener: Given the assumption that about 20 per cent of business will be referred, how will that affect High Court business in terms of the number of trials compared to the number of courts that are available?

John Ewing: We hope that by referring those cases we will free up some capacity and be able to use the available sitting times more efficiently. Initially, there will be some surplus capacity, but if the drive on serious criminal business continues—I mean the police approach to tackling drug offences, intelligence-led policing and various other matters with which I am sure the committee is familiar—there are likely to be more serious criminal prosecutions in the years ahead. We expect to be able to match—

The Convener: The committee is aware that the figures for serious crime are not coming down. Can you give us a more detailed picture of the court administration under the new system? If you shift 20 per cent of business, or more, I presume that that will create greater certainty that trials will go ahead. I assume that you have made some planning assumptions about the availability of courts relative to the number of trials that are pending?

Norman Dowie: The figures for 2002 show that approximately 24 per cent of indictments—about 368—went to trial. On the basis that we would lose between 20 and 25 per cent of that business to the sheriff court, we anticipate that we will run about 275 trials per year.

The Convener: Will the reduction in the number of trials relative to the number of courts that are available lead to greater certainty that trials will proceed?

Norman Dowie: Without doubt the fact that fewer cases will come to the High Court will make the system more manageable. The current system—for example in Glasgow, where 60 or 65 cases might come to the High Court and have to be managed within a two-week period—causes great difficulty. If we reduce that number and introduce fixed trials into the sitting, we will provide greater certainty and, we hope, efficiency. We also hope that the new system will reduce, if not eradicate, double bookings of counsel.

Under the current system, an advocate might well deal with five, six or more cases in any particular sitting. Technically, all those cases would be down for trial, which is completely unrealistic. By managing the new system, the judge will supervise potential double bookings of counsel and so on and the available counsel will be in the diary.

The Convener: That is understood—if all the new procedures were introduced, that would be the desired effect. However, I am trying to pin you down on provisions to shift business from the High Court to the sheriff court so that your business will be reduced by 20 per cent. I take on board the point that John Ewing made about the rise in serious crime, but I am trying to ascertain your planning assumptions about the number of trials, the number of available courts and what business will look like. I assume that you will considerably reduce the number of trials. You must have worked out a ratio involving the number of trials against the availability of courts, which I presume would look much better than it currently does. Can you give details about that?

Norman Dowie: As the chief executive said, we currently allocate approximately 14 courts per week to High Court business. Under the modelling that we have done, we estimate that around 10 to 11 courts will be required.

I would like to say something about loading of preliminary diets, which was asked about previously—I did not properly answer the question. If we use Glasgow as a model and one judge deals with preliminary diets each day, approximately five preliminary diets per day would be held in Glasgow. I apologise for not giving that figure earlier.

The Convener: That is helpful. Thank you.

Mr Maxwell: On the transfer of work from the High Court to the sheriff court, it was said that there would, in effect, be a 20 per cent cut in the High Court's work load. If nothing else was done except for such a transfer and the number of cases was reduced, would not that in itself create a great deal more certainty and make the High Court work much more efficiently?

John Ewing: No. It would give us a breathing

space, but it would not procure the benefits in respect of impacts on victims and witnesses that the change in procedures that we are discussing would procure. It would give us some easement in the High Court, but the other changes that the bill proposes will produce more beneficial impacts for the system as a whole.

Mr Maxwell: You said that a change in the sentencing power of sheriff courts from three years to five years was entirely reasonable and appropriate. Why would a change to five years be better than a change to four years? It seems more obvious to change the sentencing power to four years. I can understand a change from three years to four years, given the normal break between short-term and long-term sentences, so why is a change to five years more appropriate than a change to four years?

John Ewing: Five-year sentences are available in statute at the moment. Lord Bonomy considered different options and ministers considered the facts and decided that they would go with the existing legislative provision. There is no fine dividing line. You are absolutely right about short-term and long-term prisoners, but should the dividing line between short-term and long-term prisoners be five years rather than four years, given that they are not always in for four years? We are not talking about an absolute fixed point in time. However, there is a feeling that sheriffs are capable of dealing with the change in the sentencing pattern and are perhaps better equipped and trained than they were five or six years ago.

Mr Maxwell: I do not doubt the capability of sheriffs. I know that ministers have made a decision and I know what the statute says. However, I was interested in whether you had a view on the matter, other than that that is the way things are. Is there a reason why the maximum length of sentence that they can give should be increased to five years rather than to four years, apart from the fact that ministers have so decided?

John Ewing: It is not for us to form a view on that matter.

Mr Maxwell: So—you have no view on the matter.

John Ewing: No.

The Convener: That matter is properly for the Executive.

Margaret Mitchell: I have a brief question on management. Where should cases that are handed down from the High Court to the sheriff court be heard? Should they be heard in the sheriff court local to the area in which the crime took place, should they be heard where the accused resides or should they be heard at an available sheriff court in which there is space for the case to be dealt with?

John Ewing: It is possibly slightly misleading that we talk about business going down from the High Court to the sheriff court because, in practice, it will not work like that. In practice, when marking the case the fiscal will indicate whether it should be handled as a sheriff and jury case or whether it should be referred to the High Court. That decision will be reviewed within the Crown Office using its usual mechanisms. It will not be possible, therefore, to say categorically that case X has gone to the sheriff court instead of to the High Court. Overall, we will see a change in the distribution of business. The presumption will be that cases that go to the sheriff and jury court will go into the court that currently has jurisdiction over that offence and that they will be just like any other sheriff and jury case.

There are circumstances in which individual cases would sometimes be better dealt with other than in their normal court, but that is not changed by the bill in any sense.

Margaret Mitchell: As there will be more business in the sheriff courts, if there is available space in another part of the jurisdiction, might consideration be given to hearing a case in a different way just to get the business done?

John Ewing: That issue will be considered as part of the general overall planning of business. At the moment, fiscals can move cases around within a jurisdiction. Part of the debate that we are likely to have will be about how best to manage that. It would be patently absurd to allow a delay to build up in one court if there is a court close by that has available space. We will obviously need to consider that issue, but we will do so as part of our consideration of how we manage the total demand for sheriff and jury business rather than just in terms of how we deal with the High Court cases.

Margaret Mitchell: That was helpful.

The Convener: Finally, I know that you have answered some of this question, but I just want to be clear about your answer. Will cost savings result from the transfer of business from the High Court to the sheriff court? Where do you envisage those savings coming from?

John Ewing: Under section 306 of the Criminal Procedure (Scotland) Act 1995, the Executive publishes the costs of various parts of the process. The section 306 publication gives a figure of the order of £14,000 as an estimate for the cost of a High Court trial. The estimate for sheriff and jury trials is around £4,710. Inevitably, there will be a saving associated with that move. Sheriff and jury trials are shorter and do not involve counsel as a matter of course. Various measures in the bill could produce savings, but the extent of the

saving in an individual case will clearly depend on the nature of the case and on how complex or otherwise it is.

The Convener: You have identified the fact that, as counsel appear in the High Court but not in the sheriff court as a matter of course, the bill might produce a saving. However, that would not be a saving for the Scottish Court Service.

John Ewing: No, the saving would be to the Scottish Legal Aid Board.

The Convener: I think that that is all. I thank you for answering all our detailed questions—it has been helpful to us in our examination of the bill.

I welcome our second set of witnesses, who are from the Law Society of Scotland. They have been with us many times before, so I welcome them again and thank them for their time. Gerry Brown is the convener of the criminal law committee, Michael Meehan is a member of that committee and Anne Keenan is the secretary.

Marlyn Glen: I ask the witnesses to outline which of the bill's measures the Law Society welcomes and which it does not welcome.

11:15

Gerry Brown (Law Society of Scotland): I do not want to avoid that question, but I will try to avoid it. The criminal law committee thinks that the bill's effectiveness is to do with disclosure. As members will know from our response, our starting point is that, other than a few provisions that I might touch on—such as the one on tagging—the import of the bill depends on the disclosure provisions.

We welcome the invitation to give evidence. We think that the bill's aims are positive and we support an efficient and fair system. Our fundamental point is that the major provisions, such as those on mandatory hearings, focused meetings and a written record, can be achieved only if the defence is provided in advance with much of the Crown information, rather than the defence having to chase the Crown's tail at the last minute.

Marlyn Glen: I presume that you are positive about the provision on the early disclosure of information.

Gerry Brown: Yes.

Marlyn Glen: Are there any measures that you do not welcome?

Gerry Brown: We have concerns about tagging witnesses and about citation for precognition. We can deal with those issues today, or we can provide the committee with a supplementary note, depending on how much time is available.

Margaret Smith: I will focus on disclosure. Your written submission states:

> "the effectiveness of these proposals in operation will depend on whether the principle of early disclosure of information … is introduced into legislation."

Is it your view that the proposals must be made clear in the bill so that people know exactly what they have to do?

Gerry Brown: Our position is that the disclosure system cannot be based on informal arrangements; it must be laid out clearly in the bill.

Margaret Smith: Broadly, what do you mean by disclosure?

Gerry Brown: All three of us have discussed the issue in detail and we will contribute as we see appropriate because the issue is a major one. The fundamental point is that the implementation of the bill provides an opportunity for developing a particularly Scottish approach to disclosure because our system is distinct. The Crown should be required, at an early stage, to provide the defence with the statements of the witnesses who are listed on the provisional list of witnesses and, subsequently, on service of the indictment, with the statements of witnesses who were not listed on the provisional list of witnesses or with statements that were not previously provided. That would be a starting point.

The Crown is already under an obligation to provide copy productions and copy reports such as forensic reports. The earlier transmission of those to the defence would help to allow the full implementation of the bill's aims, which are laudable.

Margaret Smith: In what respects are the current arrangements for disclosure unsatisfactory?

Michael Meehan (Law Society of Scotland): The current arrangements rely on the duty of the Crown to provide information to the defence. The Crown has the advantage that, when it precognosces cases, it has copies of the police statements. The Crown Office review identified that one purpose of precognition is to clarify discrepancies and ambiguities in police statements. Under current legislation, both parties in the criminal system are entitled to put inconsistent previous statements to a witness.

The difficulty that the defence has in preparing a case is that it does not know the shape of the case. It is almost as if the criminal case is a jigsaw and the Crown has the lid of the box but the defence does not. We are provided with the names of witnesses, but we do not know whether they are key witnesses or whether they simply speak to completing a rights-of-arrest form. We would have an advantage in that we could direct

our preparation and say to the Crown at an early stage, "We can agree that Constable Smith completed the rights-of-arrest form, so don't bother with him on the indictment." We would be able to notice that the key witnesses were not able to provide the police with a description of the accused at the time. If they came into court and picked out the man without hesitation, we would be able to say, "You didn't say that to the police at the time."

I appreciate the fact that the Crown has a tradition of providing information to the defence. The recent authority is the case of Maan, petitioner, which determined that if the Crown has the information available it will come to the assistance of the defence. One of the difficulties is that the depute fiscal or the advocate depute in court might not always have a copy of the original statement in front of him. Although the Crown has the duty to provide information that is of material assistance to the defence, it is not to know in advance what the witness will say in the witness box and therefore it is not in a position to know in advance what would assist the defence.

Margaret Smith: I want to pick up on an earlier point, which I think you also made in your submission, which is that you are suggesting the adoption of a system of timetabled disclosure of certain material to the defence. Will you expand on how you think that would work in practice? We have heard arguments regarding the fact that police statements are taken by a number of people in a number of ways; we might have to consider changing the way statements are taken. I would like you to cover police statements and the timetabling issue.

Michael Meehan: From the defence point of view, the earlier information is provided, the better, because the defence then has the information when it is deciding who to precognosce. If it knows that the witness is speaking simply to formal evidence, it could say that it will not precognosce that witness. If we are given a name, we are given an indication of what the witness is likely to speak to.

The quality of statements is a separate matter. If a previous statement is put to a witness, it is for the jury to decide what weight it attaches to what was said at the time and how the witness explains any discrepancies. It is for the judge and the procurator fiscal or advocate depute to bring out in the evidence the fact that at the time the witness gave the statement they were extremely distressed and were perhaps waiting to go to hospital in an ambulance. The fact that they did not give a detailed description of the assailant or the incident would be entirely in keeping with the circumstances of the case.

Gerry Brown: I would like to make just one point: Anne Keenan might also want to say something. I presume that members of the committee have had sight of the review of the Crown Office systems, which was published in June 2002. That document is excellent, warts and all, and not because I sat on the internal review team. I was not one of the warts. It shows the various problems and identifies a timetabling procedure to some extent. A fundamental aspect of that is that the Crown is able at an early stage to identify provisionally whether a case will be a High Court case, whether it will be a difficult case and whether it will be allocated to a particular precognition officer, depute fiscal or advocate depute. We acknowledge that there are cases that are out of the norm, but most are not out of the norm. Many High Court cases—I hesitate to say this—are simply district court cases that have gone terribly badly wrong and have serious consequences for everyone.

Anne Keenan (Law Society of Scotland): The only point that I have to add supplements what Michael Meehan said about the potential impact of early disclosure on witnesses. If we have early disclosure, parties will get together at a much earlier stage and we could perhaps even avoid the necessity of precognoscing witnesses and citing witnesses at a later stage. There could be savings in the system following early disclosure.

Margaret Smith: Your written submission refers favourably to the requirements of advance disclosure on the part of the prosecution under English law. I appreciate that there are difficulties with cherry picking from other jurisdictions. I understand that the obligation of disclosure is reciprocal in England: in other words, the defence must also disclose the case that it intends to present at trial. Would you favour such an approach here?

Gerry Brown: The wording in our submission is:

"The Committee believes that if this type of approach were adopted in Scotland, it would be of considerable benefit".

We have not looked at the English system in detail, other than in relation to our own experiences of it. There are problems with it. We would not propose to use the English system; we would propose that we start off with disclosure up to a limited stage, see how that develops and then move on. On the question of disclosure by the defence, our view is that a lot of that is carried out already, and it is part of the statutory obligations that we have at present.

Anne Keenan: The defence currently has to intimate to the Crown the lists of defence witnesses and the lists of productions that it will use in evidence. There is also the statutory requirement to lodge notices of special defence. If the defence intends to lead with defences of alibi,

incrimination and so on, it must give the Crown notice of that.

It is my understanding that the reason for those statutory provisions' being brought in is the Crown's obligation to investigate. It is fair for advance notice to be given to the Crown, so that investigations may be carried out. Disclosure of what the Crown case will be is already required to an extent under the current statutory provisions. To go further might be to encroach into areas of legal professional privilege and confidentiality, which is well recorded as being a cornerstone not only of the legal profession but of the justice system. As recently as 14 October, a Home Office minister, Caroline Flint, during a debate on the Crime (International Co-operation) Bill, said:

"Legal advice cannot be obtained unless a client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to the client's prejudice."—[*Official Report, House of Commons*, 14 October 2003; Vol 411, c 43.]

It is a cornerstone of the justice system that a client must be able to speak to their solicitor in confidence, without the fear that what they say might be further disclosed. We already have provision for disclosure by the defence, and we would be reticent about going any further if that would impinge on legal professional privilege and confidentiality.

Michael Meehan: Lord Bonomy discussed confidentiality in his report in connection with the note of the line to be prepared by the defence. The terminology is slightly different in the bill, which describes a joint report, but in any event Lord Bonomy recognised the importance of confidentiality.

Leaving that aside, although the defence may not be able to disclose a line for reasons of confidentiality, it would be able to disclose to the Crown at an early stage what was not in dispute. That would trim down the number of witnesses who were required to attend and it would allow the Crown to funnel its preparation of the case on to certain issues, knowing that certain matters could be left aside.

Margaret Smith: I return to the question asked by Marlyn Glen. If earlier disclosure is introduced in a systematic way, with a timetable—but assuming that there will always be things that crop up and cannot be timetabled—and alongside the Executive's various proposals, will that have a positive effect on the system as it exists at present?

Gerry Brown: Yes. If that is done, the mandatory preliminary diets will be effective. We are concerned that, without disclosure, the mandatory preliminary diets will not be effective. Advance disclosure would also encourage what already exists. The system works on a basis of good will now, and most of us who operate within the system realise that. The good will that currently allows the system to work would be developed and the system would become more efficient as a result.

The disclosure of information at an earlier stage would also encourage advisers to contact the other party and tell them what is not in dispute and not to worry about matters concerning arrest forms, retention forms, forensic reports or medical evidence.

It is not the medical evidence that is in dispute, but the identity of the perpetrator. What Anne Keenan is saying is that there can be informal discussions, but we are slightly concerned about how far the disclosure goes. I think that we should walk before we run.

11:30

The Convener: What are the limits on the Crown's duty to disclose information? Presumably you would accept some limit on what the Crown has or has not to reveal to the defence.

Gerry Brown: There are a number of cases, such as the McLeod petition, on which Michael Meehan and I have had discussions.

Michael Meehan: The right of disclosure is often considered in relation to the European legislation on equality. It is not absolute disclosure; it is disclosure so that the accused is not at a material disadvantage. In its written submission on the McLeod v HMA case, the Crown mentioned that evidence that supports any known or statable defence could be disclosed, but it also mentioned information that undermines the Crown position. In a criminal case, as well as the accused having a position, the Crown has to prove the charge beyond reasonable doubt. That would kick in where a witness is perhaps not sure of his or her identification and has expressed that reservation. In such circumstances, that type of information might be made known.

One of the features raised in the McLeod case was that there would not be the expectation to disclose absolutely everything. The example given in that case by a counsel appearing for the defence related to his involvement in the case of R v Black, quoted as Robert Black. He said that, in that case, a million documents had been provided to him. As the court commented, the defence could find itself swamped if everything were provided. However, the Crown also recognised that there could be situations—sexual offence cases, for example—where the Crown will, as a matter of policy, interview known sex offenders whose names are on the sex offenders register to eliminate them from the inquiry. It would not be

appropriate that the details and statements of people who have been eliminated from the inquiry should be provided to the defence. The information that is to be disclosed is information that either supports the defence or undermines the Crown case, but no more than that.

The Convener: Do you agree that it is a question of getting the balance right in changing the procedure? The defence would not want its case compromised by revealing something that it felt might undermine its case, but it may try to get points of agreement, and even points of dispute, out in the open.

We have been asking questions about the managed meeting prior to the mandatory preliminary hearing. In your view, should that be a face-to-face meeting sitting down with the Crown, and do you think that it is an important part of the process?

Gerry Brown: I like face-to-face meetings, but we are kidding ourselves on if we think those meetings can be done by phone or e-mail. There has to be a meeting and the parties would be wise to have it recorded. I might be wrong, but I think that Lord Bonomy's proposal was that it should be an obligatory or mandatory meeting. Our response was that it should not be mandatory, but that it should be discretionary and encouraged. Having discussed the matter and having gone over the bill and all the responses to it, I am more of the view that there should be an obligatory meeting between the Crown and the defence, so that the preliminary diet can be as focused as possible and so that the parties can tell the judge individually, "We have had this meeting and discussed these issues."

Michael Meehan: At the very least, such a meeting would save time in court if parties discussed difficulties at that time. It would be regrettable if a mandatory system for preliminary diets in court were introduced and then, in a year or two, it were decided that the system was not working as well as it could because meetings were not taking place in advance.

The Convener: Is it your view that the legislation should describe a format for the written record?

Gerry Brown: Yes. It is difficult for those of us who have a professional responsibility and may face some sanction because of that to know what our responsibilities are in statute without knowing what we are required to do. That should be embodied. There is a view that it should be in an act of adjournal, but we would like to know what the act of adjournal is before we sign up to it.

The Convener: We have heard evidence that there is no sanction—or, at least, that there is none in the bill—that would apply if parties were not ready at the preliminary hearing. If that happened, would it be a question of the judge giving a heavy-duty opinion.

Gerry Brown: A "slap your hands" approach?

The Convener: Should there be a sanction? If so, what should it be?

Gerry Brown: Not slapping your hands. Anne Keenan is good at sanctions. She gives me a row every now and then. Perhaps she might want to say something on the subject.

Anne Keenan: I suppose we should focus on how the bill is drafted rather than on Mr Brown's conduct. We have to look at who the fault would lie with. As the convener rightly said, under the bill as it stands, the judge would have the right to desert the diet simpliciter or pro loco et tempore. If the case was within time limits, the case could simply be reindicted. In effect, that is no real sanction.

If there was thought to be a fault on the part of one of the professionals who was involved in the defence of the case, there would be a right of complaint to the professional body—either the Law Society or the Faculty of Advocates. If the fault was perceived to fall on the accused, ultimately the only downside is the potential for them to be remanded for a longer period in custody because the case would have to be continued. There has been some debate about bail. It has been decided that the person should still be remanded. Those are the sanctions that I can see within the framework of the bill.

Michael Meehan: The position of the society on sanctions is that we are moving away from them. Certainly, in so far as the breach of the 110-day limit is concerned, we would say that the ultimate sanction of the accused being free for ever should be removed. That would be a shift towards more responsibility. Clearly, at the end of the day, if there were to be no sanction for not fulfilling those responsibilities, that could lead to tension.

The Convener: I want to move on to criminal legal aid. There is perhaps an acceptance that although there may be additional costs to the new procedure, there could also be savings. The two might balance out. We have had two opinions on whether, if business is shifted from the High Court to the sheriff court, counsel will appear in the sheriff court. The bill team tells us that counsel will do that, but we have also been told that that would not happen. What is your general opinion of the implications of that proposal for criminal legal aid?

Gerry Brown: It is difficult to determine what the impact would be. If the bill is effective, it should result in a smaller number of trials. I will deal with counsel appearing in the sheriff court later on in my reply, as that concerns sentencing as well as provision. Sanction is automatic in the High Court

for counsel, but that is not the case in the sheriff court.

I am not sure whether there will be savings in legal aid or whether there will be an increase in legal aid. I am also not sure whether that matters in the general picture of things. When I think of the criminal justice system, I always think of it as a balloon filled with water: if you push in one bit to make some savings, the other side pops out. If, for example, there are mandatory diets that are effective, the savings will be in judicial time and in a reduction in inconvenience to witnesses and victims. There will also be savings for the police: police time in coming to court will be saved and there will be a reduction in the problems the police have with citations.

We have to look at the whole picture. Legal aid exists and, as far as I understand it, will continue to do so; the situation as regards budget is open ended. Once the people who represent individuals in terms of legal aid move on, other people will replace them. Legal aid is a service—one that keeps the system going.

The reduction to the sheriff court is in line with the increased sentencing powers for sheriffs. From our response, you will see that we are not supportive of that. We are happy to expand on our reasons for that.

Anne Keenan: The committee has obviously received from the Scottish Legal Aid Board submissions about figures. For completeness, we provided our response to the Finance Committee. I understand that SLAB's figures have been estimated on the basis of current legal aid figures. The Minister for Justice has indicated that there is to be a strategic review of legal aid. We cannot answer questions about the impact on the system because we do not know what is going to happen with the strategic review. Assessing the impact on the system is therefore difficult for us, but SLAB might be able to give you a view of that with the information that it has to hand.

Gerry Brown: SLAB is participating in the strategic review—as we are—so it might be able to assist you.

The Convener: Do you have a view about the shift in business to the sheriff court and whether counsel should be available for cases for which they were previously available? Would there be implications for the legal aid budget if that were to happen?

Gerry Brown: There should not be an increase in the sentencing power. The provision has been in force since the Crime and Punishment (Scotland) Act 1997. I am not sure what has changed.

Serious crime deserves to be dealt with in a serious forum such as the High Court of Justiciary. We do not know what the Sentencing Commission will say about sentencing. Other than in very exceptional cases, sentencing linked to serious crime is consistent when it involves a set body of judges. There could be variations if sentencing decisions were spread throughout Scotland.

Public confidence is also an issue when decisions are made about whether serious crime should be dealt with in the High Court. My colleagues might have something to add to that.

If there is be a change in policy to allocate cases to the sheriff court, facilities have to be available and there has to be a regular opportunity to obtain the sanction of counsel. What is the difference? Just because the forum has changed, that does not mean the crime has changed.

The Convener: So you believe that counsel should be available for those cases.

Gerry Brown: Yes. I do not see the difference in principle between counsel and a solicitor advocate. They should be available.

Mr Maxwell: You said that you do not believe that the sentencing powers of the sheriff court should be extended to five years. If the bill were enacted, what type of case should be allocated to the sheriff court?

Gerry Brown: I listened to the previous witnesses, particularly John Ewing. We do not have a view on what cases should be allocated because, unless the law changes, the Crown should make the decision about where a case is determined. It is also a matter for Crown policy, which can and does change over the years.

Mr Maxwell: We have heard evidence that much the same cases would go to the sheriff court as go at the moment, but that they might be a little more serious. Certain drugs cases might be transferred, for example.

Gerry Brown: I have a view about cases that should go to the High Court but do not, but that is another matter. That aside, it would be wrong for me to comment.

Michael Meehan: The chief executive of the Scottish Court Service gave evidence on cases being referred to the High Court just because the accused had a record. I am not able to speak to evidence in relation to that, but I do not believe that that would make up a great percentage of cases, even though the figure of 20 to 25 per cent of cases was being bandied about. High Court cases often feature first offenders committing serious offences; an extreme example would be murder. I would be surprised if a significant proportion of them were sent because of the accused's record. However, that is just my impression as opposed to detailed evidence.

11:45

Mr Maxwell: In your written submission, you express concern that the bill does not indicate the type of information that the written record of state of preparation would contain. Why are you concerned that that is not in the bill?

Anne Keenan: We want to know what we are signing up to in advance, and the proposal is nebulous. I referred earlier to our concerns about any erosion of the doctrine of legal professional privilege or anything that would interfere with confidentiality. If we sign up to something that could be prescribed by an act of adjournal, we could not say, "We agreed to it in principle when the bill was passing through the Parliament, but now the act of adjournal says that we are supposed to disclose something confidential, and it would be improper for us to do that." That is why the bill should specify the confines of the written record. We have had some thoughts about which matters should be covered, such as whether all the evidence has been agreed, whether all the witnesses have been cited, whether we can cut down or trim the case in any way, and perhaps a list of outstanding matters. However, we want certainty about what we are signing up to before we can say to the committee whether the provision is good or bad. Otherwise, it will impinge on our professional responsibilities.

Mr Maxwell: I accept what you say. You listed a number of things that should be included. What, then, should be excluded?

Michael Meehan: The written record should not stray into confidential issues. In his report, Lord Bonomy raised the idea of a note on the defence. From reading Lord Bonomy's report, I had formed the impression that the note would be akin to the shopping-list letter that the Crown would prepare to highlight matters that need to be attended to, in that it would be a note on defence matters that needed to be attended to, and that it would be a matter for the defence team. The bill proposes a document that would be before the court, which is similar to what one finds at an intermediate diet in summary cases in some jurisdictions where, in some cases, the solicitor will stand up and say what their position is. Other jurisdictions have a pro forma that asks about matters such as whether the witnesses have been precognosced, whether legal aid is in place and whether evidence has been agreed. It would be advantageous to know in advance which matters the document will contain; as Anne Keenan said, it would also be advantageous to know that the document will not stray into confidential issues.

Mr Maxwell: In your written submission, you seem to question the idea of the prosecution and the defence submitting the written record jointly. Will you expand on that? It seems common sense that, if both parties were agreed, there would be no reason why they could not make a joint submission saying what they agree on.

Gerry Brown: There may be situations in which everything can be agreed, but individual responsibility rests with the solicitor or counsel. We have an adversarial system, and we must acknowledge that, if there are multiple accused, individual responsibility rests with each accused's representative. Also, a solicitor might find that they are unable to achieve agreement as to what is to be put before the court because they have not been able to meet counsel. We were concerned about who has ultimate responsibility: the solicitor who instructs counsel or counsel. There may be ways round that, but we would like that whole area to be clarified.

Mr Maxwell: Is the provision too vague?

Gerry Brown: We think that it is not precise enough—I think that that means that it is too vague.

Mr Maxwell: On the point about multiple accused, they are obviously all at the same trial. More parties may be involved if different people represent different accused. I am not sure how a separate agreement between each of them rather than a joint agreement would speed up the process or in any way enhance the situation.

Gerry Brown: The written record has to be lodged 48 hours before the preliminary diet, so the judge will have access to it.

This is why the provision is too vague. A mechanism could be put in place whereby the individual legal representatives have to exchange documents with one another; they have to do that at present in relation to notices of special defence, notices of incrimination and so on. If that mechanism were extended to cover the written record, they would arrive at the preliminary diet with either a resolved position between the parties or a disputed position, which could be resolved at the preliminary diet. It is about exchanging information, through whichever method is appropriate. Personally, I would rather take individual responsibility for my position rather than have joint responsibility with any of the co-accused or with the Crown.

Michael Meehan: The Law Society of Scotland's position is that the document would be an individual report on the state of preparation. Therefore it is perhaps not correct to define it as an agreement, because we would not necessarily be agreeing with the Crown. We would be saying to the Crown and to the other parties in a given case, "This is our position." I agree that it would be a bit incongruous to have individual agreements, because if, out of five accused, four say that they can agree the forensic evidence or the fingerprint

evidence but the fifth does not, the Crown would need to lead evidence on that point. I accept that, if there is to be an agreement, it would make sense for that to be an agreement between all the parties involved.

Our position is that we would look at each party's position and intimate those to the other parties, so that prior to the preliminary hearing not only would each party have intimated their position to the Crown, but they would also know the respective positions of the various parties before the case called in court.

Margaret Mitchell: Your submission indicates that you do not believe that it is necessary to extend the 110-day rule in all cases. You have suggested an alternative for cases in which that extra time would be required. Will you outline your alternative?

Michael Meehan: Our proposed alternative—it is a loose proposal—is for a hearing within, for example, seven days of the indictment being served. Therefore, seven days after the 80 days have expired, there would be a hearing at which the parties would appear in court. They could use that hearing to say that the case was straightforward, that the information about charges, witnesses and productions on the indictment was as they expected and that they would be ready to proceed in 110 days.

As we indicated, more complicated cases would have been identified at a far earlier stage and a timetable would be disclosed for them. We would still anticipate there being a preliminary hearing for the 110-day cases but, with the advantage of early disclosure at a very early stage, the defence would be in a position to confirm that their state of preparation was advanced.

Margaret Mitchell: So you could ask for a realistic extension, knowing the stage that you were at.

Gerry Brown: I go back to a point that was contained in the review of the Crown Office. If an experienced prosecutor can say at an early stage, "This is a 110-day case, but there is no way that we will be prepared in 110 days," they could bring that to the attention of the accused's legal representative. As Michael Meehan properly says, many cases can be dealt with inside 110 days; they would be dealt with inside that time scale if there was early disclosure. It is a canard to suggest that adjournments are always brought about by a defence motion for adjournment. The committee may have heard evidence about that, but in our experience adjournments happen because certain preparations still have to be conducted.

Margaret Mitchell: If I have read your submission properly, it suggests that when forensic evidence is required, it is necessary to tease out whether the delay arises because extra time is required due to the complexity of the forensic evidence or because insufficient resources are in place.

Michael Meehan: A recently reported case—HMA v Hannigan—was thrown out because of delay. The High Court judge took the view that the case was very straightforward, and although it involved only 11 witnesses, it had taken two years from the date of arrest for the case to come to court, which he said was too long.

In some cases, only analysis of drugs requires to be done. Our position is that if it takes 10 months for the analysis to come back because of a backlog of work, that is completely different from a situation involving a process such as the amplification of DNA, which takes months. There is a distinction to be drawn. The Bonomy review and the Crown Office review acknowledged that there are demands on the resources of the forensic science services. The issue comes down to cost. If the money were forwarded to the labs, would they be able to clear the backlog of cases so that drugs could be analysed more quickly and not have to wait in a queue for months?

Margaret Mitchell: It might be worth while for the committee to investigate that area to find out what the reason for the delay is.

Michael Meehan: Indeed.

Margaret Mitchell: Does the extension to the 110-day rule, where extra time is needed, work informally in the High Court?

Michael Meehan: Even in a sheriff court case in which someone has been remanded for 110 days, an extension must be dealt with by a High Court judge. In other words, a request for an extension has to come formally in front of the judge. In the same way that a High Court judge could refuse a motion to adjourn, they could say that they were not prepared to grant an extension beyond the 110-day period. Judges often rely on what the parties tell them. If the defence says that it needs more time because, following late receipt of a fingerprint report, it has an essential inquiry to make, a judge would usually—although not in every case—back that request and grant the adjournment, if the Crown was in agreement. It is always for the judge to decide whether to grant an extension.

Margaret Mitchell: If there is sufficient reason, it is not uncommon for the judge to grant such an extension.

Michael Meehan: That is right.

Michael Matheson: In the evidence that we took from the bill team last week, one of the main arguments for the need to extend the 110-day rule

concerned the complexity of the cases that go before the High Court and the fact that they are becoming much more sophisticated, because of scientific advances. I will ask you a question that I asked members of the bill team. At some point in future, will we have to revisit the time frame that we are changing, in order to extend it even further because of advancements in the technology that the police use and in scientific evidence? Although those factors might speed up the process, they could also make it much more complex. Are we in danger of going down a slippery slope by extending the time scale?

Gerry Brown: I am not sure which analogy to respond to. If we had to revisit the issue, our position would be different. It has taken us a long time to come to the view that the 110-day rule should not be preserved. As Michael Meehan said, we have put forward our position.

The issue is fundamentally predicated on the implementation of the Crown Office review that I have referred to. If that is effective and progress is made once that work starts—perhaps it has already started, but that might be a secret—as Michael Meehan said earlier, it should be possible to have early identification of what are often fairly simple High Court cases, such as an assault and robbery in a shop with a weapon. Such a case may involve just three eye witnesses and seven police officers. Many cases are not complex or difficult, while some are very complex and difficult, and I suggest that the majority would not be as difficult if there were early identification.

The Convener: Will you clarify which Crown Office review you are referring to?

Gerry Brown: I am sorry. I can give you a copy of it—it is called, "Review of Crown Office and Procurator Fiscal Service Systems for Processing, Preparation and Prosecution of High Court Cases", which was published by the quality and practice review unit in 2002.

The Convener: Thanks. That is helpful.

Bill Butler: Your written submission states that you do not agree with the proposal to extend the circumstances in which a trial may be conducted in the absence of the accused. Is the non-appearance of the accused a significant problem in High Court trials?

Gerry Brown: No, it is not a significant problem. I am surprised by how many people turn up at High Court trials. Most of your witnesses will probably confirm that that is the case.

12:00

Bill Butler: So the problem is not significant.

Gerry Brown: No. Sorry—maybe I should have said yes.

Bill Butler: That would have been handier. Is it possible for an accused to have a fair trial if he or she is not present? The answer does not have to be yes or no.

Gerry Brown: My view, which I think is the view of our committee, is that it would not be possible to have a fair trial.

Bill Butler: Is that true in all circumstances? If the accused does not turn up for the trial, do they not in effect waive their right under article 6 of the European convention on human rights?

Michael Meehan: Each system is considered on its own merits when it comes to the ECHR—for example, the English system is more statement based. In Scotland, there could be a trial in which, after all the evidence has been led and the advocate depute has presented his speech to the jury, the accused thinks, "I am going down." In that circumstance, no further evidence is to be led, so it is difficult to identify what prejudice there would be to an accused not being present to hear his solicitor advocate or counsel address the jury.

However, the Scottish system relies predominantly on witnesses giving evidence in the box. Legal representatives often consult the accused in the morning, at lunchtime or in the afternoon if something unanticipated arises in the evidence. Even when the Crown examination-in-chief is concluded, the defence can ask for a brief adjournment to take instructions in relation to a witness's evidence. The Scottish experience is that it is more difficult to predict what witnesses will say because we do not rely on statements. As a consequence, representatives need to take instructions as cases progress. If the accused is not present, that cannot happen.

Anne Keenan: Our submission refers to the English case of R v Jones. During a speech in that case, Lord Rodger of Earlsferry pointed out the differences between Scottish and English procedures. He said that the difficulty with examining the trial-in-absence procedures in different jurisdictions throughout Europe is that each country has its own system. We cannot look at case law in one country and say that because the trial-in-absence procedures there are okay, they must be okay in another country. We must look at the procedural rules that surround the law. Lord Rodger quoted the fact that, in the Scots system, trial in the presence of the accused goes back as far as Baron Hume.

I am happy to send the committee further information on that case, because I cannot remember it fully, but towards the end, a checklist was produced of points on which the court should be satisfied before it starts a trial-in-absence procedure. For example, it was stated that the court must decide whether there has been due

citation and whether the Crown has made all due inquiries to ensure that the accused knew that they were to be present at a particular time and place. It was also stated that the court must consider the impact on the witnesses of going ahead with the trial and whether a retrial is likely. The last thing one would want would be to go ahead with a sensitive case and find that an issue arises that has not been taken into account, which would mean that the witnesses would have to go through the procedure again. From memory, about nine or 10 prerequisites were produced for starting a trial in the absence of the accused. I am happy to write to the committee and outline the points in Lord Rodger's speech.

Before we give a yes-or-no answer, we must see how procedure in Scots law turns out when the bill is implemented and decide whether all the checks and balances are in place to ensure that article 6 of the ECHR is complied with.

Bill Butler: That is a helpful and detailed answer on what is obviously a complex issue. Does the Law Society's position reflect article 14(3)(d) of the International Covenant on Civil and Political Rights, which provides that everyone who is charged with a criminal offence has the right

"To be tried in his presence"?

Anne Keenan: We will have to write to you about that after looking up the terms of the article.

Gerry Brown: This is the first time that I have heard of that.

Bill Butler: There is a first time for everything.

The Convener: Perhaps we can teach the Law Society something.

Margaret Mitchell: I want to move on to the subject of the court appointing solicitors in the absence of the accused. As I understand it, at present there is a contract between the client and the solicitor who is instructed to act. Is there a conflict between that relationship and the obligations and responsibilities that the bill would impose on court-appointed solicitors?

Gerry Brown: Anne Keenan will respond to that. Obviously, there are professional implications for individual solicitors who are appointed.

Anne Keenan: As some members will know, the original proposal for a court-appointed solicitor came up in the bill that was enacted as the Sexual Offences (Procedure and Evidence) (Scotland) Act 2003. We had concerns about court-appointed solicitors at that stage because such appointments would interfere with the traditional solicitor-client relationship. We have expressed those concerns again on the Vulnerable Witnesses (Scotland) Bill, in which the provision has been extended, although it is discretionary. We have the same concerns about the Criminal Procedure (Amendment) (Scotland) Bill.

The basis of a solicitor-client relationship is the law of contract. The solicitor takes instructions from the client. The Criminal Procedure (Amendment) (Scotland) Bill would impose an artificial relationship. In many ways, the bill goes one step further than the 2003 act, because the client would not even be present in the court. Therefore, there would be no possibility of being able to take instructions from the client, which is at least possible in the other legislation to which I have referred.

Our difficulty with the Criminal Procedure (Amendment) (Scotland) Bill as drafted is that we understand that it would impose that artificial relationship while continuing to demand of the solicitor the same duties towards the client as he or she would have had if he or she had been instructed by the client.

We have codes of conduct that govern the conduct of solicitors. One of the codes states:

"Solicitors must always act in the best interests of their clients".

It goes on to state:

"Solicitors must provide adequate professional services."

The code then explains:

"An adequate professional service requires the legal knowledge, skill, thoroughness and preparation necessary to the matter in hand."

Thoroughness and preparation are indicative of the fact that the solicitor has instructions and knows what the defence will be.

The second element of our concern is over lack of information. I appreciate that the bill distinguishes between two situations in which the accused is absent. In one situation, the solicitor has already been instructed and may or may not have instructions as to what to do in the client's absence but he or she will presumably have some knowledge of the defence.

However, the situation is exacerbated in the case of a court-appointed solicitor who, by definition, will not know what the defence is. The solicitor could perhaps be provided with information about the Crown's case so that, in some way, he or she could test it. However, the court-appointed solicitor will not know, for example, whether the defence would have been one of alibi, incrimination or self-defence. Therefore, without having any information to take the matter further, the solicitor could only expose potential weaknesses in the Crown's evidence.

Our concern is that the solicitor would be left almost in a vacuum, in which he or she had to try to operate without instructions while nevertheless

being professionally responsible, with duties to the client whom he or she has never met. The solicitor could actually find themselves being sued by the client under the civil law for defective representation or the subject of a complaint to the society.

Our other concern is that there could then be what has become known as an Anderson appeal—a subsequent appeal on the ground of defective representation—which might undermine the conviction.

Those are our concerns about the provisions. If there was no provision on the statute book that regulated the relationship between the solicitor and the client, we would still have concerns about telling our members to proceed on a basis whereby they could not take instructions.

In its submission, the criminal law committee of the Law Society of Scotland referred to the fact that section 38 of the Youth Justice and Criminal Evidence Act 1999, which is in force in England and Wales, introduced similar provisions for court-appointed solicitors. The provisions in the 1999 act do not, however, apply to trials in absence but envisage a situation in which someone who has been accused of a sexual offence is present in court and the court appoints a solicitor whose sole purpose is to cross-examine the witness. The legislation specifically provides that the solicitor is not responsible to the client, making it clear that there is an altered relationship between the parties and that the solicitor's duty is to the court. The solicitor therefore does not have to carry the full range of professional obligations to the accused.

Margaret Mitchell: That is helpful. The implications of the court-appointed solicitor's potential liability under the bill as drafted are extremely worrying. You highlighted the fact that a court-appointed solicitor could be made responsible to the court. Is that the sole way of avoiding those potential pitfalls?

Anne Keenan: It would be one way of reconciling the professional duties of the solicitor, but I am still at a loss as to how the solicitor could adequately put forward a defence if they had no information about the potential case for the defence.

The Convener: While you were speaking about defective representation in relation to the Anderson case, it occurred to me that if someone was being tried in absentia because they had run off, it would be interesting to see how they might come back to sue the solicitor.

Anne Keenan: You are right; the case might not go far. However, an action could still be raised and that would create professional difficulties for the solicitor, as solicitors have to pay for professional indemnity insurance. Although the solicitor might ultimately be successful in defending the action, the people in the claims department might put a loading on their premium while the action was outstanding. As I understand insurance rules, such a loading on the premium would be non-recoverable.

The Convener: If an accused who had not made themselves available for trial then sought to sue a solicitor on the ground of defective representation, surely the solicitor would have a good defence. The court would ask, "Why here and now?"

Anne Keenan: That is right, but there would still be an issue about the period during which the action was outstanding, before the court threw it out. I believe that it can be some time before actions are dealt with—perhaps that is a matter for a civil law review.

Gerry Brown: Solicitors are under an obligation every year when they apply for their practice certificate to fill out a professional indemnity application form. They must notify the insurers of any circumstances that are likely to go to court, such as the situation that the convener described. The insurers might then put a loading on the policy premium.

The Convener: Section 12, which is about reluctant witnesses, provides a new power to grant a warrant for the apprehension of a witness when it is known that the witness is unlikely to turn up at court. Do you have concerns about that provision?

Gerry Brown: Yes. One of our concerns is about the new section 90A(2)(a), which provides that a warrant can be granted if

"the witness, having been duly cited to any diet in the proceedings, fails to appear at the diet".

We would like a requirement for personal citations to be included in the bill. Indeed, it would not be appropriate to carry out the process unless there had been a clear personal citation.

The Convener: As opposed to a postal citation.

Gerry Brown: Yes. After all, the implications from the use of the power include the subsequent detention of the witness.

12:15

Margaret Mitchell: Given all the potential problems that you have highlighted with regard to court-appointed solicitors, are you saying that very few people will volunteer to take up those posts?

Gerry Brown: At the risk of avoiding your question, I want to go back a stage and query whether there is a problem in this respect. I do not know what the statistics are for the number of cases in which witnesses or accused do not turn up; however, in a straw poll that we took among

members of the Law Society's criminal law committee—who come from across Scotland—they did not envisage that there will be a huge problem.

That said, although we have not canvassed the matter, I think that there will be a problem with finding people to volunteer for these posts. Provision might be made through some other forum. I do not know.

Anne Keenan: To assist with the Sexual Evidence (Procedure and Evidence) (Scotland) Act 2002, we provided the Scottish Executive with a list of solicitors who were willing to take referral. As I have indicated, the bill goes beyond that. The solicitors in that list might be in a position to take instructions; however, that would not be the case under the bill's provisions and I cannot definitely say whether the solicitors on the list would be willing to go ahead.

The Convener: What is your view on discount sentencing for early pleas? Under the bill, sheriffs must stipulate the element of the sentence that relates to an early guilty plea. Should we move towards having a level of detail in sentencing that has not really existed before?

Gerry Brown: Michael Meehan might also want to respond to that question. The case of Du Plooy, which is described in the October edition of the Scottish criminal case report, gives clear guidance on discounting sentences for guilty pleas. The option is a very welcome addition to our process and I think that it is being implemented regularly.

Disclosure will encourage early guilty pleas. After all, no agent worth his salt will discuss such pleas unless it is clear from proper investigation and analysis of the evidence that he can properly advise an individual to tender a guilty plea. That is the foundation of the matter. I welcome the proposal to amend the use of the word "may" in the section in question to "shall". That said, I think that the Du Plooy case assists matters to a large extent.

Michael Meehan: That is right. The Du Plooy ruling has overtaken the point that the bill seeks to address. When a High Court judge passes sentence, they should take into account the fact that an individual might have co-operated with the police at the time and perhaps sentence them to six years instead of seven. An accused person and those in the court will know that that is the discount. Therefore, I think that the development is helpful and might well have more of an influence than passing matters to the sheriff court.

The difference between the sheriff court and the High Court is that it is far more likely that a person will receive a significant period of imprisonment if found guilty in a High Court case. The significant factor in convincing someone to tender a guilty plea is the expectation that doing so will be taken into account and will mean a substantial discount in their sentence. If a person who faces a seven-year sentence knows that they will receive seven years no matter whether the case goes to trial, they will probably decide to go to trial. However, the Du Plooy case has firmly indicated that tendering a guilty plea will be taken into account and judges are already following that guidance.

The Convener: Does the measure widen the scope for appeals against sentence? For example, given that the judge is using his or her own discretion, could someone appeal against that element of the sentence? Will it be open to challenge?

Gerry Brown: Do you mean appeal against sentence by the accused or by the Crown?

The Convener: I suppose that I mean both. If the provision becomes law, will there be scope for people to appeal on different grounds because, for example, a sheriff applied a discount of six months instead of 18 months? Should any discount be entirely at the sheriff's discretion?

Gerry Brown: The Sentencing Commission will consider all those issues. However, the scope for appeals should be reduced if during the sentencing process a judge advises the accused in open court about the sentence as it would have been, the sentence as it now stands and the reasons for imposing the sentence. I am optimistic that that informed decision might lessen the prospect of appeals against sentence. After all, a judge or sheriff might simply give a six-month discount and the accused might wonder why. Now we will know why.

The Convener: That is very helpful.

Gerry Brown: I am surprised by that, convener. [*Laughter.*]

The Convener: Do you want to continue? We would like to, but we cannot. I thank the witnesses for their time. Their evidence has been valuable to the committee.

Do members want a two-minute comfort break?

Members *indicated agreement*.

The Convener: I will see you back here at 12:25.

12:21

Meeting suspended.

12:30

On resuming—

The Convener: I welcome Patrick Fordyce, who is the president of the Scottish Law Agents Society. Good afternoon.

Patrick Fordyce (Scottish Law Agents Society): Good afternoon.

The Convener: Our first question is from Margaret Smith.

Patrick Fordyce: Before the committee begins its questions, would you mind if Janice Webster, who is our society's secretary, took a seat next to me?

The Convener: Not at all. Please join us, Janice.

Margaret Smith: The bill makes provision to extend established time limits, including the 110-day rule. The view has been expressed that that is not necessary in all cases and that the system has enough flexibility. Is such a departure from existing procedures justified?

Patrick Fordyce: I have mixed views about that. The provision is a little premature. Perhaps we should think about more ways of accelerating the existing process. In some ways, all that the bill will do is add 30 days to the 110-day rule. Gerry Brown and the other Law Society witnesses made the valid point several times that the earlier full disclosure is made in such a process, the quicker both sides will be ready. That is my main position.

In practical terms, most experienced fiscals who receive a set of papers for a serious case on the first day when the accused appears from custody can say almost immediately, before the case goes anywhere near a trial, that preliminary consideration of a case shows potential problems with the 110-day rule. If such cases can be identified and dealt with appropriately earlier, the necessity for extending the periods of time in the proposed way will be less.

Margaret Smith: You said that you agreed with the Law Society's point that early disclosure would go a long way towards remedying the problem. Do you agree with the society that a disclosure timetable is required? What are your general views on the issue?

Patrick Fordyce: That suggestion is good. I do not doubt that Gerry Brown's comments have been recorded, so perhaps we can replay them to save me from saying the same things.

The Convener: He would love that.

Margaret Smith: We could hear the remarks in stereo.

Patrick Fordyce: Under the present procedure, not even the supply of a provisional list of witnesses is guaranteed. If a case that may be destined for the High Court starts on petition in the sheriff court, a lawyer will first write to ask the procurator fiscal for a provisional list of the witnesses whom the Crown will call eventually. Such lists are not always provided. The Crown might have reasonable grounds for saying that providing such a list is inappropriate, but it does not tell us them—we either receive the list or we do not receive it. Sometimes under the present system, the first time that we know which witnesses the Crown intends to call is when we receive the indictment, which happens a short time before the trial diet. We could guarantee full disclosure and I cannot imagine that there are many cases where the Crown is not in a position to issue a provisional list of witnesses within 14 days of the first appearance on petition. That might be a fairly tight time limit, and I am not putting it forward as a specific suggestion, but it would be useful if there were a rule that a list of witnesses should be provided within a relatively short time scale.

Margaret Smith: Should provisions on disclosure be in the bill, or would it be enough for them to come later?

Patrick Fordyce: The bill presents a great opportunity to address major failings in High Court procedures. Many of the problems with not being ready for trial—which has most concerned the committee today—could largely be addressed by full disclosure, or by more detailed disclosure than we have at present. If we are contemplating making significant changes with the bill, disclosure should be included.

Marlyn Glen: The bill also makes provision for the detention of a witness who has failed to appear following citation. In your experience, is there a significant problem with witnesses failing to attend court when they have been cited to attend?

Patrick Fordyce: There is a moderately significant problem. There are all sorts of reasons why witnesses do not want to turn up and give evidence. Perhaps their hands are not entirely clean in relation to the incident in question. It could be that a member of a family is being required to give evidence against another member of the family. There are all sorts of reasons why witnesses may be reluctant. I stress what Gerry Brown stressed, which is that if there is the possibility of a warrant being granted for the arrest of a witness who does not turn up, it is important that the court must be satisfied that that witness has been personally cited and knows that they must be there. Subject to that, there requires to be a mechanism to get witnesses to court.

Clear mechanisms must be in place to ensure that witnesses who are arrested on a warrant and who are appearing before a court have access to legal advice. That is not usually a great problem in the sheriff court, because there is a legal aid duty scheme in the sheriff court, and a legal aid duty agent will always be available. I am not too familiar with what happens in such situations in the High Court, but if witnesses are increasingly going to be arrested, they need advice as to their legal rights.

Marlyn Glen: I think that you have answered my next question, about the concern that has been expressed that that might be seen as coercion of a witness, by saying that you want the witness to have legal representation.

Patrick Fordyce: Yes.

Bill Butler: You will know that the Executive has stated that it intends to implement section 13(1) of the Crime and Punishment (Scotland) Act 1997, so that the sentencing powers of sheriffs in solemn procedure are enhanced. Is it possible to estimate the impact that that will have on the work load of the sheriff court?

Patrick Fordyce: That is difficult to estimate. Other witnesses, such as Mr Ewing, gave the committee statistics on that. He would be a better guide than I could be on such matters.

Bill Butler: Is it your impression that it will at least marginally improve the system?

Patrick Fordyce: Inevitably, it must. If a certain number of cases go to the sheriff court that previously would have gone to the High Court, almost inevitably that will have a beneficial effect on the High Court. What impact it will have on the sheriff court is another matter. There will be a domino effect, with cases falling out of the High Court and into the sheriff court. There will also be an impact on summary procedure. I am not sure where Sheriff Principal McInnes has got to with his review, but there will be an impact on sheriffs' time, as sheriffs will have to deal with both increased solemn business—they will now do some work that was traditionally High Court work—and their load of summary work. That is bound to have some impact. I find it difficult to assess the extent of that impact, but it is a matter for concern that requires a bit of thought.

Bill Butler: Do you have a view on the increase in sentencing power to a maximum of five years' imprisonment? Is that appropriate?

Patrick Fordyce: I was just looking back at the response that the Scottish Law Agents Society gave to Lord Bonomy's paper—it was mostly my work, so I have to take the blame—and I see that we agreed with that increase. Having listened to Gerry Brown, I am almost persuaded that that was a bad idea, for the reasons that he has given.

Bill Butler: You say that you are almost persuaded. Why do you maintain your view?

Patrick Fordyce: There is a superficial attraction in the idea that the transfer of a certain amount of High Court business to the sheriff court, which is going to be beneficial to the High Court, will require an increase in sentencing power to deal with those cases. I also said in my response that, if there were to be such an increase, the Executive might do well to consider whether it would be reasonable to retain the power of remit. On the basis of all that I have heard today about the type of cases that are liable to go from the High Court to the sheriff court, I would have thought that five years would be a more than ample sentencing power—if that is what the ultimate result is. Ultimately, there is an issue of decision in the first instance as to what is suitable for the High Court and what is suitable for the sheriff court.

Bill Butler: In your view, what types of cases would go to the sheriff court?

Patrick Fordyce: Probably the borderline cases, although even now there are some very strange decisions and we see serious cases appearing at sheriff and jury level. We also see cases that seem, on the face of it, not particularly complex or serious going to the High Court. That is down to human decisions about the seriousness of cases.

Bill Butler: But the general type?

Patrick Fordyce: We will probably see a lot more drug-related cases and assault and robbery cases in the sheriff court, which already takes quite a lot of such cases at the lower end of the scale. Those are the sort of cases that will, for the most part, graduate down to the sheriff court.

The Convener: Much of this morning's discussion has centred round Glasgow and Edinburgh as the High Court base. I wondered whether you might comment on the High Court in circuit. Are there any issues relating to the circuit of which the committee should be aware?

Patrick Fordyce: I would hate to correct the convener, but although I have heard about 500 references to Glasgow, I do not remember any references to Edinburgh. Nevertheless, I acknowledge the point that you are making. Those are the big boys in the High Court circuit.

I do not have any specific comments to make other than to say that cases should be tried as near as possible to their origins—subject to some considerations when a case has particular notoriety and there might be benefit in taking it to a court some distance away because of the public knowledge about it. My main concern would be the convenience for the witnesses and the accused—not to mention myself—in not having to travel excessively far. However, perhaps that was not the question that you were asking, convener.

The Convener: I want to be sure that we have covered everything in relation to the High Court in circuit. We have concentrated on Glasgow and Edinburgh but, if you have nothing to add, that is fine.

12:45

Patrick Fordyce: I do not have much to add. I agree that Dundee badly needs a High Court facility and that Aberdeen needs an upgraded facility. I do not think that there is much likelihood of the High Court coming to my home patch of Dumbarton in the foreseeable future—we have not even got a decent sheriff court. I do not know whether anybody listening has any influence that they might bring to bear.

The Convener: I am sure that there will be a letter in the post—that has been my experience.

I think that we have covered the main issues. In answer to a question on reluctant witnesses, you said that they should have access to legal aid. The Scottish Legal Aid Board has made that point, too. I do not suppose that all that many cases would involve reluctant witnesses, or do you think that they would?

Patrick Fordyce: I am not aware of any statistics on that, but it is common in jury cases for there to be reluctant witnesses—that happens pretty frequently. Whether a warrant for their arrest should be issued, so that they are brought to court under duress, is another matter. Such matters are sometimes resolved in a more administrative fashion, with a large policeman going to remind them of their duty to come to court.

The Convener: If you are right about the frequency, there would be an additional cost to the Scottish Legal Aid Board if it were to provide representation for those witnesses.

Patrick Fordyce: Yes, but I do not think that the cost would be significant. People simply need access to a solicitor—who is totally independent of the process and who has nothing to do with the case—who can spend five or 10 minutes telling them about their legal obligations and answering any questions that they may have.

Margaret Smith: Convener, will we ask about trial in absentia? The Law Society of Scotland was obviously concerned about that.

Patrick Fordyce: I wonder whether I might ask the society's secretary, Janice Webster, to comment on trial in absentia. She has been much involved in European issues and the committee may be interested to hear what she has to say.

Janice Webster (Scottish Law Agents Society): If I may, I will introduce myself, convener. For some years, I was the director general of the Council of the Bars and Law Societies of the European Union and covered some countries that are not members of the European Union. That gave me an opportunity to see how other judicial systems worked, which was very interesting. I also worked quite closely with the Council of Europe, the European Court of Justice and the European Court of Human Rights. We had a standing committee in relation to all those organisations. When I came home to Scotland, I maintained my interest in international affairs and was used by the Council of Europe to go to some eastern European countries to try to bring their legislation up to the levels in the rest of Europe. I have had good opportunities to observe issues of the type that members are raising.

I sit as a chairman of medical appeal tribunals. Very often, appellants choose not to turn up. That puts us at a severe disadvantage. Anybody in a judicial position bends over backwards to be fair to somebody who may not have knowledge of the system. There is no substitute for seeing the person—seeing the whites of their eyes, if you like—for testing credibility. However, it is possible to decide things on paper and we frequently do.

That is a civil issue, but if we now consider a criminal issue—where somebody's liberty or reputation may be at stake—I find it impossible to envisage being able to do justice if the person is not there to raise questions. On the other hand, we have the decision of the court in Strasbourg that if someone does not attend when they have been given the opportunity and all the papers have been sent out properly and all the rest of it, they are deemed to have waived their right to attend. That is the bottom line.

Part of me feels that we should take a robust view and say, "Look, if these people can't be bothered to come, why on earth should we waste public funds on them?" However, the legal side of me says, "Hang on. Sometimes these people are not in a position to be aware of what is best for them." It is like the concept of informed consent in relation to conflict of interest; it could not work in Scotland, because the man in the street who does not have the benefit of a legal training does not always know what is best for him.

As was said in the evidence from the Law Society of Scotland, questions can arise during a trial and, if the person is not there, it is difficult to deal with them. That was perhaps not a terribly helpful answer, but it is not an easy one to give. The balance of my feeling is that trial in absence will never work properly and will always be open to challenge. What Lord Rodger said was helpful and should be pursued.

Margaret Smith: I wanted to ensure that we had it on the record that you concur with the view that the Law Society of Scotland witnesses expressed this morning that someone could not necessarily get a fair trial if they were not present to give instructions and deal with anything that came up in the trial.

Patrick Fordyce: That is broadly my view. To take a pragmatic view, if I was the solicitor whose

client had disappeared and the question arose whether I could continue to represent him and he could have a fair trail in his absence, the first issue to consider would be whether he had run away because he thought his lawyer was rubbish. That would be a concern and I might consider whether I should continue to represent him. It is totally impractical to hold a trial in absence, because, as often happens, a witness may say something completely different from what we expect them to say and we cannot ask our client what they have to say about that.

In the situation where the court appoints a solicitor, there are all sorts of difficulties with the contract between lawyer and client—for example, how can we have a contract with someone whom we have not met and how can we apply the solicitors' code of conduct on how best to represent our client? If I took instructions on the phone from a client whom I had not met about something as simple as a debt matter, I would be liable to get a severe slap from the Law Society. The idea that I could conduct the defence of a High Court trial on behalf of a person who was not there and whom I had not met is too bizarre to contemplate.

Margaret Smith: If, for the sake of argument, the Executive went ahead with the provision, would you agree that a minimum position might be that the contract would have to be between the lawyer and the court, to safeguard the lawyer?

Patrick Fordyce: If we were to go down that road, we would be inventing an entirely different animal. Lawyers have all sorts of duties—they have duties to their client, to the court and to the public interest—and meeting all those obligations is a constant balancing act. However, we have an important duty to represent our client to the best of our ability. If there is a shift whereby the court and the public interest are represented rather than the client, that would be an entirely different approach. I do not know how one would begin to put in place the rules and guidelines that would be necessary for that shift.

Janice Webster: I support what has been said. I have in interest in ethics and have written a book called "Professional Ethics and Practice for Scottish Solicitors". I feel strongly about the matter. Trust is the essence of the relationship. We have heard that the relationship is based on contract, but its essence is trust, independence and integrity. The lawyer is the minder of justice as well as an adviser, representative and negotiator. If we were to throw out the baby with the bath water, that would be sad. The independent approach is the right approach. As Patrick Fordyce said, the lawyer must balance various interests, including a duty to the court and a duty to the client. That takes us into the realm of not misrepresenting facts, which is vital.

Another issue that was raised earlier was double booking, which is a problem. A case involving counsel in a double-booking situation that might interest the committee was reported in a recent issue of the *Scots Law Times*—I do not know whether the committee has had access to that issue. The case concerned contempt of court and a robust view was taken of the matter. The problem was that an element of misleading the court was involved. A nice statement was made, reminding solicitors and advocates of their duties and suggesting that the professional bodies and the Scottish Legal Aid Board might like to consider the consequences of double booking. One hopes that the problem will be eliminated if the changes go ahead.

The Convener: Is it fair to say that the judge took a firm hand with the advocate in that case because the advocate had misled the court about his availability and had not simply double booked?

Janice Webster: Yes, but if one properly manages one's affairs, that should not happen. Whether the electronic system will improve matters remains to be seen, but we hope that it will.

The Convener: I would like to return to the issue of trying a person in their absence. I take on board all the points that you have made and what you have said about the ethics of the matter. The Law Society of Scotland made the same points about the practical difficulties involved in not having instructions from a client. However, there is also an ethical question that relates to the public interest. An accused person might have dodged their trial and flown the country—notable criminals have done so—and a person who has had crimes committed against them might not have access to justice. Do you accept that the provision intends to deal with such situations? There are practical difficulties, but it is a fair consideration that those who have absconded from justice should not be able to—

Janice Webster: Absolutely. Each case must be considered on its own merits. There is always a question of balance when we get into the realm of human rights. There are rights on one side and duties on the other side; the public interest is, of course, a heavy weight in the balance. It would not be a good idea to be totally prescriptive—there must be a degree of discretion. I can envisage situations in which a person would perhaps not deserve to appear.

The Convener: You mention the contractual relationship between solicitors and their clients, but there is a slight difference in the relationship between clients and advocates. Does that make any difference? I understand the principle of presenting a good case, but there is a slight difference in the relationships.

Janice Webster: The origins of that go back to the old days, when the main division was between advocates and law agents, as is reflected in the name of our society. The agents do what the name suggests—we step into the shoes of the person so that we can do everything that the person would have been able to do. The advocate who assists, or stands beside, the person—I think "ad sistere" is the derivation—speaks for or represents the person. Even the origins of the names and titles says something about our duties.

The advocate is also one place removed from the public. The solicitor-client relationship is a close one, whereas the advocate often deals with the solicitor and does not see the client in the same way. The relationship is, therefore, somewhat different. Moreover, the solicitor branch of the profession is highly regulated nowadays and there are many preliminary matters that must be dealt with before a solicitor can do any work. They have to establish identity, to ensure—

13:00

The Convener: May I just stop you there? My question related to the role of advocates. In a murder case that goes to the High Court, if there is no accused for the solicitor to take instructions from, would not an advocate represent the case? Would all the practical difficulties that you have described to the committee also apply to the relationship between the absent accused and an advocate?

Janice Webster: Obviously, the advocate cannot take instructions if there is nobody there to pass them on. What people see in court is only the tip of the iceberg; all the preparatory work is very important. The solicitor is involved in all that and the advocate then presents the case, so the advocate would have his hands tied behind his back as well.

The Convener: But there is no contractual relationship like the one between the accused and the solicitor.

Patrick Fordyce: No.

The Convener: Therefore, you cannot simply translate the practical difficulties that you have described in relation to your own profession and say that those practical difficulties would exist for the Faculty of Advocates.

Patrick Fordyce: The solicitor would have to be involved. The solicitor instructs the advocate and the accused instructs the solicitor—it is a two-way process. The solicitor is the person in the middle, without whom the system would not work.

Janice Webster: There are all sorts of ramifications now, with the Proceeds of Crime Act 2002, money laundering and so on. You have probably read Dame Elizabeth Butler-Sloss's decision of just the other week. A barrister and a solicitor were involved in a matrimonial dispute and it became clear that some of the husband's assets might have been ill-gotten gains. The lawyers had a duty, under the Proceeds of Crime Act 2002, to report that. That opened up the whole question of confidentiality that you were talking about earlier. All sorts of new developments are taking place in the law, which have an effect on the relationships of solicitors and advocates. This is quite a difficult time.

The Convener: You referred earlier to your experience in the pan-European bar. Given your background, do you know of any jurisdictions that are operating such a provision of trial in absence of the accused?

Janice Webster: Only some of the eastern European countries, which were told pretty quickly that they ought to improve.

I listened to what the Law Society of Scotland had to say. The use of pleadings in writing, in a lot of the continental countries, is useful because a lot of initial points can be covered and the areas of agreement can be identified at an early date. If we had a system that borrowed a little from the continental systems, while maintaining the best elements of our system, we might arrive at a good solution. An awful lot more could be agreed in advance in this country. Such a system works well in the European Court of Justice and in some domestic courts. Joint minutes and more use of areas of agreement would be ideal. I acknowledge the problems of confidentiality, but the issue is one of balance and judgment—it is not beyond people's ability to work something out.

Employment tribunals and hearings on directions—which are like preliminary hearings—are effective in identifying the issues that a case will involve and in clearing away some problems that might have taken days of evidence. We have an example of that already and the new proposals would work quite well.

Michael Matheson: I would like to clarify whether other countries in Europe allow for trials in absence. Is it the case that no other member state in the European Union allows for that?

Janice Webster: I could not say that offhand. I dare say that there may be some, but I would be misleading you if I were to give you an answer today, although I could research the matter. The Council of the Bars and Law Societies of the European Union, for which I worked, has a website and information service. Perhaps the answer could be pursued in that way.

Michael Matheson: I asked the question to ascertain whether there were implications for the execution of European arrest warrants between

member states. For example, a member state could say that it was not prepared to execute the warrant on the basis that the person could be tried in their absence.

Janice Webster: There are all sorts of international and Council of Europe conventions about which people forget or do now know. The United Kingdom is a signatory to a number of those conventions, which means that it has to bear in mind certain obligations. That aspect also needs to be looked at.

The Convener: That is the end of our questions. I thank both our witnesses for their evidence, which has been very valuable.

Patrick Fordyce: I would like to mention one more point, if I may, convener. I have been at the meeting for most of the morning and I am not aware that the point has come up. I do not want to open up a debate on it; I simply want to mention it.

One of the primary purposes of the bill was to do away with certain sittings in the High Court, which have not been working well for some time. If I understand proposed new section 83A to the 1995 act correctly, it seems that we will be left with a sort of curious hybrid that does not include a fixed date for trial. Paragraph 160 of the explanatory notes to the bill states:

"In future, however, trials in the High Court will not be assigned to sittings but will be a mixture of dates fixed for calling of the diet or as the first day of a period (to be fixed by Act of Adjournal) in which the diet must call."

Frankly, I do not understand what that means or what, in practice, will happen. Perhaps somebody else knows the answer. If so, perhaps they could let us know.

The Convener: Well, I do not think that we can help you there. You have drawn to our attention a crucial part of the bill in relation to how the new system will work. This morning, we talked about the need for a fixed date. We have been pressing for information about how the date is to be arrived at. You have drawn our attention to a point that needs to be clarified. We are grateful to you for that. Again, I thank both of you for your evidence.

Patrick Fordyce: We thank the committee for its hospitality.

Freedom of Information (Scotland) Act 2002

13:07

The Convener: We will move quickly on to item 2. Members have a copy of a draft paper that was prepared by the clerk in the name of committee reporter Michael Matheson. I thank the clerks and Michael Matheson for putting together the paper for the committee—I am conscious of the short time scale in which they had to prepare it. Do you want to speak to the paper, Michael?

Michael Matheson: I am conscious of the time. Members will have had an opportunity to read our recommendations on what we should pursue with the Executive.

The Convener: The key elements include alternative formats and elements of the charging regime, such as the cost limit. The paper also makes the important point that the committee needs to have early sight of the fees regulations that are to be laid before the Parliament. The regulations are crucial to the operation of the act. We also need an explanation of why no response has been made to the original recommendation about Scottish Administration policy formulation. There is also a recommendation about firming up some stuff on training and education. Does any member dissent from anything in the paper?

Margaret Mitchell: In my experience, a number of things come under the public interest heading and are not disclosed because the public interest test is subjective in nature. I think that we should look at that. Do your recommendations cover that point, Michael?

Michael Matheson: The 2002 act is drafted in such a way that it contains lots of opt-out clauses. We are not in a position to address the issue, as it does not relate to the regulations but is already enshrined in the act. The matter was raised when the bill was being considered, but it would be difficult for us to do anything about it in our consideration of the regulations.

Margaret Mitchell: Right. So if we feel that the public interest test is being abused, there is no way of pinning down the issue to see how the provisions are being implemented.

Michael Matheson: That would come under the review of the implementation of the act and of the regulations when they have been put in place. That will be done at a later stage.

Margaret Mitchell: Thank you.

The Convener: That is correct. When enough time has passed, a future committee might review the operation of the legislation—as we have done

in the past in relation to other legislation—especially with regard to the public interest. We have been asked to look at the code that accompanies the act. If there is no dissent from the paper, I suggest that we adopt the recommendations. We can return to issues such as fees when they become apparent. Are we agreed?

Members *indicated agreement*.

The Convener: Thank you. I remind members that we are to make a joint visit with the Justice 2 Committee to Her Majesty's Prison Kilmarnock on Monday 8 December. I also remind members that our next meeting will be held on Wednesday 10 December. Unfortunately, the meeting will be in the Hub—we have to take our turn at that. We will hear further evidence on the Criminal Procedure (Amendment) (Scotland) Bill, with witnesses from the Procurators Fiscal Society and police organisations. Do members agree that we should meet at 9.30 am again in order to review the evidence in the *Official Report*? I hope that members will have time to get their heads around what we have heard so far so that we can put some of the evidence to our new witnesses.

Bill Butler: I think that that would be reasonable, convener.

The Convener: Members know that we were trying to arrange an informal meeting with Lord Bonomy, the author of "Improving Practice: the 2002 Review of the Practices and Procedure of the High Court of Justiciary". The meeting has now been arranged for Monday 15 December at 4 pm. As members know, we thought it important to take evidence from Lord Bonomy, but it was not considered appropriate for that to be done on the record. We will draw up a report of the meeting, which can be used to inform our stage 1 report. I thank members for their attendance.

Meeting closed at 13:12.

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ISBN 0 338 000003 ISSN 1467-0178