JUSTICE 1 COMMITTEE

Wednesday 17 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
17th Meeting 2003, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

Mr Stewart Maxwell (West of Scotland) (SNP)

COMMITTEE MEMBERS

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

*attended

COMMITTEE SUBSTITUTES

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

THE FOLLOWING ALSO ATTENDED:

THE FOLLOWING GAVE EVIDENCE:

Professor Peter Duff (University of Aberdeen)
Douglas Haggarty (Scottish Legal Aid Board)
Lindsay Montgomery (Scottish Legal Aid Board)
John Scott (Scottish Human Rights Centre)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 1

Scottish Parliament

Justice 1 Committee

Wednesday 17 December 2003

(*Morning*)

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

Item in Private

The Convener (Pauline McNeill): Good morning and welcome to the 17th meeting this session of the Justice 1 Committee. We have apologies from Stewart Maxwell, who cannot be with us this morning. I would be grateful if members would do the usual and switch off their mobile phones, if they have not already done so. I also formally welcome Paul Burns, who is adviser to the committee.

I invite the committee to agree to deal in private with item 6 because it relates to consideration of candidates for the post of adviser to assist the committee in its proposed inquiry into the effectiveness of rehabilitation programmes in Scottish prisons. Is that agreed?

Members *indicated agreement*.

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

10:16

The Convener: Item 2 is consideration of the Criminal Procedure (Amendment) (Scotland) Bill. I refer members to the written submission from the Scottish Human Rights Centre and I welcome John Scott. I thank him for coming along and for his written submission, which has been very helpful. We will just go straight to questions.

Margaret Mitchell (Central Scotland) (Con): Good morning. Your submission states forcibly that the 110-day rule—not the 80-day rule, as Lord Bonomy suggested—is the jewel in the crown of the justice system. Will you explain why?

John Scott (Scottish Human Rights Centre): My concern is that this is the moment to look at things properly. The amount of time that is required to prepare for cases will expand to fit whatever amount of time is given. If 110 days is changed to 140 days or to two years, cases will take that long and there will still be applications to extend. As you will have seen from Lord Bonomy's report, roughly the same number of applications for extension are received for cases that involve someone who is on bail, for which the time bar is 12 months, as are received for cases that involve someone who is in custody, for which the time bar is 110 days.

The main change that we would like—which would tie in with much of the other oral and written evidence that the committee has received—relates to early disclosure and preparation. At the moment, the Crown prepares fully, after which the defence prepares. There are definite limits to the amount of work that the defence can do before the Crown issues the provisional list of witnesses, and to what the defence can do before the indictment is issued. If the defence could prepare at the same time as the Crown, it should also be ready at roughly the 80-day mark.

The concern is that, if the 110-day rule is changed now, it will never come back. The Crown has worked well with the 110-day rule. Some cases have ended up disappearing because charges had to be dropped, but the Crown was not lobbying hard for a change to the 110-day rule prior to the Bonomy inquiry. Procurators fiscal and advocate deputes to whom I have spoken are aware of the requirements and have complied with them because they have had to. If the rule is changed, they will not comply because they will no longer be required to do so.

Margaret Mitchell: Should we allow co-operation and early disclosure to work through and

be given time to bed in, rather than go straight to saying that the whole system should be changed because the rule does not work in some cases?

John Scott: Absolutely. The committee has received some evidence about how cases are prepared and about the precognition process. Precognition is a process that the Crown undertakes, but the defence also undertakes it. In a case in which there are, for example, 30 witnesses, I may wish to have only 10 of the witnesses precognosced. They might be eye-witnesses or the complainer in the case. However, there might be 20 police officers who are speaking to procedural matters. Currently, we get their details—sometimes in a provisional list of witnesses, but sometimes as late as the indictment—and all that they do is read from their notebook a statement that they gave to the Crown earlier. That is a time-consuming and expensive process.

The bulk of the legal aid bill for solemn work by solicitors is for preparation. That is another reason why legal aid rates for solemn work should also be examined. From the defence's point of view, precognition is important for two reasons. First, it enables the defence to check things. In many cases, the defence will not know, without precognoscing witnesses, on what areas it should cross-examine. The other reason is that precognition is where the money is made, because court rates are so poor and have not been changed for more than 10 years. The legal aid rate for defending someone in a sheriff and jury trial is £54 an hour—the rate has not changed for more than 10 years and there is no way of increasing that for sheriff and jury work. The suggestion now is that cases with sentences of up to five years should come to the sheriff court with no increase in that rate—obviously there is nothing in the bill about that, so although discussion is proposed it will not happen quickly enough.

Margaret Mitchell: That issue was certainly mentioned in Lord Bonomy's report, but it was not picked up in the bill.

John Scott: Yes.

Michael Matheson (Central Scotland) (SNP): Is it your view that the 110-day rule should not be changed?

John Scott: Yes.

Michael Matheson: Your submission refers to the change to the 110-day rule. It states:

"It is an erosion of principle for the sake of practice. If there is an adjournment culture will an extra 30 days really change it?"

What could be changed in order to address that culture?

John Scott: That brings us back to the point that I made about early disclosure. If the Crown were to give us a provisional list of witnesses within a couple of weeks of the person's appearing on petition, that would be something that does not currently happen. We do not get a provisional list of witnesses in a significant number of cases. The only notice that we get of who the witnesses will be is on the indictment, after which we have a month to prepare for something that the Crown has been preparing for for the best part of three months. Such a change would be very significant because we would be preparing at the same time as the Crown and should therefore be ready—as the Crown very often is—to go to trial within 110 days.

The main point is that in 2001, when Lord Bonomy considered the issue, only about 25 per cent of cases required an extension of the 110 days. We seem to be abandoning the 110-day rule for the sake of a quarter of cases.

I have been appearing in the High Court for two and a half years and most of the custody cases that I have had have gone to trial within 110 days. Once people are on bail, the issue tends to cause the court less of a problem, because if there is an adjournment we are not talking about a person staying in custody for excessive time. It seems to me that there is in custody cases less of a problem, and it seems to me to be mad to abandon—for the sake of the 25 per cent of cases that do not go ahead—a rule that has worked well and which has the beneficial effect of ensuring that most trials go ahead within 110-days.

Michael Matheson: In your experience, what is the main reason why information is not disclosed by the Crown to the defence at an early stage?

John Scott: There are several reasons. The Crown likes to ensure that it knows exactly what witnesses will say before it even tells us that the witnesses exist; there is, to an extent, a culture of mistrust. Provisional lists of witnesses are released to the defence on the strict understanding that the accused is not given access to them, which is something that no responsible solicitor would ever do. However, there is still a feeling that the Crown does not want to tell us too soon what its case is in case it somehow prejudices the case, or we find out at an early stage that there are questions that we should be asking. That is part of the explanation.

Another part of the explanation relates to resources. The police and forensic services are under incredible pressure, so the reports that are needed from outside bodies often do not come to the Crown until very late. Therefore, it is not necessarily always a case of the Crown hiding things from us or keeping things from us until the

point when it has to tell us—it may be that the Crown does not have the information.

I do not think that all the changes that the Crown Office review thought were necessary have yet filtered through. I was in a trial recently in which it turned out that there was fingerprint evidence to link my client to the locus. Her defence was one of alibi, and it came out that there was fingerprint evidence only during my cross-examination of a police officer in the case. Even the advocate depute who was in court did not know about it.

There is still a lack of co-ordination at the Crown end. Agencies for which the Crown is responsible either do not pass the Crown information at all or do not do so in time. That has the knock-on effect that such information does not get to the defence until much later, and if it is the kind of evidence that takes longer for the Crown to prepare, the defence would need to get sanction from the Scottish Legal Aid Board to get someone separate to have another look at it, especially if it is expert evidence.

There is a great deal of scope for disagreement among experts, as the committee is probably aware. It is not simply a matter of somebody's being able to find an expert to back them up if they have the money—although there is a feeling of that about the system. There are new areas on which the experts themselves cannot agree, but on which we expect juries to make their minds up on a balance of expert-opinion evidence.

There is a combination of things, but there seems to me to be no good reason why the defence cannot get a list of witnesses at the same time as the Crown, start to work its way through that list and agree at an early stage who are the formal witnesses so that the defence does not send someone out to take a statement from a police officer late at night—or whenever his shift allows—to the effect that he detained someone or that he ran the identification parade. If the defence can get a copy of the statement sufficiently early, it can say that there is no need to take, no point in taking, or no justification for taking a separate statement from that witness.

The Convener: I will ask you about your position on the 110-day rule, which is that you want to preserve it. How would the system work? Would you argue against moving to a fixed trial date system? Without the 30-day period that is provided for in the bill, which is when the preliminary hearing would take place and there would be an opportunity to fix a trial date, how would the system work?

John Scott: We could try, although it would be difficult, to have a preliminary hearing at, or shortly after, the 80-day stage. That would be quite tight but—

The Convener: So when would the indictment have to be served?

John Scott: At the moment, an indictment has to be served with 29 days' notice, so it would have to be served at about the 70-day stage.

The Convener: Will you talk me through what it would mean for the Crown if it had to serve the indictment at the 50 or 60-day stage?

John Scott: The Crown would probably have to serve the indictment at about the 60-day stage, which is probably unrealistic.

The Convener: In your submission, you acknowledge that we are dealing with more serious crime. The Crown's position is that cases are getting more complex. It is not asking for more time—it will accept the limitations—but it acknowledges that crime is getting more serious and more difficult. Is it realistic to expect the Crown to serve an indictment at 50 days or 49 days?

John Scott: It might not be. I like the idea of the preliminary hearings; the package of measures that includes them is also attractive. The preliminary hearing could perhaps take place at the 90-day stage—I have not thought specifically about that.

I am anxious not to lose the 110-day rule, because it gives us a focus and trials happen at an earlier stage, which is to everyone's advantage—victims, witnesses and the accused. At the moment, the Crown is generally supposed to be ready at the 80-day stage. It has to be: it has to serve the indictment then, so it must be sufficiently prepared at that point—so perhaps we could have the preliminary hearing within 10 days of that point. That would work if the defence had been preparing at the same time as the Crown, but it would not work if the first that the defence got to hear about things was when the indictment was served. I cannot emphasise enough how fundamental a shift the defence's being allowed to prepare at the same time as the Crown would be. It never happens at the moment.

The Convener: That point is acknowledged. You made an important point about the defence not being able to get on with a case until everything is disclosed. Almost every witness has said that early disclosure is the key, but as there are no sanctions—the bill does not address how we could force early disclosure—how could we bring that change about?

John Scott: As Lord Bonomy said, the aim is a culture change. Whatever might be suggested elsewhere, the system has many people who are trying to do their best to deal with cases as quickly as possible. There are several reasons why that does not happen; many or all of them are covered

in Lord Bonomy's report, "Improving Practice: the 2002 Review of the Practices and Procedure of the High Court of Justiciary".

If we kept the 110-day rule and had a preliminary hearing, with early disclosure and earlier preparation by the defence, all those measures would be sufficiently new and different to allow people to show what they try to show at the moment, which is the desire and willingness to deal with matters as quickly as possible and in the best interests of the public in the case of the Crown, or the accused in the case of the defence.

10:30

The Convener: What does the adjournment culture to which everyone refers mean for those who are held in custody and whose trials are constantly being continued? The 110-day rule applies to the trial start date. When a trial is constantly adjourned, what additional time does an accused person spend in custody?

John Scott: Judges are fairly keen to ensure that the 110-day period is not extended, other than when that is absolutely necessary and no fault on the Crown's part is involved. In the first instance, an extension of 30 days would normally be given. Obviously, that does not apply to exceptional cases such as that in Camp Zeist, which was in a category of its own. Extensions for any great length of time are not given.

The Convener: Do you acknowledge that if a trial is constantly adjourned, the accused remains in custody during the adjournment?

John Scott: Yes. I do not enjoy going to tell a client that I must ask for an adjournment, because it means that they will have to stay in custody. As the committee has heard from other witnesses and read in other evidence, often the reason why I must ask for an adjournment is that I have received something late from the Crown. That might be the Crown's fault, or the Crown might not have received that information until a late stage. No client wants to stay in custody any longer than necessary. The prisoners who gave evidence to Lord Bonomy were all keen for the 110-day rule to be preserved.

Margaret Mitchell: When a case's complexity is the reason why extra time is needed, what sort of complexity are we talking about? Does it involve forensic material not turning up, resource questions or complex evidence? For example, if more forensic scientists were available to do work, would that speed up the system, or does the process cause the delay?

John Scott: If more forensic scientists were available, that would probably speed up the process. The complexities that we are talking about tend to relate to forensic or other scientific evidence. The cases that I have in mind, which I have seen adjourned numerous times—sometimes even well beyond the year stage for someone who is on bail—involve the death of a child, because huge disagreements about that continue in the medical profession, so the defence can say legitimately that there is so much difference of opinion that it needs to spend a bit more time on the matter. The defence often goes to other countries to try to find suitable experts to debate issues with the Crown experts.

A murder trial can be simple. The most serious case can be not much more complicated than the sort of trial that might take place at the district court or the sheriff court, although it involves the tragic consequence that someone died. The fact that a case takes place in the High Court does not mean that it is complicated, but sensitive issues are often involved. Child witnesses may give evidence in sex offence cases, so further inquiries might be needed into the background of someone who had been in care, which would mean that the court might need to be approached for access to medical records, school records and that sort of thing.

Most so-called Anderson appeals, which are based on defective representation by a solicitor, an advocate or a solicitor advocate, have related to sex offence cases, so all members of the legal profession are especially aware of the need to exhaust all avenues of inquiry in such cases. If a client says something, no matter how ridiculous it might seem, the defence must do everything possible to ensure that the matter is investigated properly or else the client may, if convicted, argue subsequently in the appeal court that the conviction be quashed because something had not been done. The appeal court might say that although the person had maintained the point all along, the defence had not investigated the matter and so had not done its job properly, which meant that the person had not had a fair trial and the conviction may be quashed. That would have unsatisfactory consequences for everyone involved in the case.

Most cases are not terribly complicated. A case may involve many witnesses and medical evidence, but that does not necessarily mean that it is complicated. The majority of cases in the High Court are not genuinely complicated.

Margaret Smith (Edinburgh West) (LD): You touched on disclosure and the fact that a change of culture is required. Given that disclosure is central to the aims of the bill, should the meaning of disclosure be explicit in the bill or would that lead to more problems? Is it better that we allow greater flexibility in order to enhance the cultural change, or that the meaning of disclosure be

explicit in the bill? Early contact may mean different things to different people—it is subjective.

John Scott: The meaning of disclosure should be made clear in the bill. For example, the bill should say that the Crown must provide a provisional list of witnesses to the defence within a fortnight of a person's appearance on petition, unless the Crown can give good reason why that should not happen. In some cases, particular sensitivities may make a delay perfectly reasonable, but the Crown should be required to justify the delay. The bill should include a presumption in favour of disclosure, so that the Crown must disclose evidence as soon as it receives it, rather than sit on it until the indictment is served, which often happens at present and causes many problems. The Crown sometimes receives late evidence, but when it has evidence, it should disclose it immediately.

If disclosure is not put in the bill, the flexibility will result in people saying that they intended to disclose information but did not get round to it, or that they thought that somebody else was going to do so. If the bill states the action that must be taken unless there is good reason for not doing so, that is what will happen. I do not entirely trust the notion that the culture will change simply because of the other measures in the bill. Early disclosure is not mentioned in the bill, but it is the key to the process.

Margaret Smith: Are you saying that the Crown should disclose information fully and that it should not be up to the Crown to decide which information to give to the defence, which would mean that the defence could build its case on that, rather than on what the prosecution decides to pass on?

John Scott: The Crown will still need to have discretion. For example, during police investigations into a sex offence, various people on the sex offenders register may be investigated and excluded from inquiries after swabs have been checked against their DNA samples on the record. It is not necessary for the defence to have such information. However, there should be a presumption in favour of disclosure to the defence of most of the material that comes to the Crown. Certainly, any fingerprint or other forensic evidence should be disclosed. At present, such evidence does not always come to the defence. For example, I do not always receive reports that say that no DNA or blood was found, even though that might be important to the case. Such reports should not be left lying in Crown papers and I should not have to ask for them, which sometimes happens.

There must be a presumption in favour of disclosure, with the Crown being able not to disclose when that is justified. In England, there has occasionally been so much disclosure that there is a roomful of documents, which is worse than having no information because the defence is lost in a sea of irrelevant information.

Margaret Smith: The irrelevant information can be used to cover up the relevant information.

John Scott: Yes.

Margaret Smith: Your submission refers to the importance of

"early contact and co-operation between Crown and defence."

In fact, that is the key to the matter. What practical form should such contact take? What is your view of managed meetings? What can be done prior to preliminary hearings? What issues should preliminary hearings throw up?

John Scott: If possible, managed meetings should be face-to-face meetings. I have found that trying to resolve issues over the phone or by e-mail does not really work. If I am appearing as a solicitor advocate in a High Court case, issues will not be resolved until I speak to the advocate depute who will be involved in the trial, which often does not happen until a week before the trial or sometimes until the start of the sitting. Things have certainly been improving and Crown Office practice now is for the advocate depute who is dealing with a case to phone the week before the sitting to speak to the person who is dealing with the case. However, by that stage, it is late and witnesses have been cited.

As far as possible, there should be a face-to-face meeting between the parties who will deal with a case. That is important because, if a person steps in for the day for a preliminary hearing or a managed meeting but someone else will be involved in the trial, it will probably be found that there will not be agreement. That person will not want to tie the hands of someone else further down the line, which can happen where there is a change of counsel during a case. Often, a person will have their own idea of their professional responsibility and so cannot be bound by an agreement that someone else has made, because they must answer for matters eventually. They are professional advisers and must do the job as best they think they can.

It will be difficult to arrange a managed meeting prior to a preliminary hearing between the two people who will deal with a case. The Crown seemed to anticipate that it would not necessarily be the advocate depute who would be involved in the trial who would attend the meeting or the preliminary hearing, but that person should do so as far as possible. That is less of a problem from the Crown's point of view, because one advocate depute can tie the hands of another, but one

defence counsel cannot effectively tie the hands of another defence counsel.

There should be face-to-face meetings and continuity of representation for the accused, although that entails difficulties that Lord Bonomy identified. The best QCs and the best solicitor advocates are involved in trials all the time and are in demand because they are good at what they do. It will be difficult to arrange for them to be released a few weeks before a trial for a preliminary hearing and for them to take on cases in which they will potentially run the risk of days in their diary opening up because trials do not go ahead, even under the new system. That is the point at which it is hoped that the Scottish Legal Aid Board will come in, with help from the Executive. The Executive must consider payment for such cases, because they are not as well rewarded, compared with other cases that are dealt with in our highest court. There is a strong tendency for people to juggle cases.

Margaret Smith: They will not be able to do that so much because of fixed dates.

John Scott: Indeed. If the advocate does not turn up, he or she will be responsible for that; it would be supposed that they would have been at the preliminary hearing and stated that they had checked their diary and were free on the day in question.

The appeal court has recently made changes: there are preliminary hearings at which the person who is undertaking the appeal is supposed to be present to explain the state of preparation. If a different person is present, as long as the person who turns up to conduct the appeal does not come in and say that they are not ready because they have just taken on the case, the appeal court will live with a change of personnel. Continuity is important. The main point is that any change of personnel should not cause unnecessary disruption or adjournments.

Margaret Smith: I have a final question. Do you favour advanced disclosure of lines of defence?

John Scott: No more than exists at the moment. The suggestion in Lord Bonomy's report of a confidential note prepared by the defence seems pointless, with respect. If neither the Crown nor the court can see it, what purpose does it serve? The person who is preparing the defence will, presumably, have drafted the note and will therefore know all its contents. I do not see the point in that.

Such disclosure as is required at the moment, such as intimating special defences and, in sexual offences, lodging an application to the court on the line of questioning, already goes too far because an entire line of cross-examination can be revealed to the Crown beforehand and will be checked with the witness. That is certainly fair to the witness, but it might result in tailored evidence. I would be against any further disclosure for fear of the same sort of thing happening. Witnesses should not know what the defence is going to be, so that the jury can see their spontaneous reaction. If they are told, they can tailor their evidence.

10:45

Michael Matheson: Earlier, you said that disclosure from the Crown should be dealt with in the bill and you gave an example of a provisional list of witnesses being available at an early stage, unless someone should not be on it for a good reason. What might a good reason be? Who would decide whether there was a good reason for them not to be included on the list?

John Scott: A good reason might be if the Crown was toying with the idea of using a co-accused as a witness. I would not expect the Crown, two weeks after the person had appeared on petition, to have made a decision as to whether the co-accused was going to stay as a co-accused on the indictment or was going to be used as a witness. The decision would require to be made by the Crown but the defence should be able to test it with the court. Ultimately, the decision on whether something should be disclosed should be for the court.

Marlyn Glen (North East Scotland) (Lab): I would like to ask about the proposed extension of the powers of the sheriff in solemn procedures, about which you express concern in your written submission. Could you comment on that? Do you have a view on what types of case should be allocated to the sheriff and what types should not?

John Scott: My general concern relates to the fact that the McInnes report, which is a fundamental review of the summary justice system, has not come out yet. One of the possibilities that I understand is being considered by McInnes is the scrapping of district courts, which would result in more cases being handled by the sheriff courts, particularly those in Glasgow and Edinburgh. If a significant percentage of High Court cases were dumped on—or, to use a less emotive term, transferred to—busy sheriff courts without any thought of how they would be dealt with alongside the possible increase in sheriff court work as a result of the scrapping of district courts, I do not think that Glasgow and Edinburgh sheriff courts could cope. I know that concerns were expressed by sheriffs principal when Lord Bonomy investigated the matter.

We should also take account of the fact that a number of experienced sheriffs will be part-time High Court judges. They are exactly the kind of

sheriffs whom we would have wanted to handle cases if an increase in sentences from three years to five years were available to the sheriff courts. At the moment, there are some sheriffs who do not have sufficient experience to cope with that increase. I would not be happy with certain sheriffs, even full-time ones, dealing with cases involving sentences of up to five years, as they do not have the experience. Having the appeal court as a safety net to deal with excessive sentences is not as good as getting it right first time. As I said earlier, murder cases are often similar to sheriff court or district court cases that involve deaths. At the risk of sounding patronising, the majority of sheriffs would be easily able to cope with handing out sentences in relation to cases involving drugs, assault, assault and robbery and so on, as they are the sorts of case they are used to dealing with.

At the moment, a case would be heard in the High Court if the injuries were worse, if the value of the drugs were higher or if the category of the drugs were such that the matter might be considered to be appropriate for the High Court. Such cases can be accommodated in the sheriff court as far as the breadth of experience and ability required of sheriffs is concerned, but they cannot be accommodated as far as the number of cases coming in is concerned. The timing of the changes has not been thought through. The sheriff courts will struggle from the spring of next year.

There are occasions when the sheriff courts struggle to cope with their existing level of business. There are seven jury courts in Glasgow and three in Edinburgh. In Edinburgh, we have occasionally had to ask for other courts to be used as jury courts, and we run into difficulties with the availability of sheriffs and fiscals and of the sheriff clerks who are needed to run the courts. Not every sheriff clerk is trained to run a sheriff and jury court. A number of people in the process need to be up to speed to be able to cope with the changes. It would be short-sighted for the measures to be introduced in the spring of next year without taking into account the McInnes report and the potential need for a greater number of staff and an even greater need for facilities and courtrooms.

Bill Butler (Glasgow Anniesland) (Lab): The bill proposes a general power for the High Court to proceed to try an accused in his or her absence. Do you have a view on that? Is such a proposal compatible with the accused's right to a fair trial?

John Scott: It could be compatible, but I am very uncomfortable about the proposal, as I think are most of the witnesses who have already given evidence. There have been challenges in the European Court of Human Rights in cases where people have been tried, convicted and sentenced in their absence. Some of those challenges have been successful, for example when someone did not have legal representation. The bill team and its legal advisers had a look at the relevant European cases. The fact that representation is present takes care of one of the possible criticisms, although we have to be sure that the person knows about the trial and that the state—the Crown—has done everything it reasonably could have done to take care of the matter.

Even with all the safeguards that the bill contains, it would still be possible for an arrested person to come along and say that they did not get a fair trial, to say what their defence was and who their defence witnesses were, none of which would have been covered during the trial. That person would be likely to challenge their conviction, as happened in the case of R v Jones in England. The accused might say that they want the court to hear the evidence it did not hear and then decide on the safety of the conviction. There would then be a possibility of the conviction being quashed, and a further trial. That would inevitably cause some trauma to the witnesses. I read some of the evidence the committee has heard over the past two weeks and noted that, hopefully, it will get some help finding out the number of cases when that happens.

I do not think that there is a huge problem. In fact, it is surprising that people so readily submit themselves to the process when they have the opportunity to do something else: to try to disappear. Most of my clients are not people who you would have to look abroad for: most of them would be found, for example, at the chemist's where they normally go. One of my clients who escaped from Saughton was found in his bed at home. Most of them will not be criminal masterminds who go to South America. I would be surprised if there was a significant problem although, when it happens, it causes huge disruption, incurs an enormous amount of expense and creates considerable trouble for witnesses.

Bill Butler: What you have just said is broadly similar to the written evidence that we received from the Sheriffs Association. You said that, in certain circumstances, a trial in absence of the accused could be compatible with their right to a fair trial. Could you elucidate on that?

John Scott: I can give you an example.

In the summer, Michael McKevitt was prosecuted in the Special Criminal Court in Dublin for membership of the Real Irish Republican Army and for orchestrating terrorist activities. During the trial, he sacked his legal team. He then stayed in the cells and was given the opportunity to come up to court, first to hear what the prosecution was going to say and then to address the court. There was no jury, because it was a special criminal court. He refused. Inevitably, he will claim that he

did not get a fair trial and appeal, but he will not be able to claim that he did not get a fair trial because the trial took place in his absence: he was in the building, he sacked his legal team and he was given—but declined—the opportunity to turn up at court.

If the accused had given evidence and the defence evidence had been led, but the accused then disappeared, it would be difficult for the accused to argue that the court did not have all the information it needed. After the accused has given evidence and the defence evidence has been heard, the presence of the accused is no longer really necessary.

Bill Butler: With the exception of those singular examples, would you still be uncomfortable with trials in the absence of the accused?

John Scott: I would be extremely uncomfortable with them because I have never been able—try as I might—to work out what every client will say and what their defence will be. Most of the time they say exactly what I expect them to say, but there are always cases where a client takes me completely by surprise. I have been in situations where a client has said, "No, that is completely wrong and I have a witness who can back me up" and where that information turns out to be correct, or at least is accepted by the court.

Trying someone in their absence would store up trouble for the future, for the sake of the supposed certainty of achieving a conviction against them. If a person who had been convicted in their absence were arrested, there would be a host of problems for the appeal court to try to unpick. In the case in England in which the Court of Appeal said that the conviction was okay, when the person turned up after their conviction, they did not complain that they had not known about the trial or that they had had a reasonable excuse for failing to attend it, and they did not try to introduce fresh evidence. Had they done so, the Court of Appeal's decision might have been different.

The idea that someone could waive their right to a trial in their presence also causes problems for judges in England—or for a couple of them, anyway—and for the European Court of Human Rights. It cannot be deduced from the fact that someone has not turned up at their trial that that person has waived their right to a trial in their presence.

I would hate to be a solicitor or a solicitor advocate in a situation in which the court said that I should put forward someone's defence in their absence—I think that the Law Society of Scotland has provided good evidence about that. If I had never met the client, I would not want to take on the case and even if I had met the client, I would have difficulties. Things often turn up during the course of evidence, so I meet clients to check on the situation before and after the day's evidence has been taken. Often, important information is presented at that stage.

I do not know how many people are on the Law Society of Scotland's list of people who provide representation in sexual offence cases, where the court has the power to say that the accused must have legal representation, but I would be surprised if there was a huge queue of volunteers for that sort of work.

To require legal representatives to retain a duty to a client who has disappeared is to put an impossible burden on them, which is not fair. No one can make me take on such a case, so I will not do so.

Bill Butler: Thank you, Mr Scott. That is very clear.

Michael Matheson: The Sheriffs Association expressed a further concern about trials in the absence of the accused, saying that there is a danger that show trials might take place in cases in which the accused has left the jurisdiction of the court and gone to South Africa or South America, for example. Do you concur with that view? The Sheriffs Association also stated that such trials have been

"actively disapproved of in recent European Court decisions."

Do you have any knowledge about that?

It has also been suggested that complications could arise in relation to extradition treaties. A European Union member state might disapprove of the fact that someone who is in its jurisdiction had been tried in their absence in another member state and might refuse to extradite the person.

John Scott: I agree entirely with what the Sheriffs Association said about the danger of show trials. Before Saddam Hussein was captured, there was talk about putting him on trial. I think that in France, after a plane was bombed, a trial took place in the absence of the accused that led to a conviction; however, in the French system there remained the possibility that there could be a fresh trial if the person was ever arrested—I did not see the point of that.

A high-profile case in which someone left the jurisdiction of the court would put the Government and the prosecution under pressure to act, so the Crown might not be terribly keen to have such a situation thrust upon it.

Earlier, I should have mentioned Lord Rodger and the Jones decision in England. In Scotland, you still have dock identification so, in many trials, unless the witness knows the person, you will not be able to have the trial. A trial in absence would

certainly be to the advantage of an accused person, because when the witness is asked to have a look around the court to see whether they can see the person, it will be that bit more difficult.

11:00

The Convener: You said that you are opposed to people having to disclose their line of defence. My understanding is that Lord Bonomy envisaged that if there were a private and confidential note on the general line of defence, such as a note saying that the defence intended to challenge fingerprint evidence, and the defence then asked for an adjournment in order to challenge that fingerprint evidence, the note would allow the judge to consider refusing to adjourn. A central theme of the Bonomy report was a reduction in the number of adjournments. Would your view be different if that was the reason behind a refusal?

John Scott: From what I read in Lord Bonomy's report, I am not sure how the judge would know what was in the note. How would he know your position on fingerprint evidence? If you turn up and say, "I need an adjournment because I want to look into the fingerprint evidence," then, unless you hand over the note to the judge—a note that you have prepared for yourself—so that he can use it against you, he is never going to know about it.

The issue of cutting down on unnecessary attendance by witnesses would be addressed by other measures, such as discussion of meetings, agreement of evidence and management at preliminary hearings. If, on my first contact with the Crown, I hear that there is fingerprint evidence, I would want to know what it was, to have the opportunity to look at it, and, if necessary—after consultation with my client—to have it checked separately. I do not imagine that many people would put something in a confidential note that would allow the court to say at a later stage, "Hang on, you've not been doing things right." I cannot think of circumstances in which that note would be revealed to anyone. I do not know who would get access to it. I mean, if I have it in my pocket—

The Convener: I think that Lord Bonomy envisaged that it would be a private and confidential note to the judge.

John Scott: To the judge?

The Convener: Yes, a private and confidential note that only the judge would see, so that, if someone asked for an adjournment on spurious grounds, the judge would know. It would be part of the package of measures to reduce the number of adjournments.

John Scott: I do not think that the judge should be involved in that at all. That is the kind of thing that would be covered in discussions between the Crown and the defence. If I stood up and said, "I need an adjournment because I want the fingerprint evidence looked into," the advocate depute could stand up and say, "Well, he was just talking to me about the fingerprint evidence the other week and he said that everything was okay, so I'm a bit puzzled about why he's now saying that he needs an adjournment." The situation could be covered that way, between the Crown and the defence. I do not think that the judge should be involved.

A judge can find out during a trial whether someone has previous convictions, whereas the jury is not allowed to. However, I would not be happy about the judge knowing any more about the defence than he does at the moment. A judge has the power to intervene to clarify things and there might be temptations in certain situations. Appeals have succeeded because a judge has said something about how unfortunate a person appears to be. That could perhaps even happen more.

The Convener: Thank you for coming along and answering all our questions this morning; it has been a valuable session.

We now welcome our second witness, Professor Peter Duff from the University of Aberdeen. I refer members to Professor Duff's written submission. We will move straight to questions.

Marlyn Glen: Good morning, Professor.

Professor Peter Duff (University of Aberdeen): Good morning.

Marlyn Glen: Will you briefly outline the main findings of your research into intermediate diets, first diets and the agreement of evidence in the sheriff courts?

Professor Duff: Most work has involved summary procedure, for which intermediate diets were made compulsory in 1996. However, we did consider two sheriff solemn courts where the procedure is more or less the same as in the High Court. First diets were made mandatory in those sheriff courts but not in the High Court.

The main findings were that a substantial number—between one quarter and one third—of first diets resulted in the accused pleading guilty, which then cut down on the number of cases going to trial. There were also a large number of cases where, at the first diet, it was clear that there would be problems with the original trial diet. The trial diet could be adjourned at that stage, rather than on the morning of the trial, by which time all the witnesses would be present and considerable inconvenience would be caused.

The overall message of the research on summary and solemn procedure was that, if

managed correctly, the preliminary or pre-trial hearing is quite successful in getting rid of quite a lot of cases at an early stage, either because of a guilty plea or, less commonly, because the prosecution abandoned the case. It is also reasonably successful at enabling problems with the timing of the trial to be anticipated and enabling adjustments to be made.

In the solemn cases, when more witnesses tend to be involved than are involved in summary cases, the main beneficiaries in the sheriff solemn courts were witnesses. The procedure is slightly different in the sheriff court than in the High Court at present in that there is an initial hearing and then, if the accused pleads not guilty, a first diet and a trial diet are set. If the accused pleads not guilty at the time of the pleading diet, all the witnesses are cited. If there is a plea, or the trial is going to be adjourned at the preliminary diet, witnesses can be countermanded and will not turn up on the day of the trial to find that no trial is going ahead because the accused pleads guilty on the morning of the trial or some other problem arises, causing the trial to be adjourned.

We considered only 150 solemn cases in Aberdeen and Glasgow, making 300 in total. For those cases, there were more than 1,000 witnesses who, having been cited for a trial on a particular date, were countermanded. Were it not for the pre-trial hearing, all those witnesses would have turned up on the morning of the trial and found that there was no trial because the accused pled guilty on the morning of the trial or because neither of the sides was ready. There are potentially thousands of witnesses who could be countermanded and told not to bother because the case is over or the trial has been changed to a different date. In practice, therefore, witnesses were the main beneficiaries, although there was some increased efficiency in the system in that a smaller proportion of cases were proceeding to trial.

Marlyn Glen: You anticipate that consequence transferring to the High Court. There are obvious lessons that we can learn from the sheriff court experience that apply to the High Court procedure.

Professor Duff: Yes, particularly sheriff solemn procedure, which mirrors that of the High Court. At the moment, there is provision for an accused who wishes to plead guilty to seek an accelerated hearing and plead guilty, but that is rarely used. So the argument in favour of the mandatory or routine pre-trial hearing is that, shortly before trial, there is an opportunity to check whether the accused intends to plead not guilty. There is also an opportunity for negotiations to take place between the prosecution and the defence, which might lead to an adjustment to the charges and a guilty plea. Of course, if a substantial number of cases can be taken out of the system at that early stage, there are benefits to the system and for potential witnesses.

Margaret Mitchell: Good morning, Professor Duff. The mandatory preliminary hearing is central to the bill. What needs to happen in order for it to work and be effective?

Professor Duff: I have done various pieces of research for the Scottish Executive on adjournments and the introduction of intermediate and first diets in other levels of court. As John Scott implied, there needs to be a cultural shift. One can implement statutory frameworks and tests if one wishes, but there must be a culture shift—the change to the legislative framework can help to facilitate or encourage that shift—to get rid of what is known as an adjournment culture, which creates an expectation that cases will not take place.

The person with the greatest power over culture in the courts is the judge. We are talking about a small number of judges in the High Courts, so the situation should be easier to manage—if the judges are of one view—than in the sheriff courts. They have to be proactive at pre-trial hearings and they have to check that all the proper steps have been taken and that everybody is ready to go ahead.

In some sheriff courts, the pre-trial hearings, or intermediate diets, work well, but in others they do not, because such hearings are regarded as a rubber-stamp exercise and there is no real check: the procedure takes about two minutes—the judge asks, "Is everybody ready to go ahead at trial?" the answer is yes and the judge says, "Okay, fine." The judge does not check whether the parties are really ready to go ahead, that all the police witness statements have been delivered to the defence, that the defence and prosecution have discussed the case, that all the witnesses have been cited, that all the steps have been taken to agree evidence and so on. The judge must be proactive and ask demanding questions of both sides as to whether they have made the right preparation so that, barring unforeseen disasters, if the judge lets a case go forward from the pre-trial hearing to the trial, he is stating that the trial is really ready to go ahead and that nothing will stop it going ahead on the day. That requires judges to bring about a change in culture, so that there is an expectation that everybody will be ready by the time of the pre-trial hearing and that the process is not merely an administrative step that does not matter.

There must also be an expectation that when a trial is set for a particular day, it will go ahead on that day. At Glasgow sheriff court, nobody expects a trial to happen on the first time of appearance and that becomes a self-fulfilling prophecy that Glasgow sheriff court trials virtually never happen

first time, with consequent terrible inconvenience, cost and loss of efficiency. There has to be an attitude shift: at the pre-trial hearing, the judge has to check very firmly with the parties and be proactive in making sure that everything is ready, so that there is a real expectation that when the case calls for trial, the trial will go ahead.

Margaret Mitchell: The judge will lead the culture change, but a culture change is also required on the part of the prosecution and the defence. To ensure that such a change takes place, would you recommend a pre-meeting, at which the parties iron out matters, so that the written report and all the measures that require to be taken are taken?

Professor Duff: Yes. There should be a pre-meeting as suggested by Lord Bonomy and in the legislation. I have no experience of practice so I do not know whether that could be done by e-mail or telephone or whether it would have to take place face to face.

If it is clear at the preliminary hearing that there has not been a pre-meeting, rather than just accept that the trial should be adjourned until the parties have had the opportunity to meet, the judge should say, "Right. Go away and meet now while I deal with these other cases, and come back at 2 o'clock." The judge must not accept the situation. That is the kind of thing that will bring about the necessary cultural change.

Margaret Mitchell: So the judge is key and is responsible for ensuring that everyone is taking things seriously and is prepared.

11:15

Professor Duff: Yes. One sees situations in which judges are passive. At an intermediate diet—the pre-trial hearing in summary procedure—the defence might say, "Well the prosecution has not yet provided me with the witness statements and I have been unable to get hold of a procurator fiscal to discuss the case," and the judge would say, "We will have to reschedule the trial for another day and adjourn everything." That has the advantage of avoiding witnesses turning up for a trial that cannot take place because nobody is ready, but it also postpones the problem and adds to the churning of cases. The judge should just say, "Go and do whatever you need to do now and we will be here until 6 o'clock or 7 o'clock at night until you are ready and have done the necessary."

Margaret Mitchell: Should there be more disclosure of the defence case before the pre-trial meeting?

Professor Duff: Yes. As the previous witness said, it is difficult to work out how that should be done. Before one can expect greater disclosure of the defence case, there must be greater disclosure of the prosecution case. Before the pre-trial hearing, the defence must be in possession of all the evidence that the prosecution has, subject to safeguards in relation to witnesses' safety. Only when the defence has all the information from the prosecution can an informed decision be made about whether to go to trial or beat one's client over the head and say, "Quite frankly, the evidence against you is overwhelming. There is no point in continuing with your not guilty plea. You might as well plead guilty now." Once we have greater disclosure of the prosecution case, there should be a duty on the defence to disclose.

Bonomy suggested that steps should be taken at the pre-trial hearing to identify uncontroversial witnesses and that the judge should be able to rule that the presence of a particular witness is not necessary, because their evidence is completely uncontroversial. However, I notice that the bill is silent on that. It is still open to the defence—if it wishes—to say at the pre-trial hearing that it requires all witnesses to test every aspect of the prosecution case. If the defence wants to co-operate, it can say, "We agree that the evidence of this witness, that witness and these three witnesses is routine." However, it is still open to the defence simply to say, "We want every witness in court." That would leave open all possible lines of defence and would not expose any of the defence's thinking. The bill is completely silent on what the judge can do about that. It would appear that the judge can do nothing; he or she just has to accept it.

One can argue that in an adversarial system the duty on the defence is to do the utmost for the accused. The defence can say that it wants all the witnesses to appear and that it wishes to test the prosecution case, because there is a possibility that, if a witness falls under a bus or fails to turn up on the day, its client will be acquitted. However, many defence advocates will not push things to that extreme and are more co-operative.

I have reservations about the defence having to disclose the exact nature of its case. The prosecution could suggest—as it can at the moment—that certain witnesses are uncontroversial. Those might include the policeman who was given a sample of drugs by the desk sergeant and drove it up to the forensic laboratory or the person at the forensic laboratory who received it and signed it in. Very often there are five or six such witnesses, who appear simply to give routine evidence, showing the chain of events surrounding a piece of evidence. In most cases, it is totally unnecessary for such witnesses to appear.

At the pre-trial hearing, the prosecution should say—as it can do already—that it thinks that the witnesses' statements are non-controversial. Lord Bonomy envisaged the defence then having to justify why it needed a particular witness—but that does not seem to have happened in the bill. In the example that I gave, there would be no need for any of the witnesses, unless the defence intended to argue that a sample was not really drugs, that a sample was contaminated on the way up to the lab, or that there was a mix-up with the labels. Making the defence explain why a particular witness is necessary would give a clue to the defence's position and would mean that it could not suddenly spring an ambush and deny what it seemed to have accepted—for example, that a sample was heroin—and could not claim that the labels had been switched, for example.

There must be a provision in the bill whereby a judge can say to the defence that because it has not given a satisfactory reason why it needs as a witness the desk sergeant who handed over the sample to a policeman to take it up to the forensic laboratory, it cannot have the desk sergeant as a witness. There is no such provision in the bill.

I have covered two topics in what I have said, and I have outlined another way of achieving disclosure of the defence's approach to a case—what it thinks is and is not disputable—which has the benefit of preventing from being called many witnesses whose evidence will not be disputed.

I do not believe that in the example that I gave the situation would be unfair to the defence. One line of defence might be that the kilogram of material that was found in the boot of someone's car is not drugs but something else, such as weedkiller. I do not believe that it would be unfair to the defence if it had to disclose through the route that I suggested whether that was its line of defence or whether the defence would be that the person did not know who put the drugs there or that it was not their car, or any of the other numerous lines of defence that one can think of.

Margaret Smith: The bill does not impose limits on the number of preliminary hearings that could take place. Given that there is, apparently, an adjournment culture, we could see adjournments of preliminary meetings. Can anything be done about that? If so, should such a provision be in the bill?

My second question is linked to my other questions. You referred to the fact that judges must be proactive and should not slip into saying that, because a certain amount of work has not been done, there will be an adjournment—there should not be a sort of rubber stamp. Again, the bill does not say anything about the sanctions that might be available. In fact, it is difficult to envisage what sanctions might be available if parties were not properly prepared for the preliminary hearing. You suggested that they might get taken off into a room somewhere in a sort of detention. Can you think of any other sanctions that might be available if it is clear that lawyers just have not done their job before they get to a preliminary meeting? They might not have had the managed meeting or might have come ill prepared, for example. What sanctions could there be? Should there be a provision in the bill to limit the number of preliminary hearings?

Professor Duff: I will take your second question first. You are right to say that it is difficult to think of sanctions, but that is not to say that one cannot do something. Lawyers are professionals and, like most professional people, they want to appear to be competent. The simple exposure in court of the fact that they have not done their job and have not got things ready does not look good. Again, the judge must be proactive. Rather than simply accept the situation and not make any comment, the judge must pursue why a lawyer is not ready and what attempts they have made and so on. That is the first thing.

When I undertook the research, I was struck by the fact that there were virtually no adjournments in Kilmarnock sheriff court because, under Sheriff David Smith, there was what can only be described as a reign of terror whereby, if people had not done their jobs, they were shouted at and humiliated. I would not suggest that one needs to go that far. Both the defence counsel and advocates depute can be exposed to embarrassment if they have not done their jobs properly or have not done what they were supposed to do. Although it is not a financial sanction or the kind of sanction that one immediately thinks of, the poor opinion of other professionals in the system is potentially a very powerful sanction. Nobody wants to look bad.

Also, as I have said before, rather than being accepting, there is scope for the judge to say, "You say that you have not had time to discuss matters. Go away and do that now. Come back in the afternoon at 2 o'clock. If you have not done it by 2 o'clock, come back at 4 o'clock." In the short term, such things might create a little more work and some difficulty; however, our research showed that, in courts in which there is that kind of proactive culture, such an approach works in the long term. It might take a little while to turn the process around but, once it works, the savings are great, so it is probably worth the short-term disruption that might be caused.

Margaret Smith: Should there be anything in the bill to limit the number of preliminary hearings?

Professor Duff: No, although there is clearly a danger that all one does is build in extra court appearances with no added value whatever. That

happens in some of the courts that have a passive approach to intermediate diets. However, because every case is different, I would be reluctant to specify an absolute number of preliminary appearances.

At a pre-trial hearing that is held 30 days before the trial, when virtually everything is ready to go but a couple of things are missing, it can be useful for the judge to say, "Okay, it is not serious enough to adjourn the trial yet; however, let us continue the pre-trial hearing for 14 days. We will come back and see whether everything is sorted out then." If everything is sorted out, the trial will go ahead with the minimum disruption, and only a five-minute hearing will be necessary. If everything is not ready, the trial will be adjourned at that stage.

There are situations in which it is probably more efficient to insert a continued hearing in the hope that the trial can still go ahead than to call the whole trial off. Therefore, I would be reluctant to say that there should be only one or two hearings. There might be situations in which a third pre-trial hearing might prove beneficial.

The Convener: If preliminary hearings operated in that way, that sanction would be continued to later in the day or to the following day. Would we not need to dedicate judges to preliminary hearings for that to happen? If judges had to conduct trials as well as preliminary hearings, they would have to be available throughout the day. How would the court system be managed to accommodate your suggestions?

Professor Duff: I am not an expert in the fine details of court programming, but I do not see any great difficulty. For intermediate diets, there was originally a presumption that the same judge would conduct the intermediate diet and the trial, but that did not happen, as it was too difficult in the context of the huge mass of cases going through the sheriff courts.

We are talking about only 20 or 30 judges in the High Court, and we just need to have a consistent attitude about what needs to be done. I do not know, but I would have thought that on many days when a judge conducts pre-trial hearings, they will not hold a trial. Even if they do hold a trial, they might hold pre-trial hearings between 10 and 11 o'clock and then start a trial at 11 o'clock. If the parties are not ready, the judge can ask them to return at 3 o'clock and adjourn the trial for five or 10 minutes, between witnesses.

I do not envisage judges ever saying, "Come back the next morning." They either deal with the matter there and then when the parties are at court or schedule a continued pre-trial hearing for two weeks' time. Obviously, there will be a court minute. If the same judge is not available to do the hearing, I do not regard that as critical. It is sufficient for people to know why the original judge continued the hearing and what is the missing bit of the jigsaw that needed to be checked for the trial to go ahead.

The Convener: In your submission, you say that a judge can refuse an adjournment even if there is a joint application to have one. Does that not give either side grounds for a cast-iron appeal?

11:30

Professor Duff: It would depend on the need for the adjournment. We are talking about a small culture, particularly in the High Court, where the judge has recently been at the bar, the advocate depute is a member of the bar—on secondment as it were—and the defence counsel is at the bar. The defence counsel might realise that he is going away for a long weekend on the day that a trial is due to start. He might simply have a word with the advocate depute to say that the date is not particularly convenient and the advocate depute, knowing that at some stage he will need some kind of quid pro quo, agrees to the request. If the judge does not inquire into the reasons for the adjournment, it would be easy enough for the defence counsel and the advocate depute to say that neither of the parties is ready or that there is a joint motion for an adjournment.

It is clear from any analysis of what goes on that many adjournments are unnecessary and that further scrutiny by the judge would indicate that. In those cases, there would be no possibility of an appeal. However, if there was a genuine reason for the adjournment, like a forensic report that had not been received, the judge would find out about it if he inquired sufficiently and, in those cases, he would have no option but to grant the adjournment.

The judge needs to be fairly strict. As I said, judges have come from the bar—many of them recently—and might have some sympathy with the advocate depute or defence counsel saying that it is not convenient for a trial to go ahead on a particular day. An adjournment would allow the judge to get on with writing an opinion or doing something else and so he agrees to postpone the trial for a month or so.

Very often, the members of the public who are involved in the process feel that the whole system is run for the benefit and convenience of the professionals who are involved and not for the general public.

The Convener: I want to ask about the proposed change to fixed trial dates. You suggest that the change might be problematic, particularly for defence counsel. Will you elaborate on that?

Professor Duff: It is just a thought. Again, I am not an expert in this area at all, as I have never been in practice and I do not know very much about how the legal aid system works. John Scott might have had something to say on the matter and the Faculty of Advocates would certainly have something to say on it. At the moment, advocates tend to fill up the two-week hearing. They put in the number of cases that they think they will be able to get through with a bit of juggling and with some of the cases resulting in pleas and so on. By and large, they hope that it will all work out. They hope that the right number of cases will result in a plea or abandonment and that the two or three trials that are left can be juggled to fit into the two-week period. That is how they ensure that they will be working every day.

It is suggested that a prediction should be made as to the length of a trial. Let us say that a case is set for a particular day and it is likely that it will be a five-day trial. The advocate could turn up in the morning and find that his client wants to plead guilty—even with the best will in the world that often happens. Clients often do not take the chance to plead guilty at the pre-trial hearing—they put off the evil day, and no matter how much their advocate browbeats them by telling them that the evidence against them is overwhelming, the advocate has very little chance of success if their client insists on pleading not guilty. However, on the morning of the trial, when the day of reckoning has arrived, the client will plead guilty. If there are to be fixed trial dates, the advocate could be left with five days blank until their next trial, which would mean that they would not get paid.

I do not know whether that will be a problem, but I can see that it has implications for the way in which defence advocates structure their work loads. At the moment, there is a considerable degree of flexibility. It would not be particularly efficient if the defence advocate and the advocate depute had tabled in five days for the trial and it collapsed. They would have to find something else to do. Of course, at the moment, they are juggling all sorts of trials, so it is easy for them to say, "This one is scheduled for some time in this two-week period, so let's just bring it forward a couple of days and let's put that back till later." A measure of flexibility is built into the new system, in that some cases will be fixed for specific days and others will not. I just point out that, at first glance, there might be a problem.

The Convener: You are right to point that out, and I do not think that you are the first to mention it. What is the solution? Do you have any ideas, or is it a matter for the Scottish Legal Aid Board to address?

Professor Duff: I have no idea what the solution is. The Faculty of Advocates, the Crown Office and the Scottish Legal Aid Board will have to sit down and address it. I am not sure whether they have done that. I could find no reference to it in the documentation that I looked at.

The Convener: We will be hearing from the Scottish Legal Aid Board shortly, so I am sure that someone will put that question.

Michael Matheson: I want to pick up on the disclosure of information to the defence. The committee has received conflicting views on the feasibility of full disclosure of police witness statements. Do you have a view for or against the full disclosure of police witness statements to the defence?

Professor Duff: I have a strong view. There should be full disclosure, although I know that the police are reluctant to disclose full witness statements. I am on the McInnes committee, and we are having much the same discussions as those that led to the Bonomy proposals. For years in England, all witness statements have been neatly typed up, signed and handed to the defence well in advance of the trial. The police's worry here centres round the fact that the quality of the statements is not particularly high. That is probably the case, but I cannot see that there is any great difference between the quality of police officers in England and Scotland that means that something that has been done for many years in England cannot be done in Scotland. I see no reason why all police and civilian witness statements should not be handed over when it is clear that a case is going to trial.

As John Scott said, if the defence team has possession of all the witness statements, it will be fully informed and in a position to decide to advise the client whether to go to trial or to plead guilty if the evidence is overwhelming. If the team does not have that information, it has to take the word of the accused, and if the accused insists on pleading not guilty, and comes up with some unlikely tale, there is not much that the team can do about it. I do not see any reason why police witness statements should not be handed over.

Michael Matheson: Arguably, if the police were forced to disclose witness statements at an early stage, that could drive up standards, because they would be more careful in producing them. I do not know whether that has been the case in England. It would be interesting to know. Is it a cultural issue or is there a lack of confidence within the police? They have been doing it for years in England, but when they introduced the measure, did they expect that their reports were not very good and were they reluctant to disclose them? If so, has there been a change in the quality of reports since they started to disclose them? Do you know of any information on that?

Professor Duff: It is an interesting point. No, I do not know of any information. I was involved in research in England around 1979 and 1980 and, at that stage, police witness statements were routinely made available. I do not know when it first happened or what the arguments were at the time. Undoubtedly the standard would be driven up because, if a statement was not good enough, the Crown would send it back saying, "That's not good enough. It doesn't give us enough information and we can't really hand that over to the defence." Disclosure would have the effect of improving the quality of police statements.

Bill Butler: Your submission states clearly that you

"support the proposal enabling the court to try an accused in his absence".

However, the committee has heard misgivings from Mr Scott this morning and read of others in the Sheriffs Association's submission. Why are you comfortable with the proposal—subject to one modification, to which we will come—when others are not?

Professor Duff: I am comfortable because there is an interests-of-justice test for trial in absence of the accused. There are many cases in which the trial could not be held in the absence of the accused, but there are equally instances in which it could, and I will give an example in a minute.

The waiver point that John Scott raised is not really valid because, as happens in England, the situation can be made crystal clear to the accused at the pre-trial hearing. The judge can tell the accused, "You are being released on bail and here is the date of your trial, but if you do not turn up for it, there is a possibility that the trial will go ahead without you, so be warned." The accused can also be given a bit of paper to the same effect. In fact, when the accused receives the indictment, it could say in big, red letters at the bottom of the indictment, "If you do not turn up, you may be deemed to have waived your right to trial."

That was the approach that was taken in the Jones case in England, which has been referred to, where the House of Lords considered whether trial in absence of the accused complied with the European convention on human rights. The judges' view was that it was ECHR compliant as long as the accused had been given sufficient warning of the consequences of not turning up and of the fact that the trial could go ahead.

Bill Butler: Would you support trial in absence of the accused in all types of case? For instance, would you support it in the trial of a young person on a serious charge such as murder?

Professor Duff: I would not restrict its use to particular types of case. Where, for example, the identity of the accused is not an issue, one can envisage cases in which one could make a strong argument that it is in the interests of justice for the trial to go ahead. Take, for example, the case of a grandfather who is accused of libidinous conduct against a coterie of grandchildren, grandnephews and grandnieces—the usual sort of case—involving eight or nine young children. There is no doubt that the allegation is that granddad did it. If granddad does not turn up for the trial, but all those children are at the court, it is not in the interests of justice or fair to the children that, having prepared themselves for the ordeal of the trial, they all be sent away and have to come back later.

Bill Butler: On being fair to everyone, what if, to take your example, the accused is apprehended and claims that he was not given justice and the appeal court agrees and orders a retrial? Is that not, as the Sheriffs Association said, an irresistible plea?

Professor Duff: Not necessarily. The ECHR jurisprudence is relatively clear that trial in absence of the accused is acceptable as long as there can be deemed to have been a genuine waiver and the accused has been informed in no uncertain terms that if he does not turn up to the trial, he might not get the opportunity to give his full story or to give his story at all. We are talking about cases where the accused is usually represented. In the absence of the accused, the only witness missing from the defence would be the accused, and if he chooses deliberately not to turn up, I can see cases in which to go ahead would be in the interests of justice, which is for the judge to decide on the facts of any particular case. In the example that I gave, if all the children were to give their evidence and the accused were convicted, it would be difficult for him to convince anybody that there had been a miscarriage of justice unless he were to come up with some completely new story that nobody had ever heard before, in which case there would be some doubt as to its credibility.

Bill Butler: Your written submission proposes a limited right of retrial in certain cases of conviction in the absence of the accused. Could you amplify what you say in your submission?

11:45

Professor Duff: In England, the trial in absence of the accused is much more fully developed, as the recent Jones case shows. What I find interesting about the Jones case, because I had not been aware how far the trial in absence had developed in England, is that it was for a very serious offence with a four-year prison sentence.

The English court seemed quite comfortable in going ahead with a trial in absence. In the magistrates court there is a safety net whereby if the accused turns up with genuine fresh evidence—as in the example that you have given—rather than having to go down the full appeal route to have a retrial, which inevitably involves delays, the accused can apply under a fast-track procedure to the court that found them guilty or sentenced them to such and such a disposal and, if the court is satisfied, it can immediately order a retrial.

An example would be where the accused—the grandfather in the example that I gave—is not there on the morning of the trial, so the trial starts. However, it then turns out that he was taken to hospital with appendicitis the night before, so there was a good reason for his not being there. In that case, there has to be a safety valve to protect the accused, but when the accused has wilfully and deliberately not turned up and has no good excuse for not turning up, I see no great problem. The judges have the interests of justice test, so they will proceed only if they think it is in the interests of justice to do so. As I say, that depends on the circumstances of the case.

Bill Butler: Thank you, Professor Duff. That is an interesting contrary point of view.

The Convener: John Scott raised the question of how we would get round the issue of identification in the absence of the accused. How would we deal with that issue?

Professor Duff: In virtually all cases of a sufficient level of seriousness to go to the High Court a photograph of the accused will be taken when he is taken into police custody. I do not see that there is a problem in these days of modern technology. A case in which identification is an issue—when the accused is denying that he was the person who did it—is not likely to be one where it is in the interests of justice to have a trial in absence of the accused. It is in the interests of justice only when there is no question but that the accused is the person involved. For example, in a rape case where the girl is alleging that Mr Smith next door raped her, there is no doubt about the identity and the question is whether the story is true. In that case, identification is not a problem.

Michael Matheson: In relation to the trial in absence, I will pick up on the point made by the Sheriffs Association about show trials. Everything that you have said about trials in absence is on the basis that the person has waived their right. What would happen if the person had left the jurisdiction of the court—they had done a runner at the time of committing the crime—and the subsequent investigation found that that was the person who should be tried for the crime and the trial goes ahead. The person would not be aware that they were on trial at that time. Would you be comfortable with that?

Professor Duff: No. I do not think that a trial could be held in that situation. The accused has to have been in court. If they have done a runner immediately after the offence and they have not been hauled into court, I do not think that a trial can go ahead, because it could not be said that there has been a genuine waiver. The person has to have been brought into court in connection with the offence and must have been explicitly warned that the case can go ahead even if they do not turn up.

If the accused does a runner between the preliminary hearing and the trial—the trial is set for 30 days and they then do a runner—the trial can go ahead because they are clearly deliberately absenting themselves from the jurisdiction and clearly could be said to be waiving their right and trying to get out of or to delay the trial by illegitimate means.

Michael Matheson: You are saying that that is once proceedings have started.

Professor Duff: Yes. I have not really thought this through, but it is fairly clear from ECHR jurisprudence that the accused must have been warned in no uncertain terms about the possibility of the trial going ahead if they absent themselves at some future stage.

The Convener: That is all the questions. Thank you very much for the evidence that you have given us. Your research—particularly on intermediate diets—has been most useful.

Professor Duff: Can I just add a point?

The Convener: Yes, indeed.

Professor Duff: As I said earlier, I am on the McInnes committee, but all the views that I have expressed today are my own and should not be taken as the views of the McInnes committee, which will be reporting very shortly.

I wanted to pick up a point that John Scott made. In its deliberations, the McInnes committee was well aware of the fact that it was likely that the sentencing power of sheriffs would be increased to five years—in other words, that the Crime and Punishment (Scotland) Act 1997 would be brought into force—and we proceeded on that basis. Therefore, it is not the case that the increase in sentencing power comes as a surprise to the McInnes committee or that the committee's proposals do not take that on board. I express no view on whether the increase in sentencing power is a good idea. In our deliberations, we were well prepared for that possibility; in fact, we proceeded on the assumption that that was what was going to happen.

The Convener: That is helpful. I appreciate that you are here in your own capacity, but can you give us an insight on the timing of the McInnes report? I understand that we are expecting it quite soon.

Professor Duff: The McInnes report has to be with Cathy Jamieson by the end of the year—that is, by December 31. There will be a time delay between its delivery to the Minister for Justice and its publication; I think that it will be published and its recommendations revealed at the end of January. The report is imminent.

The Convener: Thank you for that information and thank you again for coming to our meeting this morning.

Our final set of witnesses is from the Scottish Legal Aid Board. I refer members to its written submission. I welcome Douglas Haggarty, solicitor, and Lindsay Montgomery, who is the chief executive.

I will begin by asking you about costs and savings. Our understanding is that the bill's proposals will involve additional costs for the Legal Aid Board in the first two years. What reasons for those additional costs have you identified?

Lindsay Montgomery (Scottish Legal Aid Board): I will make a couple of general points before asking Douglas Haggarty to go through some of the detail. In the figures, we have tried to adopt a very conservative approach, by neither underestimating the costs nor overestimating the savings. We have not included the result of further disclosure by the Crown to the defence of statements, which we think could have quite a big impact. We did not include any figures for that, because it did not appear anywhere in the bill or the supporting documentation. I will ask Douglas Haggarty to go through the key points on costs and savings that we make in our submission.

Douglas Haggarty (Scottish Legal Aid Board): When we appeared before the Finance Committee, we produced two appendices, one on costs and one on savings. The board had identified the main areas of change. The most obvious hard cost would be a mandatory preliminary hearing, which we thought would cost more than £500,000. There is also the proposal for a managed meeting—all new procedures involve new costs for the board. Slightly lesser costs will arise from cases in which the preliminary hearing is held in Edinburgh or Glasgow. In fact, that is a nil outcome; although solicitors might have to travel from Aberdeen or Dumfries, counsel will not have to do so because they are based in Edinburgh. As for the new procedure for accelerating diets, we discovered, after further discussion with the team that was putting the bill together, that that will not really be much of a cost at all.

The final cost, which has already been mentioned, relates to counsel remaining available for a fixed trial diet. Under our current feeing system, counsel are paid only for the work that they do. If counsel turn up at court in the morning and the trial does not proceed, they get what is called a waiting day, which is two thirds of the daily rate. However, if counsel stand up in court and say something—it is sometimes called a technical calling—they will get a daily rate. If the case goes to a full trial, counsel might even look for an enhanced fee. Daily rates can be increased or reduced according to circumstances.

As I have said, under current feeing arrangements, we would not be in a position to pay counsel for the days on which they did not have to turn up at court. We are discussing with the Faculty of Advocates the quite different issue of graduated fees, which would mean that counsel would be paid a global fee for each case. That approach might cover counsel for different circumstances that might arise in a case, even though there are provisions for counsel to be paid additional fees for attendances at court. Those provisions would allow for more balanced payments in a case involving a trial, which would incur a higher fee, or a formal appearance, which would mean a lower fee. Such aspects are built into the system. We will begin to cost the graduated fees approach shortly, but we are considering the proposal from the Faculty of Advocates very much in the light of the situation as it will be in future rather than as it is currently.

As the Bonomy report concluded, the main savings will be made by remitting cases from the High Court to the sheriff court. I should perhaps deal with that matter in slightly more detail. It was decided for the reasons stated in that report that a certain block of cases should be marked to the sheriff court instead of the High Court. We were then asked to set out the implications of such a move. In doing so, we deducted the average cost of a sheriff court case from the average cost of a High Court case. As that figure covered the whole of the business before the High Court, we reduced it by half to reflect the lower band rate for High Court cases and multiplied the saving—about £3,700 per case—by more than 400, which was about 25 per cent of the 1,667 cases on which we were working.

As a result, we concluded that there might be a saving of £1.5 million. However, as we realised that the block of cases that would be remitted to the sheriff court would form the top part of sheriff court business and, because they might take longer and be more expensive, might involve more counsel, we deducted a third of that figure—about £500,000—to come to a global figure of £1 million. We think that that figure is conservative, because we did not build in the extent of the expected

savings across the board from the disclosure of evidence—which the board feels is one of the cornerstones of the savings and efficiencies that we can hope for in the new system—and from the fact that the High Court itself will become more efficient. At the moment, we are saying that we can make gains because the sheriff court is more efficient. However, proposed reforms such as fixed diets make it possible for the High Court to become more efficient and therefore to bring down its costs. As I said, those aspects have not been factored into our considerations on savings, but they give us hope that there will be more savings and indeed that we will more than break even.

We will have increased costs for the first two years, as the amount of procedure will increase through increased communication between the Crown and the defence, meetings and preliminary hearings. However, for the reasons that I have stated, we see potential not only for breaking even, but for making savings on what we pay.

Some lesser savings could also be made. Pre-trial pleas cannot be dismissed. About half the costs of a solemn case are incurred just in taking precognitions, so even if the accused pleaded guilty, all that work would have been done. I hope that much of that will disappear with disclosure, but if 25 per cent of cases had a guilty plea without reaching trial, that would represent a huge saving for the legal aid fund. Savings would also come from a reduced number of adjournments. I had a final matter to mention, but it is insignificant.

Our approach has been based on hard costs, because the amount of procedure will increase. However, substantial savings can be made if the efficiencies are delivered.

12:00

The Convener: When you talked about savings, you compared the average cost of the sheriff court with that of the High Court. Does the main saving arise because counsel will not be used in the sheriff court?

Lindsay Montgomery: No, although that is quite a significant part of the saving. We pay solicitors, as well as counsel and solicitor advocates, substantial amounts of money for High Court cases. According to last year's figures, the average cost of a solicitor's involvement in a High Court case is about £6,500. In a sheriff court solemn case, that figure is about £1,700.

An awful lot of the change relates to the High Court process. That process costs us much more money because it involves many more adjournments and is less efficient. If we had two similar cases, one of which involved counsel in the High Court and one of which involved counsel in a sheriff court solemn case, they would have substantially different costs, because of the nature of the process.

The Convener: Those who are accused of serious crimes can employ counsel through their solicitor. Concern has been expressed to the committee that they could not do that if their cases were shifted to the sheriff court. Do you plan to make that option available in cases that are moved to the sheriff court?

Lindsay Montgomery: That option will be available for any case in which the nominated solicitor applies to the board for sanction to use counsel. We receive about 900 applications a year to use counsel in solemn cases in the sheriff court and we grant about 450 or 500 of them in accordance with the published guidelines that we have made available to the profession. Between 9,000 and 10,000 solemn cases take place in the sheriff court each year. Solicitors are happy to undertake the vast majority of those cases themselves. Often, those cases are taken by solicitor advocates or very senior solicitors.

When the cases that you mentioned come through the system, solicitors will be able to apply to us against our criteria. If they meet the criteria, we will grant their applications. It is worth bearing in mind that some cases are in the High Court because of the accused's record rather than any inherent complexity in those cases. Junior counsel have to be used in the High Court.

The Convener: I think that you know that I am really asking you whether the board will restrict the use of counsel in the sheriff court. That is the heart of the matter, because that is people's concern. If we shift cases that currently go to the High Court to the sheriff court, will the level of availability be the same?

Lindsay Montgomery: Junior counsel will not be provided automatically, because they are not required for the sheriff court but, equally, we expect to grant for the cases that fit our criteria—

The Convener: What does that mean?

Lindsay Montgomery: We have described to the committee how we assess applications from solicitors—

The Convener: Does what you said not suggest that counsel will be less available? If the board applies its current rules, not everyone will be automatically entitled to counsel. At the moment, the 20 per cent of cases that will shift to the sheriff court would automatically have counsel in the High Court. Counsel will not be available for a substantial proportion of those cases when they shift to the sheriff court.

Lindsay Montgomery: I do not think that the amount will be a substantial proportion. Neither we nor anyone else can say what proportion of cases

will not have counsel in future. We are saying that not all cases that are dealt with in the High Court warrant counsel, but all are automatically required to have counsel because of the rules of the High Court.

The Convener: I will stop you there. Perhaps you cannot answer my question. I understand why counsel are provided automatically in the High Court; I am trying to pin you down to describing the reality under the provisions through which those cases will be marked in the sheriff court. I think that you are saying that, marked against the criteria, cases that at present automatically receive counsel in the High Court will not automatically receive counsel in the sheriff court, which means that far fewer people will employ counsel in their cases. Is that what you are saying?

Lindsay Montgomery: None of us can take a view on the proportion of cases but, as Lord Bonomy's report makes clear, some types of case that are currently dealt with in the High Court do not need to be there. Neither does Lord Bonomy think that all cases in the High Court automatically require counsel. Under the bill, some cases will not receive counsel and, more important, we do not believe that solicitors will seek counsel. At the end of the day, the provision of counsel is not automatic; solicitors apply for it where they think it is required. At present, solicitors seek counsel in only a small proportion of cases in the sheriff court. However, we think that solicitors will seek counsel in a significantly higher proportion of the cases that transfer from the High Court, and we will grant that. However, I cannot say what the proportion will be because we have no basis for knowing that.

Margaret Smith: To some extent, my questions have already been answered. However, I cannot get my head round the fact that cases that at present go to the High Court and receive junior counsel will be transferred to the sheriff court, which means that people who are accused of the same crimes will have less access to representation. Lindsay Montgomery is shaking his head, but I do not understand why, because at present those people automatically get junior counsel, but under the new system, people will have to meet a set of criteria to get the same representation.

Unless you can guarantee 100 per cent that the Crown Office or another body will say that, in cases that would have gone to the High Court but which under the new system will go to the sheriff court, all the rights that would have been incurred in the High Court will apply in the sheriff court—which means that the people involved will automatically get junior counsel—people will get less of a service from the Scottish Legal Aid Board and the legal system. People may be able to make a case for receiving counsel using the criteria, which are laid out in your useful paper, but the quality of representation that some people will receive will be diminished.

Lindsay Montgomery: You make the doubtful assumption that if people who would automatically have received junior counsel in the High Court do not receive it automatically in the sheriff court, they will have poorer representation. Lord Bonomy's report states that many cases that are at present dealt with in the High Court do not need to be there and do not need to have counsel. Solicitor advocates act in the sheriff court and they do not need to ask us for the authority to appear there; they are solicitors and they can appear automatically. Solicitor advocates handle many cases at present and I expect that they will handle many of the cases that transfer from the High Court in the future.

When a solicitor shows that a case requires counsel because of the difficulty and complexity of the case and a range of other issues, we will be more than happy to authorise it. However, there is a fundamental flaw in the suggestion that because a case does not get junior counsel, the person involved will get poorer representation. We have difficulties with that suggestion, as do other people.

Margaret Smith: You said that you have not factored in some potential savings from the bill. Can you provide figures for the potential savings from improved disclosure and possible greater efficiency in the High Court?

Lindsay Montgomery: We will be able to do that when some of the details become clearer. When we carried out the costing, we considered only the bill, but many of the issues that will affect cost are not in the bill. We will gradually work out the costs. On disclosure, the reason why we mentioned in our further submission the percentage of money that we spend on solicitors' fees for precognition is that we think that the figure will reduce substantially. It is difficult to take a wild guess now as to the proportion of witnesses whom the defence will not wish to precognosce once they have seen the statements, but I imagine that it will be a significant proportion. That will change over time as both the Crown and defence agents gradually work towards what is a very new and different approach.

Margaret Smith: You are saying that we cannot really know what the change will cost us until the system is up and running.

Lindsay Montgomery: We were concerned about making wild guesses. We did not think that we would benefit anybody if we did so. I am quite happy for us to gauge what the likely level of saving might be once more detail comes through

and once we are clearer about how disclosure is likely to be operated by the Crown. It should be easier then, but I could not say now what the level of saving might be.

Margaret Smith: So you cannot say what the savings will be, but you can say that you believe that there will be significant savings through moving to the new system.

Lindsay Montgomery: We paid solicitors just under £20 million on solemn cases last year. A significant proportion of that amount was for precognition work. Some of that work will not be necessary when there is full disclosure. A substantial amount of money could be saved, but I would just be plucking figures out of thin air if I were to say what that amount will be, which would be imprudent.

Douglas Haggarty: We did a rough calculation some years ago, although it was a very manual trawl. We went through quite a lot of solemn cases and identified that between 40 per cent and 50 per cent of solemn case costs were incurred in the precognition process. We know the total amount that we spent on solemn cases, and we know that about 40 or 50 per cent of it was precognition costs. When the new system comes in, much depends on how accurate and how timeous the statements turn out to be and the extent to which they satisfy the solicitor.

One great benefit, which was alluded to in earlier evidence, will be the effect on the present system whereby a solicitor is simply given a list of witnesses' names. In one case, in which four or five solicitors were involved, the solicitors all got a list with 150 names on it, with no indication of what each witness was speaking to. All five solicitors had to precognosce all 150 witnesses to find out what they were saying. Most of the witnesses had seen things that did not affect those solicitors' individual clients at all. We know that, in a large proportion of cases, a solicitor will look at many precognition statements and simply think, "Fine, that doesn't affect my client." The evidence might be very formal in many cases. There will be some cases, however, in which a solicitor might want the opportunity to precognosce some very material witnesses. A relatively small number of precognitions would slip back in.

The system will be new to all of us, and we will have to deal with the new arrangements, but I think that we can start with a substantial figure of about 40 per cent of solemn case costs. It depends how efficient the system turns out to be. The figure for the average High Court case cost is about £8,000. If the new system is more efficient, you could perhaps take off £1,000 or £1,500 per case, and then multiply that by 1,667. There is a lot of guesswork in that, but you could apply an educated guess. The figures involved are quite large.

Margaret Smith: Bearing in mind what you have just said, would you say that your figure of £1 million of savings per year for the first two years comes with a bit of a health warning, and that you would not necessarily stick to that at the moment?

Lindsay Montgomery: No—the figure of £1 million is pretty robust. We think that the anticipated level of savings is understated if disclosure happens. In other words, if disclosure takes place, we think that the level of savings will be substantially greater than the £1.25 million that we have indicated.

Margaret Smith: That was a net cost. You had taken some savings into account, but you are clearly saying that there are other potential savings that you had not taken into account.

Lindsay Montgomery: We had not included disclosure; because it was nowhere in the bill, we thought that it would be inappropriate to do so. However, in our submission to the committee, we stressed that disclosure is very significant in terms of its potential for saving legal aid expenditure.

Michael Matheson: I want to clarify something that you said about the cases that are transferred to the sheriff court. Is it the view of SLAB that cases are presently going before the High Court in which representations are being made by junior or senior counsel that are not necessary—cases are being represented on that basis purely because of the quirk of the system that requires junior or senior counsel in the High Court?

12:15

Lindsay Montgomery: Thank you for that. The answer is no. For all cases in the High Court, we have to be asked for sanction for senior counsel—or for two or more juniors—unless it is a murder case, where it is automatic. If the Crown has decided that the case is going to the High Court, there will automatically have to be junior counsel, because that is the way in which the system operates. There is no choice. We are saying not that junior counsel will not do an appropriate job, but that the mechanism does not allow someone else to appear.

Michael Matheson: I am not saying that junior counsel are not doing an appropriate job. I am asking whether SLAB's position is that in cases that presently go before the High Court—the cases that will be transferred to the sheriff court in the future—in which junior counsel represent the accused, the taxpayer is paying over the odds for junior counsel before the High Court because of the quirk of the system whereby someone has to

be junior counsel to make representations to the High Court.

Lindsay Montgomery: Those cases will be cheaper if they go to the sheriff court. Not all of them will require counsel, and not all of them will make an application for sanction for counsel, so it will be cheaper.

Michael Matheson: But what I am asking you is, is it SLAB's view that not all the cases that go before the High Court at present require to have counsel representing them?

Lindsay Montgomery: The point that we were making with reference—

Michael Matheson: I understand the point that you are making. I am just looking for an answer to my question.

Lindsay Montgomery: If the cases are not in the High Court, they will not all require counsel.

Michael Matheson: No; I am asking about cases that go before the High Court now and which will be transferred to the sheriff court. If they do not require counsel at the sheriff court level, it is reasonable to suggest that they do not require counsel at the High Court level, except that someone cannot go before the High Court unless they are counsel.

Lindsay Montgomery: I do not disagree with that.

Michael Matheson: So your view is that there will be cases that will not require counsel when they are transferred to the sheriff court, and that therefore there are cases presently before the High Court that do not require counsel to lead the case. Is that correct?

Lindsay Montgomery: That is one way of putting it.

Michael Matheson: Is it SLAB's view?

Lindsay Montgomery: I think I have said already that we think that not all cases will require junior counsel. If such cases have counsel just now—the process is automatic—savings will be made by putting them in the sheriff court.

Michael Matheson: Are you satisfied that Bonomy's proposal to increase the sentencing powers of sheriff courts will remove cases that are being represented in the High Court by counsel but which do not require counsel to lead?

Lindsay Montgomery: That is not the way in which we have looked at it. We have taken the point to be that Bonomy is saying five years. That change will move a significant proportion of cases, and some of those cases will be represented in the future by solicitor advocates or solicitors as opposed to counsel.

Michael Matheson: But are you satisfied that that will remove all the cases that presently go before the High Court that do not require counsel to lead?

Lindsay Montgomery: We are not in a position to answer that, because those cases go to the High Court automatically. The other thing to bear in mind is the fact that we often do not know when cases end up in the High Court, because virtually all of them start and are granted legal aid in the sheriff court. We may find out at the end of the process, when we get the account, that the case has gone to the High Court.

I understand where your question is going, but you are almost forcing us into a position where we are not competent to answer. We can approach the matter only from the other side of the coin and say that some of the cases will not have junior counsel when they are in the sheriff court, but that will be partly because solicitors will believe that they are competent to act for their client. Solicitors will be able to take that decision, which they cannot take with regard to the High Court.

Douglas Haggarty: With all cases, someone somewhere marks some for the High Court and some for the sheriff court. When our submission was drafted, we were not forming the view that there was something wrong with the system. We were simply trying to make the point that the cases in question are not readily identifiable as a block.

When cases start to come through to us as sheriff court cases that require a solicitor to ask for sanction, we might not recognise a lot of them as cases that used to go to the High Court rather than to the top end of the sheriff court. Lord Bonomy points out that, if someone is assaulted in the street, the case would go to the sheriff court, but that, if they are assaulted in the doorway of a shop or commercial premises, the case could go to the High Court.

As we said in our submissions, the boundary between the two jurisdictions is fluid. We will have a mass of sheriff court applications and there may be more requests for sanction. Out of, say, 400 cases that would automatically have got counsel, 400 applications might be made for sanction or the figure could be 200 or 50. When we look at cases that are now sheriff court cases with no automatic availability of counsel on which we have to form a view in terms of the guidelines, all that we can do is to form a view. I imagine that many more such cases will be granted sanction. There may be cases in that total that are readily identifiable as more serious than those that we have seen until now. Between now and the implementation of the provisions in the bill, we intend to look again at our guidelines to try to identify the sort of cases that are presently in the High Court that we will not have seen in the sheriff court before now. That will

allow us to anticipate the cases that we are likely to see.

Michael Matheson: If you are to have criteria to decide whether counsel should be appointed when a case goes to the sheriff court, that means that you will consider the case on the basis of your policy and those criteria. Could you not also do that as an experiment to cases that go before the High Court? I know that that happens automatically, but it would be interesting to see what the figure would be for the number of other cases that go before the High Court that would not require counsel. Would that not be in the interests of taxpayers?

Douglas Haggarty: We can only work within the system. At the moment, if cases go before the High Court, there will be counsel. Simple types of cases, however, will remain in the High Court. For possession of a firearm, I have been told that that will be the case simply because the minimum sentence is five years. That was described to me as the High Court version of the two-cop breach, as two police officers could be involved in some of those cases simply to speak to someone being in possession of a firearm. The fact that a case is heard in the High Court does not necessarily make it complex; it is serious, but most solemn proceedings are serious.

As I said, if the case is in the High Court, there is counsel and that is the end of it. Someone might ask for senior counsel. At that stage, we can form a view on whether the case is serious, complex or novel enough for that to happen. I am afraid that a lot of judgment is involved in those things.

The Convener: We are trying to press you for detail for the costs and savings. The argument is not just academic—concerns were raised directly with Lord Bonomy in the focus groups. I am thinking of the ex-offenders who raised that question.

Other aspects of the system might have more costs attached to them. We have heard evidence about the pros and cons of the fixed trial system as opposed to the sittings system. It was suggested that, under the fixed trial system, counsel might be disadvantaged if the accused were to make a guilty plea on the trial day. If they did that, counsel would have time free in their diary as a result. Will you take that issue into account? Is there a possibility that you will adjust the fee system or will the new system address that issue in some way?

Lindsay Montgomery: The answer is yes. As we set out in our submission to the Finance Committee, we think that, if advocates are to be fixed to certain dates in a way that they are not fixed at the moment, there will be some cost. We think that it would be only fair to address that issue and, equally, the issue of graduated fees and how solicitors in solemn cases, in both the High Court and the sheriff court, are paid. At the moment, with the Executive and the Law Society of Scotland, we are reviewing how the system works. We want to see whether we can create a system that puts a greater reward on efficiency.

To return to the point that was made by one of the earlier witnesses, there can be cases in which things do not happen as they should happen. In such cases, the payment system should encourage efficiency. That does not happen in the current system, under which solicitors are paid for everything that they do as opposed to for what has to be done. Both those things will enhance the approach of solicitors and counsel and provide greater certainty for everyone else who is engaged.

The Convener: Lord Bonomy might have envisaged that junior counsel would take care of meetings in the preliminary hearings system. Is that your understanding?

Douglas Haggarty: I did not pick up on that, if it was said, but we will obviously try to find out what would be involved. I think that it has been expressed that the meetings are important and should not be treated as a formality. I presume that in some situations senior counsel might be involved—indeed, there will be cases in which only senior counsel will be involved and there will be no choice in the matter.

The Convener: I do not think that the bill makes it clear how the system will operate, but I asked the question about the use of junior counsel because it has been suggested that that might be one way to achieve continuity in relation to the availability of counsel between the preliminary hearing and the trial.

Michael Matheson: In your submission, you said that you thought that it was desirable that there should be "meaningful discussions" between the Crown and the defence prior to the preliminary hearing. Will you expand on that?

Lindsay Montgomery: We are interested in the extent to which information will be shared so that both sides can understand what is and is not available. We get the impression from our contacts within the profession that it is not always easy for the two sides to understand or indeed contact each other to ensure that they know what each other is doing on the case. A meeting would save a lot of time, aggravation and effort.

Michael Matheson: Should it be a face-to-face meeting?

Lindsay Montgomery: We first considered the matter in relation to Lord Bonomy's report, which I think suggested that a face-to-face meeting should

take place. We thought that that was a sensible idea. Such a meeting might not always have to happen, so I can see why it is not mandatory in the bill, but I would be surprised if meetings were not face to face in a lot of cases. The more that such meetings are encouraged, the better the communication that will be achieved.

Marlyn Glen: You suggest in your submission that reluctant witnesses who are brought before the court under section 12 should have access to assistance by way of representation. Is that available under the existing procedures for bringing a witness before the court? Would such assistance meet the requirements of a witness who might be facing sanctions of the kind that are applied to convicted persons?

Douglas Haggarty: I understand—I stand to be corrected if necessary—that currently the duty solicitor sees a person who is brought to the court. I recall that a number of years ago legislation was amended to allow someone to appeal against the decision of the sheriff in the sheriff court to remand them in custody until the hearing. Originally, a person could appeal only against sentence, conviction or acquittal, so we had the words "or other disposal" added to the appeal provisions, so that people who had not been convicted, for example, would have the right to appeal, under the criminal legal aid system. That is my knowledge of the past and present systems, but I think that the arrangement that is envisaged in the bill is much more formal. There was concern that if someone was formally brought to the court and remanded, there might well be a need for representation in the first instance and possibly for an appeal or a review.

The Convener: I want to tidy up one or two loose ends before we finish. If counsel is sanctioned as appropriate for a case in the sheriff court, why must a solicitor advocate instruct counsel rather than do the work themselves? Is there an opportunity to change that system?

Lindsay Montgomery: Solicitor advocates can appear in sheriff court cases, because they are solicitors. In fact the Scottish Legal Aid Board has been considering whether there is a basis for changing how we perceive solicitor advocates in the sheriff courts. Given that they are, in effect, specialist pleaders, there might be scope for greater use of them in cases. In the current situation, solicitor advocates would need to either own the case already or have it transferred from another solicitor, and such transferral of cases between solicitors does not happen often. We think that that issue should be considered. In general, they do not have to ask us—they can just do the case.

The Convener: I understand that solicitor advocates can appear in the sheriff court, but if you deem a case to be appropriate for a counsel, does that mean that you would also deem it appropriate for a solicitor advocate? Is there another route, or is it the same route?

Lindsay Montgomery: There is a difficulty because a solicitor advocate can appear without asking us, and they are not counsel when they are in the sheriff court. They are deemed to be counsel only when they are in the High Court—that sounds like semantics, but it is the way in which our legislation is written. There is nothing to stop them appearing, but they would be paid as a solicitor, not as counsel.

12:30

The Convener: Is that what you are considering?

Lindsay Montgomery: We are looking to see whether we could use them slightly differently and encourage a solicitor to use a solicitor advocate for the advocacy part of the case, as opposed to its preparation. We will develop that during the next few months.

The Convener: Your submission mentions the costs of the new procedures in the first two years, but what will happen after that? Is two years just a rough estimate of when you think that the new procedures will bring savings?

Lindsay Montgomery: Our guess is that it will take that length of time to make the system fully operational, but it may well happen much faster than that.

The Convener: You would hope so. Thank you for your evidence, which has been helpful to the committee.

Alternative Dispute Resolution

12:31

The Convener: Agenda item 3 is on alternative dispute resolution; members have a note that has been prepared by the clerk. The committee agreed to respond to the European Commission on alternative dispute resolution. At our meeting on 12 November, when we questioned the Commission directly, we were invited to make a submission and we agreed that we would do so. The draft paper is helpful and it sets out several areas that members have raised in their questioning.

The main point is that we should make a submission and get into the system. We might not agree with every dot and comma, but some broad areas of agreement have emerged. We will return to the subject, so the option to go into more detail at a later date is not shut down. As there are no objections to the draft paper, are members happy to agree to the response?

Members *indicated agreement*.

Civil Partnership Registration

12:32

The Convener: Agenda item 4 is on civil partnership registration; I refer members to the paper that has been prepared by the reporter, Margaret Smith, assisted by Marlyn Glen and the clerks. Would Margaret Smith like to say a few words about the detailed paper that is before us?

Margaret Smith: I will not take up too much time, but I would like record my thanks, and those of Marlyn Glen, to the clerks for their work on the paper.

Section 7 shows the devolved matters that will be handled in a complex Sewel motion. As things stand, we do not know when we will get the motion, so it is useful for us and, particularly, the Equal Opportunities Committee to do this work before the motion comes along.

Section 13 contains two key points that pick up on points that were made at the Equal Opportunities Committee by the Law Society of Scotland and others. First, there is a need for the Executive to do a proper audit of all the implications of the Sewel motion because it will affect many parts of Scots law. Secondly, because of the complexity of the matter, when the bill and the Sewel motion are brought before Parliament, it is critical that we and the Equal Opportunities Committee have enough parliamentary time to consider the provisions in detail and to take evidence, if necessary.

All that we have done so far is take evidence on a consultation paper. We have flagged up some mistakes that have been made in that consultation paper on Scots law vis-à-vis divorce; there might be other mistakes, and changes that might have to be made, by the time that the bill is published. The bill will be pretty complex and we will need around five to seven weeks to be able to scrutinise it properly and see the differences and the key issues for Scotland. We should give ourselves the opportunity to take evidence, if we want to, and to pick up on particular legal points in sufficient time for the bill to be passed through the Sewel motion process.

The Equal Opportunities Committee, of which I am a member, has considered the bill and although we focused on some of the mistakes and the complexity in the consultation, fundamentally we considered whether the bill was right vis-à-vis equal opportunities and human rights. We focused on that much more closely than we did on the legal aspects of the bill, in the same way that the Justice 1 Committee will focus on the legal aspects when the bill is published.

The Convener: Marlyn, do you want to add anything?

Marlyn Glen: No. That was a full account of what the Equal Opportunities Committee did, but it looks as if there is still a lot of work to do, and it would be useful to separate out the work that the two committees will do.

Michael Matheson: I have a concern about something in the conclusion section. Paragraph 12 states that

"The proposals for the creation of civil partnership registration in Scotland are welcomed",

but I do not know whether I welcome them. I have not had an opportunity to study the proposals in detail or to go through the evidence.

When we acted as a secondary committee previously, we did not refer to the general principles. If I recall correctly, we focused on the specific legal aspects and the impact of the proposed legislation on Scots law. I might welcome the proposals once I have seen the bill, but at this stage I do not know that I do. I am concerned that the line that I have quoted could be construed as the Justice 1 Committee saying to the Executive and to Westminster that it welcomes the proposals, irrespective of what those proposals are. I want to see the legislation first.

The Convener: I agree that it would not be appropriate to say one way or the other.

Margaret Smith: At this stage, we could just say that the proposals are noted. It is crucial that we do not have the bill in front of us and that we do not know what will be in the published bill. It is also crucial that we do not know what will happen to the bill as it goes through the Westminster process. Ministers have told us that if the bill is changed fundamentally during that process, it might have to come back to the Scottish Parliament under a second Sewel motion. We are at the beginning of a process.

Michael Matheson: Hence my concerns.

The Convener: The paper is right to identify the importance of

"A detailed review of the impact of legislation"

and

"Sufficient parliamentary time … to allow detailed scrutiny of the provisions of the legislation affecting Scotland".

The paper recommends that I, as convener of the Justice 1 Committee, should discuss the division of the work with the Equal Opportunities Committee. Are those issues agreed?

Members *indicated agreement*.

Michael Matheson: With the proviso that I have mentioned.

The Convener: Yes. That is agreed.

Rehabilitation Programmes in Prisons

12:39

The Convener: Agenda item 5 is the inquiry into the effectiveness of rehabilitation programmes in prisons. I refer members to another note prepared by our hard-working clerks. I am inviting members to comment on the proposal about focus groups of prisoners. The idea came from the clerking team; I think that it is an excellent idea, but I invite members to comment on the paper.

Michael Matheson: During the inquiry into the prison estates review, we had something of a focus group session in most of the prisons that we visited. The sessions were of mixed value because, at times, I had the impression that some of the prisoners were just there because they had been told to go and they did not have much to contribute. How would we identify prisoners who might seek to get involved in the groups and who would be able to make a contribution?

The exercise might be valuable in enabling us to find out the views of prisoners. If we are to ascertain prisoners' views and their experience of the rehabilitation service in prisons, it would also be helpful to get the views of those who deliver the programmes and those who work with prisoners in other ways. The prisoners might have views that differ. In my experience of the prison estates review inquiry, the prisoners had a very different view from those who provided counselling services or other professionals. I am not sure where the idea of focus groups would fit into gathering that information.

The Convener: I am sure that it could all fit together. We will discuss the appointment of an adviser under agenda item 6, and that person can guide us on the best way of getting the best information. Paragraph 7 of the paper states:

"It is intended that the facilitator will organise a pilot focus group in advance of the others to test the approach used."

We would therefore get a chance to see whether what we were planning was going to work before we went to a full-blown consultation.

Michael Matheson is right in relation to canvassing the views of those who deliver the programmes, if those people can be identified. We must constantly test the quality of the exercise to assure ourselves that it is worth while.

Margaret Mitchell: I endorse what Michael Matheson said. If we are seeking a balanced view, we have to get the views of the organisations that are delivering the services as well as those of the prisoners.

Margaret Smith: I may have missed this, but I wondered whether there would be some discussion with people who have come out the other side; by that, I mean people who are not in prison but who have either benefited or not benefited from the rehabilitation process in prisons. We might be able to get that information from Safeguarding Communities-Reducing Offending and other groups. It would be useful to hear from individuals once they have gone back into society rather than just from those who are still in prison.

The Convener: I agree. I emphasise that, if we are going to do the inquiry at all, we must submit our bid by 6 January. The paper represents a preliminary attempt to set out the basics. Everything that has been said so far has been very useful and there does not seem to be any dissent on including those points. Members will be able to flesh out what they want to do later, but the paper will allow the committee to make an initial bid to the Conveners Group for money. If the paper, in its basic form, is agreeable, it will go to the Conveners Group and, after that, we will talk about the detail of what else to include.

That takes us to agenda item 6, which members have agreed to take in private.

12:43

Meeting continued in private until 12:55.

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ISBN 0 338 000003 ISSN 1467-0178