JUSTICE 1 COMMITTEE

Wednesday 7 January 2004
(*Morning*)

Session 2

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JUSTICE 1 COMMITTEE
1st Meeting 2004, 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 GAVE EVIDENCE:

Val Bremner (Procurators Fiscal Society)
Sandy Brindley (Rape Crisis Scotland)
Donald Dickie (Safeguarding Communities-Reducing Offending)
Roy Martin QC (Faculty of Advocates)
Susan Matheson (Safeguarding Communities-Reducing Offending)
Derek Ogg QC (Faculty of Advocates)
Neil Paterson (Victim Support Scotland)
Frank Russell (Victim Support Scotland)
Gordon Williams (Procurators Fiscal Society)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Wednesday 7 January 2004

(*Morning*)

[THE CONVENER *opened the meeting at 10:11*]

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

The Convener (Pauline McNeill): I welcome everyone to the first meeting of the Justice 1 Committee this year, and I wish everyone a happy 2004. I ask members to switch off mobile phones and other things that might interrupt the meeting. I have received no apologies and everyone is in attendance.

Item 1 on our agenda is the Criminal Procedure (Amendment) (Scotland) Bill and I welcome Professor Christopher Gane, who is the adviser to the committee on the bill.

I refer members to the written submission from the Faculty of Advocates and I welcome Roy Martin QC and Derek Ogg QC from the Faculty of Advocates. Roy Martin is vice-dean of the faculty. Thank you for your submission, which has been very helpful and to the point. We will move straight to questions.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, gentlemen. In its policy memorandum, the Executive states:

"One of the main aims of this Bill is to introduce certainty into High Court procedure … and to ensure that trials proceed when the parties are ready. It is recognised that the current practices of the High Court do not deliver this."

Do you share that view?

Derek Ogg QC (Faculty of Advocates): Yes.

Bill Butler: Could you elaborate? For what reasons?

Derek Ogg: For the reasons given by Lord Bonomy in chapter 5 of his review. I have no difficulty with anything that Lord Bonomy has identified. What he did was very important; he took a holistic approach and realised that, as in the Forth rail bridge, everything cantilevers into everything else.

If the prosecution is under pressure and does not have time to get a witness list out to us, as defence counsel, early enough before a trial, we cannot prepare because we do not know what the case is. If, two days before the trial, the prosecution suddenly produces an expert report that says that, in a case in which there was virtually no evidence against the client, there is now fingerprint evidence, DNA evidence and blood spatter evidence—and I am talking about something that happened to me in a case this week—then I have to get reports. That causes delay. If a witness does not appear, that can cause delay; and if an accused has health problems, that can cause delay. Lord Bonomy recognised that delays come from a number of sources. In his recommendations, he rightly tries to attack each and every cause of delay and to see how they could be cured. You cannot cure them all, but he tries to consider them all. There is no single cause of delay; there are many causes.

Roy Martin QC (Faculty of Advocates): I wonder, madam, whether I may add briefly to that?

The Convener: Yes, of course.

Roy Martin: I wanted to confirm that the representations that the committee has received have been prepared by the criminal bar association of the Faculty of Advocates, of which Mr Ogg is the chairman. The faculty itself supports those representations.

You might be aware that the faculty has submitted its own observations on the bill on three occasions: first, to Lord Bonomy's consultation exercise; secondly, to Lord Bonomy's report; and thirdly, to the white paper. I mention that, not because there is any difference of position on those matters—the faculty entirely supports the criminal bar association's position—but to indicate that the faculty presented submissions prior to the recent representations.

On that basis, and as I do not want to take up too much time, I endorse everything that Mr Ogg has said. We are entirely satisfied, as was Lord Bonomy, as he indicated in chapter 5 of his report, that delays in trials, disruption, adjournments and other such problems result from a combination of factors, some of which are a result of, for example, late notices, which have been mentioned. That implies no fault on the part of the Crown, but is simply a consequence of the overall pressure on the system.

10:15

Margaret Mitchell (Central Scotland) (Con): The introduction of mandatory pre-trial hearings is central to the bill. Will that improve efficiency and reduce delays?

Derek Ogg: Yes, absolutely.

In my submission to the committee I say that a culture change will be required. The word "change" creates chills in any institution where it is

heard and the High Court is certainly one such institution.

The making of rules does not secure the outcome; that will require all of us to want the measures to work. The preliminary diet procedure could be subverted if people do not put in the effort that is needed. In particular, I call on the Crown Office to assign specific counsel to specific cases. It already does so—to its credit—in very big cases. However, on numerous occasions when the defence approaches the Crown Office to speak to an advocate depute about a trial that is coming up, they are told, "I only just got the papers today and I have not read them." Advocate deputes are literally up to their waists in papers. They might be sent the papers for 10 trials that are scheduled for a sitting and they cannot read them all—to start with, they do not know which trials will go ahead, so it would be a terrible waste of time if they did read everything. By the way, they have to do that reading at weekends and at night.

It might seem strange that I am speaking on behalf of the prosecution after all that we have heard from some advocate deputes about the matter. The key to success would be to assign a dedicated advocate depute to a particular case, so that we could speak to them at an early stage, prior to the preliminary diets.

Margaret Mitchell: Why does that not happen now? Is it because of the resource implication?

Derek Ogg: Absolutely.

Margaret Mitchell: So the system needs more people.

Derek Ogg: If an advocate depute has 10 cases to try during a fortnight and does not know which ones will be adjourned because a witness is unwell or has not shown up, or because there will be a motion for adjournment due to a lack of preparation, why would that advocate depute read 700 pages of evidence and productions—and spend their weekend doing so, when they should be spending time with their children? They simply will not do so. The Crown Office must provide resourcing and I have spoken to people in the Crown Office who acknowledge that that is necessary.

The culture change also applies to the defence. A major culture shift will be required, but Queen's counsel, particularly in High Court cases, will in effect have to become case managers, which is something that we have never done. We have behaved rather like automatons; we talk about being instructed by solicitors and we turn up and act when we receive a letter of instruction. As case managers, we will spend less time on our feet in court, moving for adjournments, and more time outside court, meeting the prosecutor and our solicitors and telling our solicitors what they must do to ensure that a trial can run on a specific date. We will not wait for a solicitor to turn up and say, "I tried to get that statement but I didn't manage to," or, "Do you want me to apply for sanction to call a particular expert?" We will have to anticipate matters and instruct our solicitors. In other words, if the new system is to work, the instructions will go in the opposite direction. I certainly advocate that, but it will involve a big culture change for the defence. As I said, rules do not achieve outcomes, but culture changes do.

Margaret Mitchell: We take the point about the need for a culture change, which you make strongly in your paper.

As a result of the Pryce-Dyer report, more resources are being put into the Crown Office and Procurator Fiscal Service. Are those resources sufficient and have they led to any improvement in the service?

Derek Ogg: I am speaking anecdotally, but I cannot say that I have noticed any difference. On Christmas eve I received a letter from the Crown Office about a particular murder trial, which introduced 13 new witnesses and 12 new productions, which would extend to 300 pages of evidence. The case involves a big medical question about whether there has been a homicide at all.

Included in those 300 pages was an expert opinion from a cardiologist, who was added as a witness at the last minute. We had no idea about that evidence at all and only found out about it in a letter that we received on Christmas eve. The productions themselves were produced the next week—the day before new year's eve. You can imagine the kind of disruption that was caused.

I was ready for trial on Monday of this week—the first day of the first sitting of the new year—until I received that notice. My professional obligation to my client means that I should not go to trial until I have found a cardiologist who can tell me if the cardiologist that the Crown has produced is talking sense or nonsense or is merely expressing an opinion. If he is expressing an opinion, I have to find out whether it is one that is generally shared and so on. I have to protect the client's interest in a critical case in which we must establish whether a crime has been committed.

I am delighted that the bill will amend section 67 of the Criminal Procedure (Scotland) Act 1995 to state that additional witnesses will have to be produced a minimum of seven days before the preliminary diet and that only in extremely special circumstances could new witnesses be introduced before the trial diet. I believe that Lord Bonomy was particularly keen on that amendment. Provided that the judges interpret "special circumstances" as meaning that they should not

simply grant permission, the system should work. I always understood that section 67 was meant to deal with special circumstances but, in the past 12 months, no criminal trial that I have been involved with has proceeded without at least one section 67 notice to introduce witnesses at a late stage.

Margaret Mitchell: That brings me on to my next point. What do you think is the role of the judge in the preliminary hearings?

Derek Ogg: Unfortunately, you have to think about the judge independently. We are dealing with human beings and, to some extent, what happens in any situation depends on their personalities. There will have to be a culture shift on the part of the judges; they will have to want to make the system work. If judges are simply going to sit up on the bench and remain aloof from the procedure, it is not going to work. Judges must acknowledge that the Crown and the defence have difficulties and help to resolve those difficulties in a way that results in a definite trial diet.

I am concerned about one aspect of judges' conduct that I have noted in the behaviour of a couple of judges who would be influential in relation to the procedure. Sometimes, judges can ask too much about what the defence is. If the defence requests an adjournment for a specific reason relating to a specific expert, some judges say, "Why do you need that expert? Are you disputing this point or that point?" In one case, the judge asked, "Is your client disputing that that is his handwriting?" That is not a question that a judge should ask me. My client's instructions are confidential; I am not obliged to tell a judge anything about a case and could be criticised and sued if I did. I will not tell a judge details of the defence.

I fear that a result of judges' proactivity in managing cases will be their thinking that they are entitled to make too many inquiries into what the defence is, as opposed to how well the defence is prepared. As long as it is quite clear that we will not be disclosing confidential client information—and nothing in this bill would make us do that—the system will work, provided that the judges are willing to make it work. That would be a great help.

Roy Martin: I would like to add to that from the point of view of the Faculty of Advocates. I agree with everything that Mr Ogg has said. The critical underlying issue that is technically addressed in the memorandum that accompanies the bill, but is not explained in any great detail, is the point that we made from the outset in our submissions to Lord Bonomy's consultation exercise, which is that there must be sufficient resource available for the procedures to work.

The Faculty of Advocates warmly welcomes and enthusiastically encourages the Lord Bonomy reforms and the bill in general. We hope that the reforms will work, but they will do so only if all the participants in the system have adequate resources to do what they have to do, particularly in relation to the early case management. That means that, first, the Crown Office and Procurator Fiscal Service must have the resources to allocate an advocate depute to the case sufficiently early that he or she can discuss meaningfully with the other side the evidence that will be required and the issues that will be important.

Secondly, there must be sufficient judicial resources, which is the very point that is made about the judges with the right culture being available to perform the services. Thirdly, there will be implications for legal aid. There must be sufficient legal aid for solicitors and counsel to prepare adequately and early enough. From the point of view of the Faculty of Advocates, I emphasise that those are important factors. The culture cannot be changed by simply changing the rules; the resources have to be provided so that the rules can be properly followed through. Subject to that, we enthusiastically endorse what is being proposed.

Margaret Mitchell: What do you think should be the consequences if either party comes to a preliminary hearing without being fully prepared without just cause?

Derek Ogg: I have always taken the view that a judge is able to report any member of the faculty who fails to carry out their duties, whether those duties are statutory or to the court. We are principally officers of court who are responsible to the dean of faculty. I do not think that it will happen a lot because there is a sentimental view held by judges, who are former members of the faculty, that it is clyping on other professionals. They often make do with being acerbic or giving counsel a dressing down in court. If counsel fails in their duties, it is appropriate for there to be some underpinning of a culture change and that failure should be reported to the dean of faculty. The dean would then exercise the discipline of the Faculty of Advocates against someone who was failing. That is what it is; it is someone who is failing in their job. Just because we are self-employed does not mean that we cannot fail in a job. If someone fails in a job, there should be consequences.

I am concerned that it will end up impacting on the accused. The person who pays for bad counsel or badly prepared cases—and it happens with solicitors and counsel—is the accused. I have no difficulty with a professional getting it in the neck, but I object to a trial judge saying that, despite the professionals not doing their job

properly, they are going to trial anyway. That is improper because it is not fair to the accused. It is not the accused's fault if their counsel has taken on too much work or gone on holiday or not contacted the solicitors or managed the case properly. The potential impact on the accused is why I would prefer to remain in a system that would involve a report to the dean.

Deans, past and present, who have received reports have never hesitated to discipline members who have failed in their duty to the court. We take very seriously the fact that we are not like solicitors and that the accused is therefore not a client. We represent the accused, but we are officers of court and that is where our principal duty lies.

Roy Martin: Although there have been one or two reported instances in the recent past when judges have criticised counsel in particular, I suspect that that has occurred as a consequence of the existing system: the lack of time for preparation, the sudden presentation of materials and the lack of certainty about when trials are going to start. Some years ago I was an advocate depute and apart from then, I have practised only rarely in the criminal court. Having been out of the Crown Office for 15 years or so, I was astonished to find out how informal the system is for allocating a diet when a trial was going to start. That is one of the reasons why there have been some apparent difficulties.

The benefit of a preliminary diet system is that that should be avoided and everyone will know when the trial is going to start. So there ought to be no excuse for a lack of preparation. Mr Ogg fairly accepted that that might be counsel's responsibility, but it might also be the responsibility of the solicitor or a delay on the part of an expert witness. The judge, who is in control of the preliminary diet process, is the ultimate arbiter and he can report someone for professional misconduct to the appropriate authority, whether they be an advocate or a solicitor. I suspect that, if the system is properly implemented with the necessary resources, that is much less likely to happen because people will know what they have to do and when. The judge is also the best person to make the assessment of professional behaviour at a time when it can be done.

Margaret Mitchell: The bill does not contain any limit on the number of preliminary hearings that there can be. Should there be such a limit?

10:30

Derek Ogg: No, I do not think so, because common sense will limit the number of such hearings. A judge will look at the minutes and see how many preliminary diets there have been and for how many weeks the process has been going on. The whole culture of the bill is geared towards fixing a date when everyone is ready to go ahead and that is what the judge will have in his mind every time a preliminary diet is called. The idea is that the two parties are supposed to tell the judge when they will be ready. If they tell the judge one date and then tell him another, he will wonder at what point he can rely on what they tell him. A judge will be well able to focus people's minds on that.

With expert witnesses, for example, the difficulty might be getting all one's experts in one place at one time, as they could be conducting heart surgery or a post mortem somewhere else. For an expert to be available for a diet of trial, he must be able to say that he can be called at any time in a fortnight. Which one of us could say that we would be available to respond to a phone call telling us that we were due in the High Court right away or in two hours' time and that, if we were not there, we would be in contempt of court? That creates difficulties for experts. Not being able to guarantee experts' availability on a specific day can cause motions for adjournment.

I would not like to restrict the number of diets, but I would like there to be a culture of fixing a date and trying to stick to it, rather than of fixing an unrealistic date. People should have a damn good reason if they need to go back to the judge. At the moment, the judges have established such a culture, partly because of the criticism that there has been about adjournments.

Margaret Mitchell: Judicial management at the preliminary hearing is crucial.

Derek Ogg: That is right. It should not simply be a case of having a form of words to obtain an adjournment; the real reason for the adjournment should be looked for behind the words. To their credit, the judges are doing that now, because they are aware of public concern on the issue. It is now much harder to get an adjournment than it was even 12 months ago.

Margaret Mitchell: That is helpful.

The Convener: I want to pick up on some of the points that you have made. The question of the use of section 67 of the 1995 act has been raised with the committee on more than one occasion. Given that you mention the issue specifically in your submission, will you give a brief summary of your understanding of how the relevant provisions in the bill would operate if the bill became law?

Derek Ogg: As I understand the bill's provisions, the Crown will be required to intimate any witnesses or additional evidence that it had not previously intimated with the service of an indictment. It will have to do that not later than seven days prior to the preliminary hearing. In

other words, the Crown will have shown its whole hand before the preliminary hearing.

The fact that we will have a week to know that will allow us to work out, for example, whether we need an expert to counter the Crown's expert, who that expert will be, when he will be available and whether the Scottish Legal Aid Board will sanction the expenditure for that. It is arguable that that could be done in a week. That will enable us to go to the preliminary diet in the knowledge that a cardiologist has been whipped out of the hat, which will mean that we will be able to instruct our agents to contact another cardiologist to find out on which dates he will be available to attend a diet and whether we will be granted legal aid for that. We would expect him to be available on those dates and to receive his report within a certain period of time. I am content with those provisions.

Although that is the general rule, as I understand it, the bill will also provide a saving provision, which is that there will be special, unforeseen circumstances, in which, if the court thought that it was justifiable, the Crown would be able to introduce evidence seven days prior to the trial—I think. The two-day rule, which was always ludicrous, has gone. It is all right to substitute one of the police officers who had served a document two days before a trial, for example, but it is not all right to introduce a new expert witness at such short notice. Having a provision about a right to introduce evidence seven days prior to the trial in very special circumstances is acceptable, provided that the judges treat it as a highly restricted provision.

The provisions in question will mean that we will have to have a properly resourced Crown Office, because it will have to meet deadlines or lose evidence altogether.

The Convener: That was going to be my next question. You spoke about receiving notice of 13 new witnesses on Christmas eve. What is your expectation of the Crown's ability to deliver what would virtually be a sweeping away of the provisions that it has relied on?

Derek Ogg: It is a bit like Parkinson's law; and this is going to be law. If an overstretched department is given a certain amount of time to do things, the tendency is to leave on the back boiler that which can be left on the back boiler, until the last minute. The last minute is now going to be changed from two days to seven days. It is just a new deadline for people to meet. Often, expert reports—such as the ones that I received on Christmas eve and new year's eve—are dated two or three months previously. I suspect that it was only when the advocate depute who was doing the trial was reviewing the papers that he or she said, "This report has not been issued; it should be sent out. I need it to prove the case." The man or woman doing the trial will eventually say, "Hold on—there are witnesses who are not in the indictment but whom I think I need in order to strengthen or help my case." To some extent, there are afterthoughts.

The Convener: When should special defences be lodged? Should everything be lodged for the preliminary hearing?

Derek Ogg: Yes. That is vital.

The Convener: You raised the question of the continuity of Crown and I thought that I should ask about the continuity of counsel. Lord Bonomy would expect junior counsel to appear at the preliminary hearing and then report back to senior counsel. How would that be done?

Derek Ogg: If I were representing someone in a murder trial, I would regard the preliminary hearing as a critical diet. The preliminary hearing will become a critical part of the whole proceedings. I would not understand why a senior counsel would not want to be there. Senior counsel are going to have to accept what is, in effect, the new job of being a case manager once they are instructed. That means carrying the can, doing work outside of court, and going to the judge to explain why things have or have not been done. It is wrong to expect junior counsel to do that.

Sometimes I instruct to assist me junior counsel who are not highly experienced criminal practitioners. The way that junior counsel learn about criminal law and learn their trade is by working with experienced senior counsel on cases. I would be unhappy about sending someone who was not experienced as a trial counsel to a preliminary diet. Senior counsel should accept responsibility for the case once instructed, and that would include the preliminary diet.

The Convener: In your submission, you make an important point about unexpected events—for example, when the Crown may claim that a witness will speak to a particular event but the witness then does not. That could upset the whole idea of the preliminary hearing. Will you say some more on that?

Derek Ogg: There are concerns about what can and cannot be said at preliminary hearings. At that stage, we are not dealing with people having lodged affidavits of what their evidence is. It is a precognition that is taken by someone; it is their words about what someone has said to them. What the defence thinks about the strength of the Crown case—or, indeed, what the defence thinks about the strength of its own case—can be in a state of flux and can change. It is not unusual to have witnesses who have given contradictory statements to the police; and it is not unusual for

witnesses to change important nuances of their evidence when they come to court.

A witness could say in a statement to the police that they saw a particular person do it; or a police officer could take from what the witness has told them that that is what they meant. That would therefore be the information that I have. However, at the trial, the witness may say, "Well, I saw the person do it; but I was 200 yards away, I wasn't wearing my glasses, I was inside my car and it was raining but I didn't have my windscreen wipers on." They may still believe that they saw something, but rational people listening to that may say, "If that is their evidence, they cannot have seen anything. They've confabulated and have interposed between two events an intermediate event that they think must have been the person doing it." That is a common psychological trait.

Sometimes you do not know and cannot agree on some areas of evidence because you simply do not know the strength or the reliability of the witnesses' evidence. That was one of my concerns about unexpected matters that could arise.

The Convener: Are you simply saying that that issue might not be curable? How would it be cured?

Derek Ogg: Difficulty with such reviews of how we do things often arises, especially when continental systems are examined. In Europe, the inquisitorial system has all the statements virtually in affidavits and on file before a trial starts, so the opportunity for people to change their positions is different from that in Scotland. We rely on an adversarial system to obtain evidence. In other words, that person's evidence and whether it is reliable are beaten out on that anvil.

The European systems involve an instruction judge who investigates matters independently and obtains statements that are available equally to the prosecution and the defence and which form a court file, rather than a prosecutor's file and a defence file. I have not been asked about it, but that relates to one of my concerns about trial in the absence of the accused. It is said that trial in absence is human rights compatible.

The Convener: We will ask you about that.

Derek Ogg: That is an example of the differences.

Michael Matheson (Central Scotland) (SNP): Will you explain how important early disclosure of Crown evidence to the defence is, to make procedures work effectively?

Derek Ogg: Bonomy is eloquent on that. In the course of its investigations, the Crown uncovers information that it keeps on file until it eventually makes a tactical judgment about whether to include a person as a Crown witness. The Crown decides whether having that person as a witness is to the advantage of its case and whether scientific evidence is relevant to the argument that it wants to make. By and large, the Crown does not tell the defence about the evidence until it has made those judgments.

If the Crown told us early that it had sent bloodstained clothing to a lab for examination, taken blood that had been sent for DNA examination and found fingerprints on the gun that had been sent for examination, and that it was examining handwriting, that would allow us to prepare our defence accordingly. If we know that those experts will produce reports, we can direct our solicitors to apply to the Scottish Legal Aid Board for sanction for such experts. We would use that sanction only if it were necessary. If the Crown's expert said, "Those weren't your guy's fingerprints on the gun," I would not need another expert to agree with him. However, I would have in the bag my sanctions from the Scottish Legal Aid Board. By and large, it takes 10 to 14 days to grant a sanction, so I would have an important time advantage.

The Crown might then say that it had a preliminary indication from its cardiologist that the person probably died because of heart disease rather than because of a punch to the face. I might therefore say that I did not need my cardiologist. We could note who the Crown's cardiologist was and send our man along to take a statement from him. If the Crown told us what it was doing as the case progressed, we could anticipate what we needed to do, save time by obtaining the approvals for that and speak to the Crown's witnesses to find out whether we needed further investigation. That would be a big culture shift.

I suspect that, sometimes, the Crown keeps all that information in the bag until it has made a tactical decision about whether to use it. I am not saying that the Crown attempts to keep things from us, but the frequent use of section 67 of the Criminal Procedure (Scotland) Act 1995 is disconcerting and cannot be justified on the ground of resources alone.

Roy Martin: I will add a broader perspective to that. One fundamental of pleading in criminal and civil cases under Scots law is that there ought to be no surprises when the case comes to trial or proof. In civil cases, that is provided for by a system of relatively full pleadings at which each party pleads the case, so giving notice to the other of the various lines that will be run. The criminal system might initially have been based on similar principles, but it is certainly not any more. The requirement for disclosure and for the case not to be kept back from the other side for any longer

than is absolutely necessary is a fundamental principle of Scots civil and criminal law. How that is managed is a matter of administration, or precedent and practice, but early disclosure is not in any sense an innovation. The Crown should lay before the defence the case that it intends to bring and the various strands of evidence that it intends to lead at as early a point as possible.

10:45

Michael Matheson: Should the bill contain a specific provision that directs early disclosure?

Derek Ogg: The provision that requires the Crown to disclose its evidence and productions seven days prior to the preliminary diet forms that specific provision. If there is a drop-dead provision that says that if the Crown does not do that at that time, it will lose, Parkinson's law will make sure that that happens.

I do not think that any of you want to wake up one morning to find that the *Daily Record* is saying that Parliament has allowed a murderer to walk free because the Crown missed lodging by a day a DNA report showing that the accused's semen was on the deceased. No one is suggesting that that should happen. The Crown could come to court and ask for such evidence to be lodged late only in very special circumstances. No doubt the judge would criticise it severely for that, but it would be a rare judge who would refuse to allow such evidence. That is why there is a saving provision to allow other evidence to be submitted in special circumstances.

Michael Matheson: Should the judge have a specific sanction to use against the Crown if it does not meet the deadline and disclose the information, other than referring the matter to the dean of the faculty?

Derek Ogg: Perhaps the vice-dean will be able to answer that better than I can, but the difficulty with reporting advocate deputes is that, although all advocate deputes who are advocates are subject to the ethical requirements of the faculty, they are also required to carry out their duties as contractees—they are all schedule E employees of the Crown Office, so they are under contract. It would therefore be difficult to report an advocate depute who was making a motion to allow late evidence because someone in the bowels of the Crown Office had slipped up. The vice-dean might be able to comment on that, but I think that the dean would be reluctant to exercise his jurisdiction against a prosecutor. If Parliament sets up the independent investigative or review body of the Crown Office, such complaints might be made to that body.

Roy Martin: From the point of view of the faculty, the jurisdiction of the dean in matters of discipline would extend over any advocate depute who was an advocate and who was alleged to be guilty of some form of professional misconduct. I suspect that we are not really talking about that here. I suspect that we are talking about a situation where, for whatever reason—not necessarily because of an individual's fault or a deliberate act—the Crown simply fails to meet a deadline. The first consequence of that is in the hands of the judge at the preliminary diet or at any other part of the procedure. That is an important safeguard, because judicial independence may be brought to bear on the particular issue.

The other thing to be borne in mind is the difference between the position of the prosecution and that of the defence. The defence is there to represent the interests of the individual who has against them the forces of the state by way of the criminal indictment. The duties of those representing the accused are to the accused, whether we are talking about a solicitor, advocate or indeed witnesses who are asked to bring an independent judgment to bear—their duties are individually to the accused.

The Crown is quite different. It is acting in the public interest. There is, of course, a victim in most crimes; there are witnesses and individual consequences to what might have happened. I would have thought that the judge was best placed to decide whether the Crown had failed—by a deliberate act, for example—to disclose something that ought to have been disclosed. Given that the Crown is acting in the public interest, the judge is in the best position to decide whether, in the public interest, the accused should walk free or whether some sanction is merited on an individual such as an officer or an advocate. That is a difference to be recognised in relation to the two sides of the criminal case. We are not talking about two private parties or two public bodies in opposition. Rather, the situation involves the public interest against the interests of an individual.

Michael Matheson: What sanctions would be available to a judge if he decided that the Crown had failed to disclose information that it should have disclosed?

Roy Martin: The ultimate sanction is that he might bring about a situation in which it was impossible for the Crown to proceed to trial because an essential part of the evidence simply could not be led. In that situation, the accused would then be free. It is difficult to envisage what lesser sanctions might be—I suspect that Mr Ogg is better placed than I am to do that. Normally, in criminal trials, particularly those in which the accused is in receipt of legal aid, there is no question of an award of expenses against either party. There might be sanctions against individuals. For example, an individual might be

called before the judge because he is said to be in contempt of court, but, again, that would be at the extreme end of the issue. I suspect that the sanctions might involve the judge exercising discretion such as allowing a further adjournment or preliminary diet. However, in such a case, we would have the assurance that the sanction was under the control of the judge and was not brought about by the Crown or the defence.

Derek Ogg: By and large, the judge would simply adjourn the trial diet because not enough notice had been given to the defence. He could simply say that it would be unfair to continue with the trial as a rabbit has been pulled out of a hat. If he adjourned the trial diet, that would make the situation fair again, as the defence would have time to do its job. We are not talking about the judge effectively allowing someone to walk free because a deadline has been missed; we are talking about a judge administering the fairness of the proceedings. His job is to make sure that the trial is conducted fairly. If the Crown pulls a rabbit out of a hat, the judge is under no obligation to say, "Nice rabbit, nice hat, let's get on with the trial." He should say, "We are going to have a further delay, caused by the Crown, which I criticise." If that happened a lot, representations would have to be made to Parliament for further powers because the system would not be working as envisaged.

The ultimate sanction would be to say that, because the deadline had not been met, the trial should proceed without the new witnesses or evidence. It may be that there are urgent considerations in relation to witnesses, such as those who might have come from abroad to give evidence. A delay in the trial might have a huge economic impact on such people. In such a case, the judge might decide that it was important to get the trial over and done with. Even if the Crown submitted evidence after the deadline to the effect that the accused had mental problems, for example, the judge would be able to say, "You obviously did not think that that evidence was important enough to put it on the initial indictment, so you've had it. We shall carry on with the trial without the new witnesses."

Michael Matheson: Most of the evidence that we have had on early disclosure has focused on the need for the Crown to disclose evidence at an early stage to the defence. Does the defence have a role in disclosing evidence to the Crown at an early stage?

Derek Ogg: If the defence intends to lead witnesses to speak to or rebut any aspects of the Crown case or to lodge any expert evidence or reports, there are time limits in relation to when that can be done. Effectively, that is when the defence discloses its evidence. The Crown can then interview the defence witnesses and experts and get a steer from that as to what the defence is thinking.

It is important to remember, of course, that the defence is under no obligation to prove the innocence of the accused; it is the Crown who has an obligation to prove their guilt. We call the charge a libel because that is what it is until it is proved. The Crown has accused someone of dreadful acts and it should not do so unless it has evidence that can prove that that person has committed those acts. The right of the defence to remain silent is enshrined in law and convention. Nothing that inhibits that right should be allowed, including requirements to disclose details of the defence.

Currently, in a rape case, if the defence is consent, the defence counsel has to give notice of that. In a murder case, if the defence is self-defence, we have to give notice of that. If the defence is alibi—"I wasn't there; I was having dinner with a nun in San Fransisco"—we have to give notice of that and give the name of the nun and the name of the restaurant. There is a system of giving notice of the defence. However, we must remember that our system entitles us to say, "Prove it. Full stop."

The Convener: I want to ask you briefly about early disclosure. I hear what you say about the legal principle of the right to remain silent and what you say about a culture change. Will it be possible to achieve that culture change if only the Crown is required to disclose its evidence early?

What is the general practice for the questioning of witnesses before the indictment is issued? It has been suggested that defence counsel could act a bit more quickly in questioning witnesses before the indictment is issued, to allow an early start.

Derek Ogg: We can act more quickly in taking statements from witnesses if we know who they are and have their current addresses and if we know that they are willing to co-operate.

The Convener: But you currently get that information.

Derek Ogg: No. With respect—

The Convener: You get a provisional list of witnesses from the Crown.

Derek Ogg: No. If you read chapter 5 of Bonomy, you will see—I think in paragraphs 5.9 to 5.11—that he says, in effect, "That's the theory; now here's the practice."

The Convener: But in some cases you get that information. You are surely not saying that you never get a provisional list of witnesses from the Crown.

Derek Ogg: No. The theory is that provisional advance lists of witnesses are given, but that does not always happen in practice—not by a long chalk. The provisional list—or, indeed, the final list—often does not appear in advance. The final list of witnesses may include people who were not on the provisional list, such as experts, fingerprint officers and others who are proving the forensic side of the case, which is an important part of Crown proof nowadays. Those people could not be on the provisional list. The provisional list contains the people whose names and addresses the police have noted. Bonomy is perfectly clear in saying that the root cause of delay in a trial is—

The Convener: I know. I am sorry to cut across you, but I was interested in your view on whether the defence could prepare cases a bit more quickly before the indictment, if it has a rough idea of who the witnesses will be.

Derek Ogg: On a case-by-case basis, that might be true. Some firms of solicitors are good at doing that and some are not so good. If the objective is to have trials proceed on a specific date after the 80 days, that will best be helped by early disclosure of witnesses. You talked about a culture shift; the culture shift that I am talking about is one in which people will co-operate towards that objective. However, I do not see how disclosing the defence achieves that at all. You are talking about a different culture there.

The Convener: Lord Bonomy talks about uncontroversial evidence and says that the procedure for that is not very well used at the moment.

Derek Ogg: That is to put it mildly. I will tell you what happens. A notice of uncontroversial evidence arrives in a solicitor's office and he fires off a standard letter from his word processor to say that none of it is agreed. I cannot remember a case involving so-called uncontroversial evidence.

I agree entirely with Lord Bonomy. When a notice of uncontroversial evidence is served on us, we have only seven days to respond, but we do not know whether the evidence might turn out to be critical or not. We really do not know. If we agree that something is uncontroversial, lo and behold, sod's law being what it is, we may have agreed something that turns out to be controversial. We have therefore been negligent and have failed to represent properly the interests of our client. Our client then appeals under Anderson v HMA that he was convicted because of the incompetence of Mr Ogg QC, his counsel. The appeal court then agrees that I should never have agreed that the evidence was uncontroversial and the client is acquitted and perhaps retried or perhaps not. The headlines in the *Daily Record* will then attack me and no other solicitor in the country will ever again agree to a list of uncontroversial evidence.

11:00

Roy Martin: I wonder whether I may add to that, based on my experience as a prosecutor. In such matters, it is often overlooked that, ultimately, the case is proved or not proved before a jury. It may be important that the jury hears evidence, even if it is uncontroversial.

I recall a series of trials in which it was necessary to lead a great deal of uncontroversial evidence, which was entirely repetitive. The evidence concerned the attendance of members of local authorities at meetings, in a case about fraudulent claims for expenses. On one occasion in that series of trials, the defence refused to agree to a joint minute, as it was then called, for the leading of the evidence—and one could suggest that that was against the public interest—and a great many witnesses appeared to testify that the particular member had not been present at meetings. In another trial, the Crown offered a joint minute of admissions and the defence accepted it, so the trial was much shorter.

I am satisfied on that experience that the jury was better served in the first trial than in the second, because instead of something simply passing before the jury in a matter of a few seconds—with the clerk of court reading out the joint minutes of admissions that stated all that was agreed—the jury was aware of the fact that on many occasions somebody had claimed to be somewhere where other people had been, to which the clerk who was taking the minute testified.

That may be a special circumstance on my part, but it emphasises the importance of witnesses' testimony before juries, even when the evidence is uncontroversial. That is not to say that I disagree with Mr Ogg, because as far as the defence is concerned his point is important. The critical element for the defence, as he mentioned in his answer to the previous question, is the presumption of innocence. The defence is not there to prove anything. There is the risk that, if something is agreed to, that makes the proof and—whether or not it can be criticised—that is ultimately not in the interests of the defence. That is not to say that I do not support the agreement of evidence as far as it can be agreed, but I understand why people are not prepared to agree it.

Derek Ogg: It is worth saying that prior to a trial it is difficult to agree evidence. I do not know of many trials during which counsel has said to the Crown, "That's not in dispute. Put it in a joint minute." In such circumstances, the Crown Office

can phone the witnesses to say, "You needn't bother coming to speak to your photographs", "You needn't bother coming to speak to the docket that you put on or your service of this warrant," or something of that nature.

Most trials involve dispensing with a dozen or 20 witnesses—or up to 30 witnesses in some cases—because we agree a joint minute on stuff that we know we can agree on. We have instructions on it and we know that it is not critical. Sometimes that is not known until one gets into the trial and knows who the trial counsel will be, because the trial counsel may say, "Well, I don't know why anyone agreed that this was uncontroversial, because I am of the view that it is controversial."

Everyone will tell you that joint minutes substantially curtail criminal trials in Scotland. They do not make a difference to the day on which trials start, but they substantially curtail their length and inconvenience to witnesses. It should not be thought that inconvenience to witnesses is caused only by adjournments. It is caused by the fact that witnesses have to hang around waiting to get a phone call to come and speak to, for example, a document that has been extracted from a file, even though they may not know anything about the case. If joint minutes can be agreed early, that should be encouraged. The trial judge could do that.

Mr Stewart Maxwell (West of Scotland) (SNP): I want to take you over your written submission and some of the comments that you have made this morning about fixed trial dates. Correct me if I am wrong, but this morning you seemed to suggest that you support fixed trial dates, because they bring more certainty. However, in your submission, you appear to be opposed to fixed trial dates. You certainly express considerable doubts in your written submission about the practical effectiveness of the proposals to replace High Court trial sittings with fixed trial dates. Do you think that it is necessary to change the current system from sittings to fixed trial dates?

Derek Ogg: I am sorry if my commentary is unclear or appears to be ambiguous in that respect. That is certainly not our intention. We support fixed trial diets and I believe that our document says as much.

That said, we criticise new section 83A that the bill proposes to insert into the Criminal Procedure (Scotland) Act 1995. According to the explanatory notes, subsection (3) of the proposed section seeks to allow judges to fix a trial diet. The indictment will fall if it is not called at that diet, although the Crown has the right to raise it again at a future date if it sees fit.

Paragraphs 59 and 60 of the explanatory notes say:

"Section 8 introduces a new section 83A into the 1995 Act which makes provision for two different approaches for the court in relation to appointing and continuing the trial diet … Under subsection (3), the court may fix a particular day as being the one on which the trial diet shall commence."

I support such an approach, because it provides certainty and means that we will be working towards a definite date. Paragraph 60 continues:

"In such cases the diet cannot be continued without formally calling in court."

I also support that, because I do not think that any procedure with respect to someone's trial should happen without it being called in their presence in a court of law. Paragraph 60 goes on to say:

"If it is not called on that day, the indictment will fall. That means that the Crown cannot take further proceedings on that indictment. Subject to any overriding time limit constraints, however, the Crown may re-indict the case."

That gives us a drop-dead scenario and forces the Crown and the defence to be ready on that particular day.

However, paragraph 61 of the explanatory notes says:

"The other approach is that set out in subsections (1) and (2). In such cases the court will appoint a trial diet for a given day, but it will be possible to continue such a diet from day to day without formally commencing it by calling it. Continuation will be by a minute signed by the Clerk of Justiciary",

who is a civil servant. That means that there will be no representations; the diet will not be held in public; the accused will not be present; and there will be no necessity under the legislation for the clerk to investigate how such a step will affect the availability of the defence's expert witnesses or even of counsel, who in three days' time might be conducting a trial under a fixed diet in another court. Such an approach puts into the hands of a civil servant employed by the courts the power that, under subsection (3) of new section 83A, is only in the hands of a judge. It gives that civil servant unaccountable power because, after all, he is not accountable to me or anyone else, including Parliament.

In fact, such a measure effectively means that, for example, a clerk in the High Court in Edinburgh and a clerk in the High Court in Glasgow could schedule Queen's counsel into a conflict of times. Without that measure, I might have known that, with the fixed diet system, I had a fixed diet for Monday which was a three or four-day rape trial and a fixed diet for Friday which was a murder trial that would last two weeks. However, if such a diet is appointed under subsections (1) and (2) of new section 83A, I do not know whether I can take those two cases. If the diet is appointed under

subsection (3), I know that I can, because if it is not called for trial on those dates the indictment will fall. The case will have to be re-indicted at another time and there will be another preliminary diet at which we will discuss our availability.

Under subsections (1) and (2) of new section 83A, I might take instructions for a rape trial on a Monday. The victim and I think that the trial is meant to start on that day and we are ready to go to a trial that will last perhaps four days. I could also take instructions for a murder trial on a Friday. However, the two clerks in the two courts could administratively continue the rape case from day to day because, for example, they want to give priority to another case. As a result, on the Thursday, the clerk might say, "I've administratively continued this case to today." That means that the victim has been kept hanging on for three days and I am due to start a rape trial a day before I am scheduled—and, I would have thought, obligated—to start a peremptory trial diet for a murder. That is just a replication of the proposed system. It will create chaos.

I think that judges will tend to appoint diets under subsections (1) and (2)—in other words, the diets that clerks can shift from day to day—because those do not involve a drop-dead scenario by causing indictments to fall. Indeed, I wonder about the relationship between the judge and the clerk in such circumstances. Who is the boss? Who is calling the shots? I also wonder about the relationship between the clerk and the Crown Office and which of them is the master of the instance. I certainly wonder about the relationship between the clerk and the defence counsel. I do not want my professional ethical responsibilities to be subject to a civil servant's whim, in effect, by their organising their court in a certain way on a day-to-day basis without any possibility that I can say to the judge, "This isn't fair."

Mr Maxwell: So your fear is that subsection (1) and (2) diets will be the norm and that subsection (3) will almost fall by default, as it involves "a drop-dead scenario". In effect, there will not be fixed dates.

Derek Ogg: We will end up having to have sittings instead. With respect, my criticism was contrary to what you thought it was. I was criticising proposed new section 83A—we all think that the new section gives definite dates, as that is the objective that all of us are working towards, but in fact it could end up doing the reverse.

Mr Maxwell: You say that it will do so in your submission.

Derek Ogg: Indeed, things will be worse because currently a judge can say, "I am not going to adjourn from day to day. We have waited long enough—let's get our act together and get started." That has happened.

Mr Maxwell: If you believe that subsections (1) and (2) will become the norm and the option of choice, particularly because of the administrative flexibility that would be provided in the court system, how could such a problem be solved? How would you resolve that problem and get fixed dates? Would you change something in the bill?

Derek Ogg: The Parliament can create a hierarchy of preferences so that the judge should in normal circumstances appoint a fixed diet. The exception should be when there are special circumstances. A victim might be very vulnerable and there might be reasons to think that his or her state of mental health will not be auspicious on a particular day, or a child witness might have examinations on a particular day but might not be sure on what day those examinations will fall. There might be an anticipated uncertainty or—to use Donald Rumsfeld's dreadful concept—unknowables that we know about. A trial might be vulnerable because of particular features that all of us can identify in advance.

The judge would have to state reasons for departing from the general requirement on him to fix a diet of trial. If the Parliament prioritised in that way, rather than simply giving us equal-handed alternatives, that would make it clear to the judge—who, as I have said, must participate willingly in the process—what was intended in respect of fixed diets. It would make it clear that, if everyone said that a trial would be ready to start on a particular day, it should start on that day and not have to fit into a civil servant's idea of which court should do what and when. In fixing the trial diet, the judge should be required to state special reasons at the preliminary diet for departing from the general requirement to make a fixed diet of trial.

Mr Maxwell: Do you object to the clerk per se being responsible for setting dates, which is an administrative function, and think that the judge should be responsible? Could the clerk set dates if certain safeguards are put in place? You said that a clerk could just make a decision about one court changing things and another court changing things without communicating with those who are involved.

Derek Ogg: What if there are two clerks in two different courts? They will have different administrative reasons for wanting to continue their work load or their judge's burden from day to day. The judge might be due to chair a meeting of the Parole Board on a Wednesday, for example, so that the trial cannot start then. A person would not know about that and might not be told about it. One of my fears relates to the fact that there does not seem to be any accountability on the clerk's

part in respect of giving reasons, explaining why things are happening or, indeed, being required to take submissions from counsel.

As a Queen's counsel, I would feel uncomfortable making representations to a clerk of the court about a trial. That matter should be in the hands of the judge. The accused is under protection of the court and the court's president is the judge, who should never lose responsibility for that to the clerks. Therefore, I have a principled objection to a clerk doing such things, but I also have an objection to a judge doing them, because I know what will happen. I know what the theory and the practice will be. We will still get continuations. We will end up having to have sittings—all your efforts at getting fixed diets will have failed, as slippage will be introduced. We will end up with a bidding war among five or six courts sitting at the same time in the High Court in Glasgow about the availability of counsel. Some clerks will no doubt favour some counsel or some types of case and some judges will think that some cases have a higher priority than others and will try to switch things around. That will not work.

Parliament has to be focused on the change and state what it wants. To the extent that rules can affect outcomes—I know that I have said that a culture change is required—the rules must clearly support the culture change. If they do not, a judge will be able to say, "It does not say anything here about which priority I am meant to apply and about whether I am supposed to fix a specific diet of trial or an administratively moveable diet of trial. I have no guidance from Parliament on that, so I will do what I like. It sounds to me that my clerks and I can fix our sittings between us." The judge and the clerks will effectively create their own hybrid sittings.

11:15

Roy Martin: It seems to me that what has been said is clearly the case. If there is to be a fixed diet system, the presumption is that any allocation or appointing of a day for the holding of a trial diet should be in accordance with subsection (3) of new section 83A. That should be the general rule. It may be a matter of emphasis as much as anything else, because it is not unreasonable to have some sort of exception to that general rule—whether that is under the control of the judge or of the clerk of justiciary raises separate issues, about which Mr Ogg has spoken eloquently. If there is to be a culture change towards fixed diets and the preservation, if at all possible, of those diets, the emphasis of new section 83A is wrong: it should start, as it were, with subsection (3) and then outline some sort of exception.

Mr Maxwell: That is helpful. We have had evidence from the court administration unit about how it sees the process working. Has it had discussions with the Faculty of Advocates on the matter?

Roy Martin: Yes, there have been discussions—on at least three occasions when I have been present—between the faculty and members of the justiciary office or, in one case, a member of the justiciary office who was seconded to the Scottish Executive. As far as the faculty is concerned, there have been such discussions and there is no dispute in principle between the faculty and those with whom we have spoken. We have not had detailed discussions on the particular provision.

Mr Maxwell: We received evidence from Norman Dowie, who mentioned the building of software for electronic diaries, and integration of that information. I know that there are electronic diaries, but he envisioned a more sophisticated measure. Would not that assist in solving some of the problems that you have identified in relation to not knowing where people are and when they are in different courts?

Roy Martin: Yes. Mr Dowie is one of the people with whom we have had discussions. That is the sort of procedural change and development that we would support.

The point that Mr Ogg makes is slightly different. His point is that knowledge of all the circumstances that may be consequent upon adjournment of a trial diet is important, but proposed new section 83A(1) does not provide any mechanism through which that knowledge would become available. The second question is about who should make the decision, having received all of that knowledge, and in what circumstances an adjournment should be allowed. In principle, better sharing of information, and use of electronic diaries and schedules to which everyone could have access, would be a great improvement, which we would certainly support.

Derek Ogg: I would see that coming in particularly at the last preliminary diet stage, at which the trial diet is fixed. Such electronic media would be useful. I am a great fan of Norman Dowie; he is a splendid modern-minded and foresightful civil servant. I wish that I had his confidence in the Faculty of Advocates's ability to manipulate electronic information.

The Convener: I am glad that it was you who said that.

Margaret Mitchell: Arguably, the extension of the 110-day rule is one of the most controversial proposals in the bill. I do not see anything in your submission that suggests that the Faculty of Advocates is against the proposal in principle, although in your evidence today you suggest that human nature is such that, if the time limit is

extended, people will work to the new time limit. Are you opposed in principle to the extension?

Derek Ogg: No, I am not. My view is that 110 is a number and 140 is another number. A difference of 30 days is significant for a person in jail awaiting trial, but the gains that the change will bring will make it worth while. I think that the dean of the faculty said the same thing in his article in "*Holyrood*" magazine. There is no magic about the number.

I do not know whether Parliament realises this, but ours is the only jurisdiction in the world that requires its citizens to remain in jail for such a short time awaiting trial. We have a fantastic record on that—and have done for centuries. In England, a person can languish in jail for a year before someone gets round to trying them. That is equivalent to serving a sentence of two years before even being found guilty, if we take into account time off for good behaviour.

We should be proud of our system. When we say that the 110-day rule is the jewel in the crown of the Scottish system, we mean that strict time limits are the jewel in its crown. In other words, there is a drop-dead scenario. Human nature is such that people will go to the wire when there is a time limit and as soon as that happens, some people will fall over the wire, because they do not manage their diaries as well as others do.

The courts have said that the rule is an important part of the constitution of Scotland—many people do not realise that we have a constitution, but we do have one to the extent that it is made up of such rules. The Parliament should always be reluctant to interfere with long-standing rules, but it is being asked simply to change the number, rather than the principle. Moreover, 140 days is still a much shorter period than is in operation anywhere else. In Belgium, for example, a man has been in jail on paedophilia charges awaiting trial for eight years. The European Court of Human Rights has said that it is not a breach of human rights to keep someone in jail for a few years while they await trial.

Scotland leads the way on the matter; we have created a system in which our civil servants and prosecutors must produce evidence; for example, if one of us were to be wheeched off the street and into jail, it would be their job to tell us why that had happened, to say what evidence they had and to bring us to trial to give us the chance to get out of jail as quickly as possible. That is the Scottish way of doing justice and I hope that others want to copy it—if they do not, it is because they are too stingy to provide the resources. The principle, rather than the arithmetical number of days—as long as that remains small—is what matters.

Margaret Smith (Edinburgh West) (LD): Lord Bonomy suggested that a preliminary diet should take place within nine months of the first appearance on petition of the accused. However, the bill proposes that the time limit should be 11 months, but that the trial should be commenced within 12 months, so there might be only a month's difference. Do you prefer the proposals in the bill to those of Lord Bonomy?

Derek Ogg: I think that it was I who recommended to Lord Bonomy that the time limit should be nine months.

Margaret Smith: My question was not in any way planted.

Derek Ogg: I certainly took Norman Dowie aside and bent his ear at great length about the matter.

In the event of someone's being arrested and told that they are, for example, a paedophile, a rapist or a murderer, a time limit of nine months would give the state quite a long time to get its act together to be able to say, "Here is the evidence to prove that." That is why I support the Bonomy recommendation.

The nine-month limit would also give the defence an extra three months lead-in time in which to get moving. Provided that there was disclosure, that extra time would create many opportunities for the defence to anticipate its needs and ensure that everything was in place for the first trial diet. I cannot stress enough the importance of that: every extra week, fortnight or month of lead-in time for the defence can be used. If there were also the culture change that I talked about, the preliminary diet really could work.

Roy Martin: I suspect that a time limit of nine months, rather than 11 months, would be more likely to bring about that culture change, because it would clearly indicate to the Crown that, in a case in which the accused is on bail, it must act more quickly than it has done in the past. That is a useful signal, even if there is a rational mechanistic argument for 11 months being sufficient. Although the Faculty of Advocates has not made representations on that, I would support the nine-month limit for that reason alone—it gives a signal to the Crown.

One would hope that once the initial period when the changes were being absorbed was over, we would then have a timetable—in all cases we would have a criminal justice system and prosecution system that is moving forward and has moved on two months in advance, so ultimately there should be no difficulty. I support the proposal for a nine-month limit from the culture-change point of view.

Marlyn Glen (North East Scotland) (Lab): The bill proposes changes to section 196 of the Criminal Procedure (Scotland) Act 1995 in relation to the sentence following a guilty plea. Will you outline to the committee your experience of the way in which the existing provisions have operated? For example, does the existence of a discount create an incentive to accused persons to plead guilty at an early stage?

Derek Ogg: Yes, I think it does, if they trust the fact that they will get a discount. Let us talk practice and theory. Let us say that I am a judge and I have before me a case of a guy who I think ought to be in jail for eight years because of the crime that he has committed. Although he has pled guilty two weeks before the trial diet, I still think that the guy should get eight years, so I say that he ought to have got 10 years, but I will give him a two-year discount for pleading two weeks in advance of the trial diet, so he ends up serving eight years. I do not think that people who take a judicial oath of office approach their job in that way, but I know how human nature can work subconsciously. You might find the headline sentence drifting ever so subtly upwards; something that would normally attract an eight-year sentence would attract a 10-year sentence. The discount for an early plea is two years so the sentence would be eight years.

Parliament has debated discounts in sentences served for good behaviour. People could get 30 per cent off a sentence of more than four years and 50 per cent off a sentence of less than four years for good behaviour. People say, "They should serve every day of their sentence." If Parliament decides that, all that will happen is that judges will say, "When previously I gave someone six years, I was giving them four years in jail, but now the Parliament is saying that people have to serve every day of their sentence, so I will give the person four years for the same crime." Judges will ask themselves subconsciously how long a person should serve for a crime and what sentence they need to impose to meet that end. That is my fear.

It is difficult to police that, but I like the bill's provision that says that the judge has to consider discounts and has to give reasons for giving them. The judge would have to say what the sentence would have been. That will allow us to go to the appeal court and ask whether a specific offence is really worth 10 years, because judges normally impose seven or eight-year sentences for it. We would be able to ask whether the judge really applied the intention of Parliament, which would allow us to have the sentence reviewed on appeal. I like the requirement in the bill, although it could be subverted by judges.

Marlyn Glen: Do you think that discounts create improper pressure on accused persons to plead guilty?

Derek Ogg: That would vary from case to case. Most of the people whom we represent have very low IQs and are extremely dependent on their professional advisers. They might feel guilty about something and they might have done something wrong morally or legally, but they might not have done what they are accused of doing, or they might not have done it to the extent that they are accused of doing it. I can envisage situations in which we would see that it was highly advantageous to a particular accused person to plead early, because he will get the discount and there might be many mitigating factors anyway, which would mean that the headline sentence would be quite low. With the discount, he would serve quite a short period in custody. That person might say, "I did not do this, but everyone seems to be pointing me in that direction." We talk about vulnerable witnesses; there are vulnerable accused persons out there, too. That will have to be considered as part of the culture change.

Defence counsel and defence solicitors will have to be aware that they take their client's instructions. The counsel and solicitors give advice, but the client is empowered to give the instructions. That sounds very theoretical, but it is important that counsel and solicitors are aware of that situation, which can be a risk.

Marlyn Glen: You have already partly answered this question, but what would happen if there were no discount for pleading guilty? Would it just go back to the headline sentence?

Derek Ogg: Yes, but I should say that I like very much the bill's emphasis that even on the day of the trial, a guilty plea can be rewarded, if you like, by a discount, because it can save vulnerable witnesses and other witnesses from the inconvenience of having to give evidence. Otherwise, a trial might be lengthy. There may be witnesses who have not turned up on day one and who are at the end of a phone call for the second week. They can be contacted. There could be a tremendous saving to the state and to the witnesses.

11:30

In addition, it is sometimes not obvious until the day of a trial that someone who may be quite an inadequate accused is able to face up to the reality of what is happening. Appearing in court and knowing that all the witnesses have shown can be a dose of cold water to the accused—a dose of reality that perhaps has not intervened until that point. Therefore, the emphasis that there

should still be a discount available for a guilty plea on the day of a trial is good.

Margaret Smith: The Executive proposes to implement section 13(1) of the Crime and Punishment (Scotland) Act 1997, to extend the sentencing power of sheriffs in solemn proceedings. We have heard evidence that a number of people have concerns about that in terms of inconsistency of sentencing, sentencing drift and so on. Do you have a view on the general question of extending the sentencing power of sheriff courts? Do you also have a view on the types of cases that should be marked for trial in sheriff courts rather than in the High Court?

Derek Ogg: I have a personal view on that, but I cannot claim that it is part of the Faculty of Advocates criminal bar association's submission. However, I would guess that the view of most of my fellow members is similar to mine. Andrew Hardie—now Lord Hardie—became Lord Advocate after the Government changed in 1997 and Labour took power. During his tenure as Lord Advocate he had the opportunity to implement section 13(1) of the 1997 act, which amended the Criminal Procedure (Scotland) Act 1995, but he did not take that opportunity. I understand that he did not do so because he did not believe that it was appropriate to do so. Clearly, there was a view in the Executive at that time that it was unnecessary to implement section 13(1).

Frankly, I do not know what has changed. Perhaps implementing section 13(1) is simply a mechanism for trying to get business through by putting it down to the lower courts. Perhaps it is simply intended that sheriffs should impose even heavier sentences than they impose for the work that they have before them now. I rather suspect that the intention is to send more High Court business to the sheriff courts in order to get through it.

I have a little worry about the proposal to implement section 13(1). A young solicitor, for example, who has been qualified for one month and has a legal aid certificate, could represent in a jury trial someone who faces five years' imprisonment—or more, if a sheriff remits the case to the High Court. At the moment, a person is entitled to be represented at the state's expense by a fully qualified advocate in the High Court of Justiciary, and to be prosecuted by another advocate, with all the rules of ethics and procedure that we have for such solemn proceedings and with the training and expertise in advocacy that the Faculty of Advocates possesses.

I realise that that sounds like a bit of a pitch for a closed shop. However, I believe that solicitor advocates might also be concerned about the proposal to implement section 13(1) because they have gone to the trouble of becoming qualified to appear in the High Court to represent people who face sentences of up to five years. However—lo and behold—overnight, their junior assistants in the office could go and do the same job in the sheriff court.

If section 13(1) were implemented, I wonder how that would affect historical decisions to appoint sheriffs. If it had been known that a sheriff might be trying solemn proceedings involving five-year sentences, I wonder whether the same judgment would have been made that a particular person was an appropriate person to be a sheriff. In other words, are sheriffs exactly the same in terms of qualification requirements and so on as High Court judges? If that is true, why is there a difference between the High Court and the sheriff court?

This year, the High Court in Glasgow could have a sheriff sitting as a temporary High Court judge, the prosecutor could be a procurator fiscal—a procurator fiscal has just been appointed as an advocate depute—and the case could be defended by a solicitor advocate. All three people could be down the road, across the bridge and in Glasgow sheriff court the next day doing a jury trial for a five-year sentence. Why have that difference between the High Court and the sheriff court? I think it might be a step too far.

Roy Martin: From the faculty's point of view, that seems to raise two implications, one of which is not necessarily in whole-hearted agreement with what Mr Ogg said. The distinction between the High Court of Justiciary and the sheriff court ought to depend on the types of crimes that are being charged. Unless we move to a single-court system, which is implied by what Mr Ogg just said and, indeed, such as exists in the Crown court system in England and Wales, the more serious crimes ought to come before the High Court of Justiciary and the less serious crimes ought to be tried on indictment before the sheriff. We have that distinction at the moment because murder, treason and rape trials must come before the High Court. Whether we expand or alter that list is a separate issue.

Although I agree that many of the facts that have been referred to raise other issues, the principle ought to be that the severity or seriousness of the crime merits the case's going before either the High Court of Justiciary or a sheriff court. In a sense, the powers of sentencing are a consequence of that and should not lead that decision.

As a result of Lord Bonomy's investigations, it is acknowledged that the critical issue is to get High Court procedure right. That will have significant implications for the Crown Office and Procurator Fiscal Service. If, at the same time, sentencing powers were significantly increased, the sheriff

court work load would alter significantly. That might have a knock-on effect that was adverse to proper implementation of reforms of the High Court. The faculty has not considered the matter, so what I say is just my view. It is worth considering the types of cases that go to the High Court, but the matter should be examined once the High Court reforms have had a chance to work, rather than be imposed at the same time with the administrative consequences that might ensue.

Margaret Smith: We are awaiting the McInnes report on sheriff courts. It has been suggested that the types of case that might be transferred to the High Court would be assaults, robberies and medium-sized drugs cases. You are suggesting that we consider that proposal when we are examining the sheriff court in the round rather than do it piecemeal at the moment, even though the impact will be a transfer of 20 per cent of business from the sheriff court to the High Court.

Roy Martin: That is a sheriff court issue rather than a High Court issue. You are right to refer to the McInnes report and the points that Mr Ogg has made about how sheriffs were appointed and whether they were judged to be appropriate judges. Those are all sheriff court issues, so it would be appropriate to consider an increase in sentencing powers when we examine the sheriff court in the round, rather than at the same time as the implementation of Lord Bonomy's reforms.

The Convener: Before we go any further, I should say that we must finish at a quarter to 12 and we have still to discuss two very important issues. Members should bear that in mind; brevity would be appreciated.

Mr Maxwell: Earlier you gave the example of inexperienced counsel dealing with cases that have been transferred. Will lack of experience cause people to decline taking on such cases because they have come from the High Court? If it will, how widespread would that reluctance be?

Derek Ogg: Lawyers', particularly young lawyers'—I am thinking of when I was a young lawyer—reach often exceeds their grasp. Most would think that they could do the job: only when we see that they are unable to do it and we see the impact that that has on a client do we see how disastrous that is. I am all in favour of young and newly qualified counsel and solicitors doing trials, but it is ridiculous that they should do trials that, until now, could have been conducted only by experienced counsel because of the consequences for the accused.

Your question also has an implication for very young junior counsel who take on cases that may be beyond their reach. I am speaking out of turn as a member of my union, but I have serious issues with very young and inexperienced junior counsel taking on, for example, cases that involve vulnerable witnesses, such as child witnesses and victims of very traumatic crime. In the fullness of time—perhaps more urgently than that—we will have to address that issue. The point, which is graphic in relation to the question, is that in the sheriff court young, tiro solicitors will think that such cases are opportunities to prove themselves and to leap on the stage, but their reach may exceed their grasp.

Mr Maxwell: I will ask about legal aid, which is available currently when cases are heard in the High Court but which would, under the bill, be heard in the sheriff court. If those cases are transferred to the sheriff court, legal aid will not automatically be available for counsel to represent the accused. Should that be changed? If the cases are transferred, should there be an automatic entitlement to legal aid just as if the case had gone ahead in the High Court?

Derek Ogg: I would expect there to be such a change, because the circumstances will have changed. When I first started, the sheriff court's maximum sentencing power was two years on indictment. It is easy to understand why the Scottish Legal Aid Board in those days said, "If you want counsel, apply for sanction to authorise counsel." The sheriff court's maximum sentencing power then went up to three years and will now go up to five years, so if the state's view is that people who face charges that attract such sentences deserve the services of counsel, SLAB would simply reallocate the funds to allow counsel in the sheriff court. It would depend on the seriousness of the charge; it is as simple as that. I expect a culture change in the Scottish Legal Aid Board in relation to applications for sanction for counsel. I would not expect the board to change its decisions about refusing counsel in straightforward indictment cases, but if a case would otherwise have been a High Court case, SLAB might decide to grant sanction for counsel more freely than it has otherwise done.

Mr Maxwell: Should sanction for counsel be granted automatically, rather than through application?

Derek Ogg: Yes—there should be a level playing field. We in the Faculty of Advocates have always moaned about the fact that solicitor advocates were given rights of audience in the High Court—why not, if they are qualified?—but we were not given automatic rights of audience in what we might call their courts, although our people must also learn in the lower courts. I have represented in the sheriff court teachers and social workers who have faced what are regarded as quite slight charges of sexual abuse—for example, touching a child—which are devastating to them,

their families, their employment and their careers, and of course it is appropriate for counsel to represent people in those circumstances.

Mr Maxwell: Lord Bonomy says in his report that counsel are sometimes "caught by clashing commitments" because they attempt to fill their diaries because legal aid payments are higher when they are in court. Does that need to change? Should the legal aid rates, which have not changed in the past 10 years, change in order to avoid that problem? If the rates were changed, would that of itself have an effect on current delays in the High Court?

Derek Ogg: The Faculty of Advocates criminal bar association's submission points out that the culture shift will require management by counsel, which will take place outside court. At the moment, the legal aid structure is geared towards paying us for up time—in other words, we get paid for when we are standing on our feet in court—but we are not paid for anything during down time; for example, preparation is not an item for which we can charge under the table of fees. That will have to change, and I expect SLAB to take that view.

Roy Martin: I endorse that. It is vital that the legal aid regulations be altered to take account of proper remuneration for the preliminary hearing and for necessary preparation. The system will fail if that is not done. We have had discussions with the Scottish Executive about that and we are having discussions with the Scottish Legal Aid Board, although a meeting has not yet taken place. I understand that the need to take that into account is acknowledged. It is also a factor in the question that mentioned that legal aid rates have not risen for 10 years. That is a critical factor that has led to difficulties whereby counsel find themselves overcommitted through the reasonable expectation that they ought to earn a living. That is compounded by the present culture of adjournments because counsel cannot simply assume that a trial will take place on the day that they expect it to. They might have to pass the trial away or it might not take place at all.

If there were a system of more fixed diets, the problem should be solved because counsel would then have much greater certainty. The public would be better represented in such a system because there would not be so much uncertainty about preparation and commitment—there might even be an ultimate saving on the public purse. All of those factors rely partly on the necessary resources' being in place.

11:45

Bill Butler: The committee has heard conflicting views, to say the least, from various witnesses on the subject of trial in the absence of the accused. Your written submission is robust on the proposal. You make the point that absconding is rare and that trial in the absence of the accused would be

"a massive departure from principle and equity to overcome a tiny problem."

I take that point, but is there any situation in which trial in the absence of the accused—other than those accused persons who are just deliberately disruptive—would be in any way equitable or just?

Derek Ogg: If, for example, someone attends a trial that has been going on for a number of days, and then simply absconds and takes the train to London because the trial seems to be going the wrong way, or because a witness who they did not expect to speak up has spoken up, or because evidence has been given to the defence witnesses, and the trial is at the stage when all we are waiting for is the Crown's speech and the defence speech—in other words, if the accused disrupts the trial by clearing off, having first turned up and participated in it—I would see that as falling into the class of misbehaviour. The accused has disrupted that trial as much as he would have done if he had stood up in the court and shouted his head off so that the trial could not take place. He has participated in the process, he has instructed counsel and his agents, he has taken it so far until he did not like it and then he has cleared off out of it. That is an act of will as much as standing up and shouting one's head off is an act of will. I would make a concession that that would fall under misbehaviour. The accused has breached his bail and he has abused the trust of the court, given that the court has said that it will not revoke his bail in the course of the trial to allow him to go home at night and so on.

If a victim of rape had given evidence, had been cross-examined on the instructions of the accused person and then had to face going through it all again in the presence of the accused because the accused had misbehaved in the course of the trial, that would be outrageous. I accept all that entirely. However, it is the idea that somebody should be tried in absence ab initio that rebels against every bit of me as a Scot and a lawyer.

Bill Butler: You say that such a trial would be wrong in principle and incompatible with human rights. However, we have heard from some witnesses that they do not believe that it would be incompatible with the European convention on human rights. How do you feel about that view?

Derek Ogg: My view is that the European Court of Human Rights has tholed it in the past because of the investigative system of the continental courts where the question has arisen. Most of the trial evidence would already be in the possession of the judge at the judge's instruction—that is why it is called the juge d'instruction in Belgium and

France. Estonia, one of the emerging nations that will join the European Union, has the same system. The European Court of Human Rights has looked at the continental system and weighed the question of fairness to the accused in those circumstances.

Our system depends on the efficacy of an adversarial system for establishing the reliability and truth of the evidence. The evidence is not out until it is examined adversarially in a court of law. If a judge appoints me under the proposals in the bill to represent someone who is not present in court for a murder trial in which a defence of self-defence has been entered, what am I supposed to do if the accused is not there? Parliament is saying that the accused's punishment for failing, for whatever reason, to attend a trial is that he runs a high risk of being found guilty of murder.

How does that relate proportionately to the accused's offence? His offence is not murder, unless he is fully tried at a fair trial; his offence is failing to turn up in court. For all we know, that might have happened because we have a system of citation under which a police officer can sellotape an indictment to the door of a tenement flat, as I said. A pal, drunk friends or people who are not pals of the accused might have ripped that indictment off the door, so that he was unaware of it. Accused people might be inadequate or hopeless, or they might be drug addicts or alcoholics who would have liked to turn up in court, but did not because of their defects or disabilities. Alternatively, the accused might be under pressure. They might incriminate somebody else in a drugs case, so they are frightened of giving evidence in court and of being a grass.

Accused persons may be under all sorts of pressures. We should not forget that vulnerable accused people may behave in some ways because of their vulnerabilities. It is being said that although someone's behaviour was caused by their vulnerability, we will punish them for their behaviour by having a trial for murder, rape or whatever in their absence.

Bill Butler: You are saying that the proposal is wrong in principle and would be unjust in practice.

Derek Ogg: The proposal is unethical. As a lawyer, I would not be prepared to be appointed by a court to defend an absent client.

Bill Butler: My last question would have been about that.

Derek Ogg: I would decline that appointment. I would not lend the system credence by representing an absent accused. I would not know what questions to ask or why to ask them. Asking a rape victim whether they had consented when the client was not present to say that consent had been given would be outrageous.

Bill Butler: Indeed—outrageous.

The Convener: We will stop the questions there. The faculty's position on trial in the absence of the accused is clear.

Derek Ogg: That is my most strongly held view.

The Convener: We appreciate the clarity. On behalf of the committee, I thank both witnesses for attending. The session has been excellent for us. You have given us valuable points that we will take on board while we take evidence and in our report.

For our second set of witnesses, I refer members to the written submissions from Rape Crisis Scotland and Victim Support Scotland. I welcome from Rape Crisis Scotland Sandy Brindley, and from Victim Support Scotland Neil Paterson, who is the director of operations, and Frank Russell, who is the head of the witness service. I know that some of the witnesses have given evidence many times. I apologise for keeping you waiting. We are grateful that you have come to give evidence.

Margaret Mitchell: In their submissions, Rape Crisis Scotland, Victim Support Scotland and Scottish Women's Aid support the objective of introducing greater certainty into the timetabling of trials. All three organisations refer to the importance of reducing delays because of their impact on vulnerable witnesses. However, do the measures to improve certainty, such as preliminary hearings, risk adding to the delays, perhaps even to the extent of requiring an extension of the 140-day rule? Will that have more of an impact and increase stress and distress?

Sandy Brindley (Rape Crisis Scotland): To us, the provisions in the bill to move away from the sitting system are significant. That can only be a positive development, because the current level of delays in rape trials is unacceptable. We have a worker who is supporting a woman who is on her 22nd court date. Given the distress that such delays cause, consideration of a bill to increase certainty and address that problem is urgent. We hope that fixed trial dates will improve the situation rather than make it worse, as you suggest.

Margaret Mitchell: We have heard evidence this morning that, as the bill stands, there could be two ways of looking at the fixed trial date, plus a more flexible approach.

Sandy Brindley: The Scottish Executive has assured us that sexual offence trials will always be allocated a fixed trial date. The bill does not specify that, but that is the intention.

Margaret Mitchell: Do you have a view on the 140-day rule, which will extend the time that witnesses, the accused and the victim will have to

wait to have their evidence heard and to hear the outcome?

Sandy Brindley: Rape Crisis does not have a view on that rule. In the huge majority of cases that we work with, the accused is always released on bail, so the change will not have much impact.

Neil Paterson (Victim Support Scotland): There are a number of potentially conflicting priorities at play and the bill is a good attempt to address that situation. For us, the most important point is to achieve greater certainty about when trials will proceed. Committee members may be aware that last year in the High Court in Glasgow only 44 per cent of trials proceeded at the time that they were listed to do so; the remaining 56 per cent were adjourned, often on numerous occasions. Sandy Brindley referred to a case with which she was involved in which the trial had been adjourned 22 times. We know of a similar case, in which the trial has been adjourned 23 times, with five changes of venue thrown into the equation. Witnesses are prepared to pay the price of the extension of the time limits and of having to wait slightly longer if that will result in greater certainty that trials will proceed on the date that is listed.

Margaret Mitchell: One view is that by making the change we are throwing in the towel, and that we should consider other proposals before we extend the 110-day limit. You say that if the extension works, that will be great, but what do you think about the proviso that we should consider other alternatives first?

Neil Paterson: If it were realistic to make the system work better with the existing time limits, we would clearly not be uncomfortable with doing so because it is in the interests of victims and witnesses that trials proceed as timeously as possible. However, victims and witnesses expect the parties to be prepared properly and it is important that the time limits allow for that. I understand that allowing time for proper preparation is a critical factor in many decisions to adjourn cases in the High Court.

Mr Maxwell: Many of the written submissions that we have received support the move away from sittings to fixed trial dates. That is understandable, but we have heard that the change will not apply in all cases. Should some types of case always be fixed-date cases? If so, which ones?

Sandy Brindley: Rape Crisis's view is that every sexual offence case should have a fixed trial date because the prospect of giving evidence in a sexual offence trial can be emotionally distressing. The more certainty that we give to women and men who are victims in sexual offence cases, the more we will lessen the distress that is caused by the prospect of waiting to give evidence.

Mr Maxwell: You hope that all sexual offence cases will have fixed trial dates, but as far as I understand the bill, nothing in it states that that will happen. Why do you think that that will be the case?

Sandy Brindley: You are right that the bill does not state that. Unfortunately, in our experience, when bills that have had positive intentions in relation to sexual offence cases have been implemented, those intentions have not always been carried through as well as we hoped. We take a cautious approach; we think that it is always better to state such intentions in the bill in order to provide a legislative basis for them.

Mr Maxwell: But the intention is not stated in the bill.

Sandy Brindley: No.

Neil Paterson: The preliminary hearing is critical. We argue strongly that cases in which a victim or witness is identified as vulnerable in the context of the Vulnerable Witnesses (Scotland) Bill, which is currently before Parliament, should take precedence and have a fixed trial date. We were given an assurance that that would be considered with regard to how the bill would operate in practice.

12:00

Mr Maxwell: You have said that all sexual offence cases should be given a fixed trial date, as should all cases in which there is a vulnerable witness. I can think of a number of other cases in which people would have an equally valid claim for their case having a fixed trial date. The family of a murder victim might have such a claim, for example, and there could be a range of cases in which people would say, "We should have that right. Our case should take precedence." Because somebody has committed an offence against somebody else, people want the case to come to court and they want certainty for their own cases, but it is not possible for all the competing cases to get the certainty of a fixed trial date. Something somewhere has to give. Surely there is a problem with saying that certain cases should get a fixed trial date over other cases.

Neil Paterson: I must be careful not to stray into matters that it is beyond my professional competence to comment on, but you may be right. The bill attempts to move forward in a range of areas. If it is possible to achieve greater certainty for a wider range of areas than is currently possible—at present, there is almost no certainty for any cases—we would very much welcome that. The system is complicated and there are many conflicting demands and priorities that have to be taken into account in scheduling trial business. However, our view is that the bill's proposals

probably represent the best possible way forward, given all the potentially conflicting demands and issues that people face in the trial-scheduling process.

Mr Maxwell: Do you accept that, if we are to have more certainty across a broad range of cases, we cannot say that certain cases must have fixed trial dates, or do you disagree with that?

Sandy Brindley: I disagree with that in principle. There is overwhelming documentation that demonstrates how difficult a sexual offence trial is for the complainer involved. Given what we know about the difficulties of giving evidence in such a trial, there is merit in prioritising certainty and fixed trial dates for those cases. Not being a lawyer, I do not feel able to comment on detailed procedural aspects. I am not the best person to say how that aim should be achieved but, as a matter of principle, we must recognise the distress that is caused in such cases and give as much certainty as possible to those who are involved in them.

Bill Butler: The written submissions refer to the possibility of prioritising or fast-tracking cases involving children or other vulnerable witnesses. Could the witnesses expand on how that might be achieved?

Frank Russell (Victim Support Scotland): The witness service has a high level of contact with children. In the previous financial year, we had contact with 4,500 children. In the first six months of this financial year, we have had contact with around 2,500 children. In relation to safety and intimidation issues, we have supported people on more than 800 occasions—that is about 2.5 per cent of people who are involved in trials. Of those 800 people, 115 were children. If we are to fast-track cases and give them a specific date, children should be given major consideration. I know that the Scottish Court Service has considered fast-tracking, but I am not qualified to comment on how that can be done. That is a piece of project management between the prosecutor and the courts system, but I think that it should take precedence over everything else.

Sandy Brindley: A commitment to early trial dates for cases involving children or vulnerable witnesses will be meaningless if the preliminary hearing happens only towards the deadline, which is 11 months. If the preliminary hearing goes right up to the wire like that, it is much too late, and there is no point in even considering early trial dates. The Crown Office and Procurator Fiscal Service needs to identify early on its wish to prioritise cases involving sexual offences or children. There would need to be a much earlier preliminary hearing to make that meaningful. We would applaud the commitment to consider having early trial dates, which could have a big impact in lessening distress. The proposals must be meaningful, however. The proposed legislation allows for having an early trial date, but it will be very much up to the Crown Office whether the proposals work in practice.

Margaret Smith: Rape Crisis Scotland's submission raises the potential advantages of an early preliminary hearing; in that regard, it identifies special measures for vulnerable witnesses. I take on board your point about the preliminary hearing having to be early.

I will ask a question that I have asked previous witnesses. Would you have preferred it if the preliminary hearing had had to take place within nine months of the first appearance of the accused, rather than within 11 months, as is outlined in the bill? That is different to Lord Bonomy's thoughts on the matter.

Sandy Brindley: Our preference would have been for Lord Bonomy's original recommendation of nine months. The earlier that the preliminary hearing takes place, the more certainty there can be for the witnesses, particularly in relation to special measures. You would need to take guidance on whether the nine-month deadline would be feasible for the preparation of cases, but that period would have been our preference.

Margaret Smith: Unless I have read it wrongly, your submission seems to assume that there should be only one preliminary hearing. Is that your view? Are you aware that some of the evidence that we have received suggests that there could be several preliminary hearings?

Sandy Brindley: I was not aware that there could be a number of hearings.

Margaret Smith: If people who come before the judge are not ready to proceed, the judge has the right to tell them to go away, work on it and come back later. It is quite likely that there will be not just one preliminary hearing.

Sandy Brindley: The overall aim must be to try to keep the schedule as tight as possible, to increase the amount of certainty for the witnesses.

Margaret Smith: Would your main point on this subject be that the special measures that vulnerable witnesses might obtain should be identified at the first preliminary hearing, so that a witness would know as far in advance as possible what was going to be done for them?

Sandy Brindley: We would like special measures to be identified as soon as possible. That would strengthen the provisions of the Vulnerable Witnesses (Scotland) Bill. We do not think that the way in which that bill is set out provides the best way of achieving improvements for women who are involved in sexual offence

cases. To improve certainty, there should be automatic entitlement to special measures. The bill as introduced increases the certainty that women could be waiting for up to 11 months to find out whether they have a right to any special measures, never mind which ones.

Considering how the two bills interlink, we would still like there to be changes to the Vulnerable Witnesses (Scotland) Bill. Whether or not those changes are made, and given how automatic entitlement to special measures is set out in that bill, there is still a degree of discretion. Even with automatic entitlement, people will not necessarily know what their rights will be in court until after the preliminary hearing. The hearing needs to take place as soon as possible to enable the witnesses to know what their rights will be. If there are to be a number of hearings, certainty must be provided at the first one.

Michael Matheson: It has been suggested that it would be helpful to have early disclosure of police witness reports to the defence. Do you have a view on that and on the possible impact on witnesses?

Neil Paterson: I have limited experience on that issue. Our interest in the changes to the disclosure regime concerns solely whether it would make a positive difference for victims and witnesses.

I am aware that, for some time, there has been a debate in Scottish justice circles about moving to a system that would be more akin to the English system, in which full disclosure happens at an early stage. From the point of view of the victim or witness, that might bring about some changes, in that the potential for multiple precognition from the prosecution and the defence would be reduced. Although precognition practice has improved in recent years—it would be wrong of me to pretend that there have been no changes in the ways in which lawyers approach the process—it is still a matter of concern for victims and witnesses, particularly in cases in which there are multiple accused. In such a situation, a victim or witness can be precognosced four, five or six times in relation to each of the defence lawyers who might be representing an accused.

It has been suggested that substantial savings could be made to the legal aid budget were alterations to be made to the disclosure regime. Perhaps that money could be usefully redirected to making improvements to the system in other areas.

Michael Matheson: It has been put to the committee that there are concerns about the quality of the witness statements that are taken by the police. If any scheme were to use witness statements instead of precognitions, the statements would have to be of sufficient quality to allow the defence to use them rather than having to precognosce witnesses. In that regard, would you like more to be done in relation to improving the quality of police witness statements?

Neil Paterson: It is many years since I worked in England and Wales, so my position might be completely out of date. I offer it in the hope that it is not.

In England and Wales, the system of taking witness statements is significantly different to the system in Scotland, in that the statement will be typed up and signed in a standard form. When I was working for Victim Support in England—12 years ago—witnesses would get a facsimile of that statement before they were called to give evidence in the witness box. When I moved to Scotland, I was surprised to see that the system differed significantly. I offer no comment on how that system would impact on the criminal justice process—I am not competent to offer such an opinion—but I believe that it was reassuring for victims and witnesses to remind themselves of what they had said to a police officer, given that there can be a significant delay between a statement being given and a case coming to court. If it were possible to incorporate that into the Scottish system, all other things being equal, we would probably welcome that.

Marlyn Glen: In your written statement, you expressed concern about bail provisions. The bill would make it possible for a person who has been refused bail to apply to the court for admission to bail subject to remote monitoring or tagging. What are your views on that proposal?

Neil Paterson: Our views are set out in our written submission. Since the advent of the ECHR, which means that all crimes are now, technically, bailable, we have anecdotal evidence that more people who are charged with serious offences are being granted bail. In itself, that is not a matter that gives us concern. What concerns us is that more people than previously have reported to us incidents of intimidation and harassment that might not have taken place had the accused person been on remand. There are a lot of conditionals in what I am saying, but I make no apology for that as our analysis is not scientific or empirical but is based on what our practitioners on the ground are telling us.

As the written submission says, using remote monitoring as a direct alternative to custodial remand might not be the most appropriate use of that measure. I noted with interest the points that Safeguarding Communities-Reducing Offending made in its submission. It stated persuasively that remote monitoring is better used as part of a package of measures. That might be a more appropriate way for the measure to be used in this regard and would probably give greater

reassurance to victims and witnesses in the community.

Mr Maxwell: In your written submission, you refer to the complexities surrounding the encouragement of early guilty pleas. Could you say more about that from the victim's perspective? How would they feel about early guilty pleas?

12:15

Neil Paterson: Three issues are probably involved. The first is that not all victims and witnesses welcome having to give evidence in court. Again, that statement is conditional, in that some people want the opportunity to stand up in front of a court and give an account of what happened and the way in which that may or may not have affected them.

For some people, it is clear that standing up in open court and being cross-examined is a very traumatic experience, and one that they would prefer not to have to go through. On that basis, a realistic system of inducements for early guilty pleas would be welcome to some victims and witnesses. The counterpoint to that argument relates to the fact that the inducements must not get to the point at which they lead to disposals that are disproportionate to the severity or gravity of the offence that has been committed. That is a difficult line to draw.

I note with some interest that the judiciary is looking to the appeal court for greater clarity in this area. We have also made note of the fact that the newly established Sentencing Commission is to be asked to look at some of the issues around the consistency of sentencing. The issue is complicated.

The last point, which is perhaps the most important point from the victim's perspective, is that very few victims understand how the sentencing system works. That is not entirely surprising. There is a range of complicated issues that include sentence discounting, people getting out at half time and a lack of understanding of the meaning of probation orders or community service orders. One of the major issues that needs to be tackled, although it is not within the remit of the bill, is how we can develop a more transparent and understandable system of disposals for the courts. That would do a great deal to increase the confidence of the public in the criminal justice system.

Mr Maxwell: Although some people prefer the person to plead guilty early on, so that they do not need to go to court, others prefer to have their day in court, as it often called. Is it right in principle that people should have their sentence discounted at all, just because they happen to plead guilty? Given that they committed the offence, is it right in principle that the victim of a crime should see the person get a reduced sentence just because they plead guilty?

Neil Paterson: There is probably a difference between my personal and professional opinions and between my opinions and what certain victims might say. It is difficult to express a conclusive view about what victims feel about that. I understand the complexities around the issue and the fact that there is a danger that sentence discounting could be seen as a managerialist intervention in the dispensing of criminal justice.

The answer probably lies in ensuring that the discounts that are offered should not unduly skew the penalty. That is probably the critical point. People need to be clear about the discount that they will get. I understand that guilty pleas will not otherwise be made. However, the discount should not skew the original disposal so much that the public at large is concerned.

Mr Maxwell: Would that concern be affected by the fact that judges will have to explain the reasons for the discounts that they give?

Neil Paterson: That is an important development. We welcome it, and I am sure that the public would, too.

Frank Russell: A similar point, which might help us to understand the issue, is that confusion is caused when pleas are accepted under deletion of certain offences. Victims and witnesses do not understand why those pleas result in lesser sentences. They have difficulty in accepting how the sentence relates to the crime. Those pleas cause distress to victims, witnesses and their families.

Sandy Brindley: That was exactly the point that I was going to make. The women with whom we work who have reported a rape to the police find it very distressing and hard to understand when a plea bargain is made in which the accused pleads guilty to a lesser charge. There are examples of cases in which the accused pleads guilty to a lesser charge that does not involve a sexual element. That raises big issues of public safety. A slightly patronising element is also involved when decisions are made to go for a plea bargain or for a charge that is based on the woman in a rape case being saved from having to go through a trial, if the woman is not consulted about those decisions. Before making the assumption that women would prefer to be saved from the ordeal of going through a trial—many women might prefer to go through a trial—we should at least have the courtesy of asking the victim before agreeing to a lesser charge with a far smaller sentence.

Mr Maxwell: Many changes to the criminal justice system are being proposed, including the

idea of victim statements. Is a straightforward problem with early guilty pleas that they do not merge well with victim statements? If somebody gives a victim statement, the judge is supposed to take that into account. At the same time, if the accused pleads guilty early, the judge is also supposed to take that into account. Are those two things pulling in opposite directions? Given the people that you deal with, how do you feel about that?

Neil Paterson: I suppose that there is the potential for those things to pull in opposite directions. The question would probably be better directed at a member of the judiciary by asking them how they would reconcile the two things.

Sadly, in their experience of going through the criminal justice process, victims and witnesses have to deal with many different potentially conflicting policy strands, of which this is just another example. On balance, we took the view that the victim statements scheme was undoubtedly a good thing. From the perspective of some victims, I can understand that sentence discounting for early guilty pleas is also a good thing. We may just have to live with some of the uncertainties, even though early guilty pleas and victim statements may not necessarily mesh well together.

Frank Russell: One thing that concerns me about the discount arrangement is that, if the discount is greater than the Crown would have liked, the Crown might take the case to the appeal court, which would increase or extend the difficulties for the family. The defence always has the option of taking the case to the appeal court. By creating a situation in which the Crown might also do so, those difficulties might be enhanced and we might find that there are more appeal cases. Obviously, that would have an impact on families and victims.

The Convener: That completes our questions. I thank the witnesses for their evidence, especially the evidence on the connection between the bill and the special measures for vulnerable witnesses. We will certainly take that point on board very seriously. Your comments on the discounting of sentences for early guilty pleas will be useful for our report. I thank all three of you for your evidence this morning.

Our third set of witnesses is from Safeguarding Communities-Reducing Offending, from which we have received a written submission. I welcome Susan Matheson, who is SACRO's chief executive, and Donald Dickie, who is its criminal justice adviser. Thank you for coming along.

Question 1 is from Margaret Smith.

Margaret Smith: As far as I can see, SACRO generally welcomes most of the bill's provisions in so far as they contribute to the reduction of delay and the promotion of efficiency in the system. What aspects of the bill are particularly useful in that respect?

Donald Dickie (Safeguarding Communities-Reducing Offending): We have generally focused on the areas about which we have some concern but, overall, the major thrust of the bill is clearly to reduce delays and inefficiencies. As an organisation that works with people who are both victims and offenders, we think that anything that will help to remove the inefficiencies and delays that are currently experienced is bound to be welcome. We are not an organisation whose daily business is within the courts in the same way as that of solicitors and advocates, so we have chosen not to make representations on those areas.

Margaret Mitchell: My question is about time limits. The proposal to change the custody time limits might result in people spending longer in jail. Do you have a view on that?

Susan Matheson (Safeguarding Communities-Reducing Offending): Are you referring to the extension of the 110-day rule?

Margaret Mitchell: Yes.

Susan Matheson: We are concerned that people would be in custody for longer, especially in the context that the proportion of prisoners who are on remand has increased substantially during the past year—we do not want that proportion to increase further. I refer back to the evidence that was given by the witnesses from the Scottish Human Rights Centre. I agree with everything that they said and with everything that Derek Ogg said this morning.

The 110-day rule is the jewel in the crown of the Scottish legal system. It has worked well for centuries and it is recognised as excellent by other jurisdictions. Usually, it is not extended; at the moment, it is extended in only 25 per cent of cases. The short period of time has several benefits for those who are innocent or wrongly accused, for victims and for witnesses. The sooner that people are seen in court, the better their recollection is likely to be, and the quicker the public will see results. There are other measures in the bill to tackle delays, particularly the enhanced co-operation between the Crown and the defence, which is a major thrust of the bill and should be given time to work. Extra time is not necessary and, as has been said this morning, human nature may well lead to people saying, "If I have an extra 30 days, I will use them." We would like the 110-day rule to be retained.

Margaret Mitchell: That is helpful. Thank you.

Marlyn Glen: SACRO appears to give guarded support to the proposal in section 14 that relates to bail and remote monitoring of compliance with bail conditions. Will you say a little more about your concerns about that?

Donald Dickie: As you rightly point out, we are not opponents of electronic monitoring. If remote monitoring is targeted properly, it can contribute to public safety and reduce the remand population, and we welcome it on those grounds. Our concerns are about the possibility that it might be seen as a panacea and that more qualities might be attributed to it than it can deliver.

SACRO has considerable experience in the area as we operate bail supervision schemes in Edinburgh, Ayrshire and Lanarkshire, and our colleagues at Glasgow City Council also operate such schemes. We have learned that a great deal can be gained from providing support and supervision to bailees who would otherwise be remanded in custody. We have evidence to suggest that sheriffs—and some High Court judges—have confidence in bail supervision as a way to ensure that bail is not abused and does not lead to further offending. We have high success rates.

In bail supervision, our criminal justice workers ensure that the bailees adhere to the major conditions in the bail order, such as turning up at appointments with whoever they are required to see, turning up at court and residing at the place where they are required to live. We have face-to face contact with the bailee at least three times per week—that includes an element of home visiting—and on at least one of those visits, sufficient time is given to address with the accused person any issues that relate to offending, such as substance abuse, alcohol abuse or other things that are likely to make them reoffend during the bail period or thereafter. A particular benefit lies in the fact that in cases in which bail supervision is completed successfully—that is, in more than 70 per cent of cases—it provides the court with more information and demonstrates to the court at the point of sentencing that the accused person can reasonably be relied on to respond to supervision in the community. They will have demonstrated that through their response to bail supervision.

Electronic monitoring by itself will not have such benefits. Although it will certainly provide some element of surveillance and supervision and information about the person's movements, it will not provide anything like the amount of close supervision and support that face-to-face contact can provide. As a result, where a court wishes to make an element of electronic monitoring one of the conditions of a bail order, it should do so in tandem with a bail supervision condition.

Our paper includes research findings from other jurisdictions and certainly a lot of evidence suggests that such an approach works better if there is human contact or assessment. For example, there are less likely to be instances of mechanical breaching of electronic monitoring through some technical failure or of one-off breaches where a bailee might be, say, five minutes late. That was the experience in England when monitoring was introduced some years ago without additional support mechanisms.

12:30

Marlyn Glen: You have helpfully explained what is involved in bail supervision. However, you said that you work in only some areas of Scotland. Why is bail supervision not available throughout Scotland?

Donald Dickie: In theory, the Scottish Executive Justice Department is very supportive of the local authorities that fund bail services and is in favour of bail services in principle. However, as far as we can establish, the funding in most areas allows local authorities to deliver only very limited bail services. For example, they might deliver some degree of bail assessment or a bail information service as a supplement to their court social work service. One imagines that the fact that bail supervision is not without cost might make the Executive slightly more reluctant to follow our recommendations and wishes.

Susan Matheson: I endorse those comments. As Donald Dickie has said, our organisation is not opposed to electronic tagging per se where it is a direct alternative to custody or remand. However, the Scottish Executive bill team has told us that it will consider introducing our proposal to allow tagging only in tandem with supervision in one of its proposed pilots. We hope that that will happen in an area with a well-established bail supervision service. That said, as Donald has pointed out, if our proposal were to be accepted there would have to be a significant increase in the provision of bail supervision across the country. Indeed, there would also have to be an increase in the information available to sheriffs about the availability of bail supervision in their area and about the aims, objectives and effectiveness of such supervision in order to give them confidence in using it in tandem with electronic tagging.

The Convener: On a point of clarification, do people who are sentenced to electronic monitoring also receive supervision?

Donald Dickie: Not necessarily. At present, some people receive supervision while others do not. People are usually sentenced to electronic monitoring under the terms of restriction of liberty orders, which can be imposed on their own or in

conjunction with probation or other community service orders. Based on all the research evidence that we have identified, we feel that it is better to carry out electronic monitoring in tandem with support mechanisms.

The Convener: So there is a general concern about restriction of liberty orders.

Donald Dickie: Yes. If electronic monitoring or whatever is simply planted in an offender's home without proper consultation or assessment of family circumstances, there is a risk that it might make some circumstances more difficult, exacerbate matters and lead people into further offending.

The Convener: But the figures show that the pilots have been highly successful and that there has been a high level of compliance.

Donald Dickie: There is a reasonably high success rate of compliance, but so far the take-up in Scotland is small. I think you will find that, statistically, the figures are not all that significant. This may not be strictly relevant to the bail issue, but the intention is partly for restriction of liberty orders to be an additional weapon in the armoury of sentencers and sheriffs. There is no evidence that such orders have made any impact as an alternative to custody; they are just another disposal in the increased number of disposals that are available to the court.

Mr Maxwell: The bill proposes to amend section 196 of the Criminal Procedure (Scotland) Act 1995 with a view to encouraging early guilty pleas. Do you agree that it is proper to do that?

Donald Dickie: We have not given that a huge amount of consideration, to be honest. As I said, we are not engaged on a day-to-day basis with the workings of the court. We have heard from today's discussion that a balancing act is required. As an organisation that helps social work services to provide the disposals and sentences of the court—enhancing probation and so on by providing programmes—we know that it is proper for the sentencer to take a whole lot of different issues into account when considering the sentence.

As was pointed out earlier, some of those factors may conflict with one another. It is perfectly proper to take into account the personal circumstances of the offender, their attitudes, and whether they show any remorse towards the victim. At the same time, that has to be weighed against the person's history of offending, their convictions and the gravity of the offences. If a judge was convinced that a victim had been spared some real trauma through a conscious decision on the part of an offender to plead guilty, there is an argument for some form of discounting. That is a personal view, rather than the considered view of SACRO.

Mr Maxwell: With all the caveats about that being a personal view, if it is reasonable to allow discounting for early pleas of guilty, do you have a view on how small or large the discount should be?

Susan Matheson: As an organisation, we do not have a view. We have focused on the areas that are in our remit.

Donald Dickie: We are reluctant to be drawn into a discussion that we have not viewed as our business to think about or consider properly.

Mr Maxwell: But obviously it will have an impact on everybody involved in the system.

Donald Dickie: Yes. Clearly, there is the potential in theory—as Mr Ogg would say—for sentence discounting to have an impact, in that people might serve shorter sentences, which would relieve prison overcrowding and reduce the increase in the prison population, which is created largely by people serving long sentences. That is the theory. However, I thoroughly agree with the comments made about the psychology of sentences. Sentencers are perfectly aware of all the different factors—the statutory discounting of sentences, the 50 per cent period and so on. I do not feel able to predict the outcome.

The Convener: We ask that question because in their evidence to Lord Bonomy prisoners said that it was important to maintain the principle of discounting sentences. We thought that you might take a view.

Michael Matheson: I turn to the proposal to extend the sentencing powers of sheriff courts from three years to five years in solemn proceedings. Your submission contains clear concerns about that, and you believe

"that serious crimes that may attract sentences of more than three years should be dealt with by our highest Criminal Court."

Will you expand on why you believe that that should be the case?

Donald Dickie: We think that that should be the case for reasons that are very similar to those that Mr Ogg expressed. Given that individuals' liberty is at risk for a lengthy period, they are entitled to the best hearings and the highest-quality representation in court that are available. The nature of the experience of the judges, the prosecution and the defence in the High Court means that it is inevitable that hearings in the High Court will be of a superior standard.

Susan Matheson: It was quite shocking to hear from Mr Ogg how a very raw recruit to the solicitors profession could represent someone who was liable to receive a five-year sentence. Such defendants must be represented by people who

have adequate experience. The use of new recruits with little experience would not necessarily provide justice. Mr Ogg made that point eloquently this morning.

Donald Dickie: It is also important to pay attention to what the vice-dean of the Faculty of Advocates, Roy Martin, said. I took him to be saying that it was just as important to ensure that cases were heard in the appropriate court as it was to ensure that each of the courts had the right sentencing powers. We agree with that.

One of the arguments that the Executive seems to have put forward for the proposed change is that too many cases that do not require a sentence of more than three years go to the High Court. Surely the answer to that problem would be to ensure that the right cases go to the right court, and that is at the instance of the Crown Office. If there is an issue, it should be addressed by issuing better guidance to ensure that the correct cases go to the correct courts, rather than by changing the courts' jurisdictions.

We have major concerns about sentencing drift, although we cannot prove them. If we consider the psychology of sentencing, it is difficult to believe that a sheriff who hitherto had only the power to impose a sentence of up to three years and who, in all other cases, had to go through the process of remitting a case to the High Court, might not, in some instances, impose sentences of longer than three years in cases in which they would previously have been satisfied to impose a sentence of three years or less. We think that there is a risk of sentencing drift.

There is evidence of inconsistency in sentencing, which I am sure that members know about. Although most of the published information is about summary cases, which are not the cases that we are talking about, the Executive was good enough to give us some figures about solemn cases. It is clear that, in such cases, there is a pattern of wide variety in custodial sentencing—the custody rates range between 57 per cent and 83 per cent across the eight major courts in Scotland. Although sentencing drift might not occur in all courts, there is a risk of it occurring in some courts.

Susan Matheson: If such sentencing drift happens, a consequence that concerns us is a rise in the prison population and an increase in overcrowding. I understand that the proposed change is due to be implemented reasonably quickly—perhaps before the McInnes report is published—and we do not know whether there are implications that should be taken into account before any other measures are implemented.

Michael Matheson: It has been put to the committee that a proportion of the cases that go before the High Court, which would attract a sentence of about five years, are not particularly complex and could readily be dealt with through the sheriff court mechanism. One of my concerns, which emerged from the evidence that we received before Christmas, is that it appears that an individual who has been involved in a serious matter but whose case is not complex will not be automatically entitled to be represented by an advocate in the sheriff court, whereas if their case had gone to the High Court, they would have had such an automatic right. It appears that the Scottish Legal Aid Board will apply criteria—as yet unknown—to determine whether that individual should be entitled to have an advocate represent them in the sheriff court.

Are you entirely opposed to increasing the sentencing powers of sheriff courts, even if it can be demonstrated that that will not lead to a sentencing drift and if we ensure that the accused receives the representation that is most appropriate to the case? If those points can be secured, would you be satisfied with an increase in sheriffs' sentencing powers?

12:45

Susan Matheson: I am not clear how those points could be assured.

Donald Dickie: I echo that. Members will understand that it is difficult to imagine the final outcome and the consequences of proposed legislation. We could be some way down the road before we establish what the actual outcomes are.

Michael Matheson: I will give an example that relates to the concerns that you expressed over access to the correct level of legal representation. If the Scottish Legal Aid Board decides that people whose cases will be transferred to the sheriff court will automatically be entitled to the same legal aid provisions that they would have received had their case gone before the High Court, would that provide you with the assurance that you seek?

Donald Dickie: That would certainly go some way along the road, from the perspective of the offender.

Michael Matheson: If a body such as the Sheriffs Association states that it is confident that there will not be a sentencing drift in the way in which sheriffs handle cases, would you be assured?

Donald Dickie: That is a much more speculative proposal because the Sheriffs Association does not have responsibility for sentencing policy. As far as I am aware, sentencing policy is not produced explicitly; as members know, it is done by precedent and appeal and so on. It would be dangerous to work

on the basis that an association of sheriffs can predict what individual sheriffs will do. The variation in sentencing throughout Scotland demonstrates that that would be a risky road to take.

The Convener: Your submission states that Scottish Executive statistics "illustrate inconsistencies" in sentencing. Are those figures publicly available?

Donald Dickie: Yes. However, although the figures for summary cases are in a publication on sentencing profiles, those for solemn cases are not in published form.

The Convener: For convenience, if you have those figures, will you send them to the committee?

Donald Dickie: Of course. If they are available to me, they must be public.

The Convener: That would be helpful. That brings us to the end of our questions. I thank the witnesses for their evidence, which has been helpful, particularly the written evidence on the importance of bail supervision and on how restriction of liberty orders should operate.

I welcome our final set of witnesses, who are from the Procurators Fiscal Society. Gordon Williams is the president of the society and Val Bremner is the secretary. We have received no written submission from the society. We will proceed straight to questions. I thank both the witnesses for agreeing to come to the meeting. We are pleased about that because we feel that it is important to talk on the record to them, given that much of the evidence that we have received so far refers continually to the importance of the Crown Office and early disclosure. My question is about early disclosure and the ability of procurators fiscal to deliver a culture change. In your view, how deliverable is that culture change?

Val Bremner (Procurators Fiscal Society): The Procurators Fiscal Society appreciates the opportunity to comment on the bill.

On the disclosure proposals, the society has no difficulty with the concept of early disclosure. Some of our members are using best practice and complying with that, but there is no doubt that it is piecemeal. It will take time and resources to achieve that aim across the board.

I have had the opportunity to consider the Crown Agent's submission to the Finance Committee about how the Procurator Fiscal Service will afford the extra resources that the bill will require. It is difficult for me to comment on the figures that he has given because I do not know how they were arrived at. I should say on behalf of the society that we are concerned about disclosure and the package of measures that the bill presents. If the Crown Office and Procurator Fiscal Service does not have the capacity to deliver those measures, that will go some way to ensuring that they do not work. No one wants that, so we have some concerns about the resources that are available to fulfil the disclosure obligations, but we welcome the idea.

The Convener: In your professional experience, are police witness statements taken in a form that is appropriate for disclosure?

Gordon Williams (Procurators Fiscal Society): Obviously the quality of those statements varies. As I was coming through on the train this morning, I read with interest some of the evidence given by the Association of Chief Police Officers in Scotland and the Scottish Police Federation when it was disclosed—no pun intended—that statements can be taken in a variety of different circumstances. Statements can be taken at the time at the scene of a minor incident when the parties are sober or unaffected by drugs, or they can be taken much later. It might take hours to take a proper statement. For example, it might take the best part of a morning to obtain properly a statement from a rape victim.

As a department, COPFS has engaged with the police at various levels to try to improve the quality and standardise the format of police statements so that we know what to expect. We would have to be sure that the statements are in the right shape to be disclosed safely to other parties.

Having had some experience of this, I ought to make the point that witnesses do not normally sign their statements. Police witnesses tend to do so, whether or not they have prepared the statement themselves. Many police officers dictate their statements and sign them. Others have their statements prepared for them, but they have to check, certify and sign them.

The average civilian witness does not sign his or her statement. So a witness might say to the police, "I think that I can identify the accused," but the statement might contain the words, "I can positively identify the accused." Practice has shown that we cannot always rely on that.

Val Bremner: There are statements that would not be suitable for disclosure. My colleague gave an example of a rape victim. If we get a police statement that gives a rape victim's address, for example, that would obviously not be suitable for disclosure in its present format.

Marlyn Glen: What is your experience of the effectiveness of pre-trial diets in the sheriff court in solemn and summary proceedings? Do they make an effective contribution to the efficiency of the system?

Val Bremner: Broadly, yes they do. However, they work when the sheriff takes a proactive role in managing business, particularly summary sheriff court business. If a proactive role is taken in a case—which might be huge—minds can be focused on whether the parties are ready and early pleas can be delivered. That is mirrored in what happens currently in first diet courts. If managed correctly, and if parties are co-operative and willing to take matters seriously and indicate their state of preparation or willingness to plead, pre-trial diets can work.

Gordon Williams: I share Val Bremner's view. Lord Bonomy emphasised in his report that there should be judicial management of cases, so that the judge does not just sit there as some kind of referee in the so-called adversarial procedure but reaches down—to use current jargon—and involves himself by asking whether, if witnesses' evidence is not in dispute, it can be agreed to avoid the witnesses having to come to give evidence. He could get the parties to focus on the issues that are in dispute. That process of separating the wheat from the chaff might leave the parties with a small issue to resolve in the course of a criminal trial. Some cases always look as though they are going to go to trial; in others there is room for a plea. An assault case with the defence of self-defence and a rape case with the defence of consent will probably go to trial, but drugs cases and assault cases with no special defences are, to coin a phrase, often ripe for a plea.

The Convener: I turn to issues that came up this morning when we discussed preliminary hearings with witnesses from the Faculty of Advocates. It has been suggested that the Crown relies heavily on section 67 of the 1995 act in relation to the production of lists of witnesses. The impact of the bill will be to wipe away that provision so that all evidence has to be submitted seven days before the preliminary hearing. What impact will that have on your work?

Val Bremner: That could have a substantial impact on our members' work. It is true that in a fairly high percentage of cases, the Crown relies on notices under section 67, but there is no complacency on the part of our members. Increasingly, we find that evidence such as forensic evidence comes in late in the day and as soon as we have it, we send it out. This goes back to the thinking behind the bill. There will have to be a culture change. All parties who provide us with evidence will have to consider where their priorities lie because, if we are going to have to produce the evidence sooner, we will have to get it sooner. A lot more work will have to be done at the front end of the process. Our members are willing to do that; it is a question of whether they have the resources and time to allow them to do it.

The Convener: Would you go as far as to say that if you do not get the required resources, the measures will fail?

Val Bremner: It is difficult for me to say exactly what resources will be required if the bill is passed. There is no doubt that with the advent of the preliminary diet, the managed meeting, the record of preparation and early disclosure, additional work will be required. It should not be forgotten that my colleague and I are aware that there is concern about the relaxation of the 110-day rule. That will not benefit our members, because the preparation for service of the indictment will still have to take place at largely the same time that it does now. There will be additional burdens in relation to pressure to disclose and prepare. Those are appropriate burdens and we have no difficulty with them, but we will need more time and legal support. The package that the COPFS has considered will take that into account. I do not know how the figures were worked up so I cannot comment on whether what is proposed is sufficient.

The Convener: From what has been said on the time limits, you could have a shorter time scale in which to get in your evidence if the courts take the view that most or all of the evidence should be available seven days prior to the preliminary hearing. At the moment, however, you can rely on section 67 if evidence arrives late so, arguably, you will have a shorter time scale.

Val Bremner: That is correct.

The Convener: I ask you about the written record of the state of preparation of the parties. There is no detail in the bill as to the form that it should take. Do you think that we need more detail or can that be left for further work?

13:00

Gordon Williams: The preliminary diet in the High Court is modelled to a large extent on what is known as the intermediate diet in the summary procedure, where cases are a lot less serious. Areas of good practice in various sheriff courts around the country have been identified as the best way of dealing with such cases.

A pro forma checklist is a simple device that a sheriff might use to ensure that, for example, the fiscal has cited the witnesses, that he is able to produce evidence of that and that the parties have put their heads together to try to agree non-contentious evidence—an example might be the evidence of the car owner whose car is broken into but who cannot say who did it because he just discovered it when he got up. The checklist is intended to whittle down what is required to be the subject of evidence at the trial.

From my experience, that kind of approach seems to work well in the first diet, as it is known in sheriff and jury cases, where the procedure is similar and where the same rules of evidence apply. An approach such as that in the High Court would probably reap rewards. The present danger is that there is no great meeting of minds until the first day of the sitting when most of the parties—it never seems to be all of them—troop in on the Monday morning. Nothing quite focuses the minds of the accused, their agents and indeed the prosecutors as the prospect of the trial going ahead.

The Convener: There are different views on whether a trial date needs to be fixed before or at the preliminary hearing. What is your view about that, given what you have just said?

Gordon Williams: I do not think that our members would have a particularly strong view. I was interested to hear Sandy Brindley this morning putting up a convincing case for rape cases to be among those that ought to be fast-tracked. However, we seem to be in an era in which so many cases have to be fast-tracked that it is difficult to put a case on what could be described as the slow track, or to send it by second-class post. There are cases that involve children and other vulnerable witnesses and there are cases that involve elderly people. Which is more urgent: a case that involves a 15-year-old or one that involves an 85-year-old? It might depend on the circumstances. There are race cases and cases that involve drugs. There are cases where there is a genuine threat to public safety. Those are all competing demands. The trick is to try to juggle them in the most acceptable way all round, bearing in mind the interests of the public, the accused, witnesses and the professionals who are involved in the system, because they all have a job to do.

Margaret Mitchell: Good afternoon. You have already touched on this but, for the avoidance of doubt, is it your position that the extension of the time limits might result in the work that has to be done within them being expanded or will the extension help you to achieve what is required of you?

Val Bremner: There could be additional pressure on our members, but it would be because of the whole package of measures—early disclosure, the preparation for the preliminary diet and any additional work that is required for the managed meeting or the record of preparation.

The extension alone will not make a great deal of difference in a positive way. We will still have to prepare and have the cases ready in the same time. As the convener pointed out, the effective removal of the section 67 notice could lead to our having less time. The society's view on the extension is that it could be a useful mechanism to ensure not that an indictment is served but that there is some certainty for the public, victims and witnesses that a trial will or will not proceed. Minds will be focused and people will be able to say whether they were ready.

Margaret Mitchell: If we turn that round, instead of extending the time limit, what if a greater emphasis were placed on resources being put in place to enable you to achieve the pre-trial disclosure that everyone agrees is a good thing? How do you feel about the suggestion that a Crown case manager should be appointed to take charge of a case from the very beginning, to avoid the use of section 67 notices? Such notices have been used in the past when, at the last minute, through no fault of their own, someone has been handed a case file and has realised that certain things have to be brought out. That may happen because of a lack of resources or just because of the way things work out.

Val Bremner: In our experience, a section 67 notice is not usually served because evidence has just been found in our department or because evidence has not been thought of by a colleague; it is usually served because evidence has been received from the police—or from someone else such as a forensic scientist. I would be uncomfortable about accepting that what you suggest is the usual reason for a section 67 notice being served.

Our view on having a case manager would be that, in the more serious cases that we are considering here, a case manager is in place at the moment, albeit under another name. When cases first come to court, they are allocated either to a legal member of staff—perhaps one of our members—or to a precognition officer, who will not be legally qualified but who will no doubt be experienced in the type of case. That person will be responsible for the management and investigation of the case up to the point when it is reported to the Crown Office and is thereafter carefully considered before indictment.

We therefore feel that there is some ownership of cases and that there is a point of contact. However, I accept that it is all very well to say that steps take place in our organisation and that indictments go out; the problem is that cases do not always go ahead in court.

Margaret Mitchell: Are you saying that, in 100 per cent of cases, the same person follows the case throughout?

Val Bremner: Before a case is reported for final instructions, the investigation of the case is usually—but not in every case—the responsibility of one individual. All sorts of things can change—there can be holidays and sick leave and cases

sometimes have to be reallocated as people move on to other duties. However, generally, cases are allocated to one person. That person may not necessarily see the case right through to the trial; they will see it through its investigation stage, after which it may be handed over to the responsibility of a High Court legal manager.

Margaret Mitchell: Would there be an advantage in the same person seeing a case through and keeping on top of things? In what percentage of cases does responsibility change hands earlier on in the system? In other words, how often does one person really take control?

Gordon Williams: I will try to answer that. I will take the second part first and say, no, I cannot estimate the number because I just do not know. I do not know whether such figures are available.

Like many organisations, the COPFS tries to encourage ownership of cases. We do not want wasted time and duplication of effort—and Lord Bonomy refers to that in terms of judicial involvement. The prosecutor—the advocate depute in the High Court—may prepare a case only to discover at the last minute either that it has been transferred out of his court, or that the accused has gone out for lunch and not come back. Derek Ogg spoke about that. Sometimes it happens in the middle of a trial and sometimes it happens just before the trial starts.

We try to minimise the number of people involved, but managing a large organisation, with a relatively large number of legal staff and a large number of cases, is difficult. Inevitably, the longer it takes for cases to progress through the system, the more chance there is of more people becoming involved. Ironically, people will tell you that a custody case—where the accused is remanded in custody and the 110-day rule applies—is easier to manage. Such cases are dealt with relatively quickly. Solicitors will even tell you that it is easier for them to interview their client, because they just go to Barlinnie. If the accused is at liberty, a solicitor might write a letter to them that comes back marked "Not known at this address". Solicitors will contact us nine months after an accused has appeared on petition and will say, "We have lost touch with the accused. We don't know what the story is." We can then put a note in our file that states that there is a good chance that the accused will not turn up. We will then call the trial on the first day of the sitting, without the witnesses being there. If the accused does not turn up, we can take out a warrant for his arrest and countermand the witnesses. However, the longer a case goes on, the more hassle and inconvenience it causes everyone.

Margaret Mitchell: Given the volume of cases with which the COPFS deals, would one of the best ways of making the system work better be the allocation of more procurators fiscal?

Val Bremner: To be fair to the COPFS, a good deal of work has been done and continues to be done that focuses on case preparation, doubtless in preparation for the package of measures that the bill will introduce. The department is looking at the issue. The work is resource intensive because the cases are serious and must be investigated properly. We do not make the decisions in the department, but I am sure that the department has been well advised and is considering the measures that it needs to put in place to improve the delivery of the service to the public.

Margaret Mitchell: I want to press you a bit on your last point. Derek Ogg said that he has not seen any substantial changes or improvements as a result of the Pryce-Dyer package. Is that your view? Is the Pryce-Dyer package sufficient, or is more needed? This is your opportunity to hold forth.

Val Bremner: If you are referring to improvements in the High Court, the running of the High Court is not just down to the COPFS or our members. From what we understand within the department, the Pryce-Dyer report initially focused on internal management changes and changes in how we deliver certain services. I understand that for some time the department has been focusing on solemn work, again with a view to the changes that the bill may bring about. Therefore, as a professional society, we can only wait to see what the result of that will be.

On the wider question of whether Pryce-Dyer has taken effect within the organisation, I am not sure that that is a subject for me to raise at this stage in this forum. We are here to talk about the bill.

Margaret Mitchell: Fair enough.

The Convener: Derek Ogg, like many others, was referring to being able to get a fiscal on the phone when it was necessary to speak to them. Whether that has been a good or a bad experience varies around the country. However, the availability of fiscals could be crucial to the management of early disclosure. That is what Derek Ogg was driving at. In that sense, it is relevant to ask you about the Pryce-Dyer report because it was meant to deliver more fiscals on the ground for people to talk to.

Bill Butler: I turn to section 11 of the bill and the proposal for trial in the absence of the accused. We have already heard that some witnesses view the proposal as controversial and problematic. I have just two questions on the proposal. In your experience, could a trial be properly conducted if the accused never appeared before the trial court?

Gordon Williams: I am happy to try to answer that. We have not taken a straw poll of our members, but I am confident that the view of most fiscals would be that a trial in the accused's absence should be confined to minor, non-imprisonable offences. There is provision in existing legislation for such a trial for minor matters, such as speeding. It is not so terribly bad if someone gets their licence endorsed with three penalty points when they are not present in the court. However, being jailed for life in one's absence would be a different matter.

There is something surreal about conducting a trial with no accused sitting in the dock. It happens more frequently than many people realise, because the accused might be a limited company. There might not be a person sitting in the dock at whom the witnesses could point and say, "He is the man who did it." However, representatives of an accused can instruct on who can put forward whatever defence the accused wants. I listened with interest to what Derek Ogg said about the proposal for having a trial in the accused's absence. Frankly, the proposal strikes me as being nonsense in the majority of cases. I certainly do not want it to happen in jury courts.

Bill Butler: I do not want to stray too far into the surreal, but if such a trial were taking place, would it present any particular problem or set of problems for a prosecutor?

13:15

Val Bremner: In fairness, I think that that would have less of an effect on the conduct of the prosecution case than it would on the defence. Clearly, we do not rely on the accused as part of our case; we might have their admissions to the police, but those could be read in their absence. Such trials, of course, depend on the identity of the accused not being at issue.

I agree with Gordon Williams and refer to Derek Ogg's earlier comments. It would be virtually impossible to defend a person on a murder charge without their instructions. As Gordon Williams said, we are not just prosecutors; we are also solicitors. The proposal makes us deeply uncomfortable.

Margaret Smith: The bill makes new provision for the apprehension of witnesses. In your experience, is the non-appearance of witnesses a significant problem in proceedings on indictment?

Gordon Williams: Yes. I think that I am quite well qualified to give an answer, because although I am here in my capacity as the president of the Procurators Fiscal Society—I was described as the chair, which was very flattering—in my day job I am the procurator fiscal at Paisley. Before going to Paisley, I worked in Glasgow and in Edinburgh, where one of my responsibilities was to manage High Court sittings. It was something of a revelation to move to the Saltmarket in 1996, just before the new extension was built, when we were using the north and south court, Lanarkshire House—now the Corinthian, of course—the sheriff court and sundry other buildings.

The extent to which proceedings were disrupted by the non-availability of witnesses was such that I used to think, when I started the job, that everything was meant to revolve around Donald Findlay's diary. In fairness to him, that was not the case; the availability of witnesses was critical in relation to the scheduling of cases. It was frustrating when everyone was ready to go ahead with a trial except witness 2, who was the essential corroborator of the testimony of witness 1, who was the victim. Sometimes I used to think that the only law that really applied in the High Court was sod's law, because we would postpone a case until later in the sitting in order to secure the attendance of witness 2, only to find that witness 1 did not turn up in the second week.

The whole thing was fraught with the inevitable difficulties of trying to secure the attendance of people, many of whom were reluctant to attend. Not all witnesses are decent, honest and truthful people like my mum, who are eager to come along and do their public duty. Many witnesses are as familiar with the court system as my colleagues are.

Margaret Smith: We heard earlier—I think it was from Victim Support Scotland—that some witnesses are fearful of giving evidence and feel intimidated. However, you are saying that others are as well aware of what it feels like to be the accused as the accused themselves and might not want to incriminate a friend or associate. In what sorts of cases might you apply for a warrant for the apprehension of a witness? It has been suggested that we should refer to recalcitrant, rather than reluctant witnesses, as there is a big difference between a person who is reluctant to be a witness because they are fearful and one who is reluctant because, frankly, they do not want to shop a pal.

Gordon Williams: Yes, absolutely. As I raised that point, I am happy to pursue it. As Lord Bonomy said in his report, one has to be extremely selective about the steps that one takes to secure the attendance of witnesses.

The fiscal, and the advocate depute in the High Court, will have information about the witnesses—usually from the police. The information will indicate whether the witness is genuinely fearful of the accused or is a good friend of the accused who does not want to come along. We can therefore make an assessment. In my experience it is very rare for the Crown to resort to seeking a warrant for the apprehension of a witness. Even when we do, we often say that it will be, in the

time-honoured phrase, "executed with discretion". That means that the police will go to the witness's house armed with the warrant and say, "If you do not come we have the power to arrest you."

I would not want the committee to think that my flippant remarks about some witnesses mean that we as fiscals are unconcerned and unfeeling about the genuine intimidation and apprehension that many witnesses feel. I have experience in a professional capacity, particularly in Glasgow, of cases in which witnesses have had to be given very special treatment. The witness protection programme was mounted by Strathclyde police during my time there. Quite elaborate measures are put in place to try to secure the attendance of witnesses who would obviously and understandably prefer not to come to court.

Margaret Smith: The bill makes provision relating to sentencing following a guilty plea—we discussed that earlier. Is it your experience that, in general, courts allow a discount for a guilty plea? How is that currently working in practice?

Val Bremner: That is happening in summary business in the sheriff court. It can work if the court is given the full information and the cases are managed properly from the bench. As a fiscal, care has to be taken that, in the case of an early plea the fiscal tells the court, for example, that witnesses have been cited but their time has been saved—they have not been required to attend. The earlier a plea, the better it is for the witnesses. On some occasions we can even have an early plea when we have not yet cited witnesses. We consider that to be helpful.

Margaret Smith: We have heard conflicting evidence about how helpful an early plea is. It has been said on the one hand that somebody who decides to plead guilty early in the process can save vulnerable witnesses, for example, from giving evidence. On the other hand, what does it say about justice if someone can get a reduced sentence because they have pled guilty to something, perhaps even if they have not done it? I presume that you are aware of the difference of views.

One of the factors that I would have thought important is the view of the victims and the people who would be called upon to give evidence in some of the particularly disturbing cases such as rape cases, sexual offence cases, murders and so on. The Rape Crisis Scotland representative said earlier that victims are often not asked whether they would prefer an early plea to be accepted, rather than have to give evidence. How do you go about deciding whether you should negotiate such pleas or whether it is in the best interests of justice to let the person go through the full process and let the victim have their day in court?

Val Bremner: We would have to distinguish between cases such as the example that you have given, of a rape case, and the more ordinary run-of-the-mill summary business. In a rape case our members would not negotiate any form of plea—that would be a matter for the advocate depute. As I understand it, best practice would be that we would try to involve the victim if that is possible. However, there is of course no point in approaching the victim until you have the offer of a plea. It would be silly and irresponsible to perhaps raise the victim's hopes that they would not have to give evidence. We would not involve the victim until a plea was on offer. Although the victim's views are taken into account, it is a matter of clear practice that the final decision would be for the advocate depute.

Gordon Williams: When I started in the fiscal service, more years ago than I care to remember—more than 20 years ago—the views of the victim were not such a central feature of the process as they are now. For example, it would now be almost unheard of in a murder case for the prosecutor or advocate depute to decide to take a plea to culpable homicide without first having the common courtesy and decency to speak to the next of kin. As prosecutors, we would always stress the fact that the final decision as to what plea to accept lay with us, but you have to weigh up the pros and cons as to the distress that might be caused by people giving evidence.

If you will forgive my using the term, it is almost a bird-in-the-hand approach that is sometimes adopted. I have known cases where the next of kin has said, "No. No way are you taking a plea to culpable homicide. My brother was murdered and we want this case to go to trial." The accused then goes to trial, is acquitted and walks out a free man. That is quite difficult for the next of kin to cope with and it is frustrating for the prosecutor at times. It is fair to say that there are occasions nowadays on which the views of interested parties, such as the next of kin or victims, might tilt the balance away from accepting a plea that the prosecutor might otherwise be tempted to accept. We have talked about the accused having his day in court. Sometimes, the victim and the witnesses want their day in court, and the process would run the distance.

Margaret Smith: Generally speaking, would you say that the victim or the victim's family should play a part in the process and at least have their views sought?

Val Bremner: In the more serious cases, that is certainly a practice that is being encouraged. We cannot say that it has happened in every case, because we have heard, even today, of cases in which it has not happened, but that is the practice that is encouraged and should be adopted. It

would not necessarily happen in the less serious summary cases. However, I think that we would both say that, in our experience, we have heard more witnesses than we can remember saying, "I'm so glad I don't have to give evidence." It is rare for someone to say, "Well, I wanted to go in there and say my piece."

Margaret Smith: In general, do you feel that the fact that judges will now have to say why they have come to a decision on a discount and what thought processes were involved in coming to the sentence is a positive step forward?

Val Bremner: It is difficult for us to comment on that, because sentencing is really not a matter for us, unless something goes awry and a sentence is considered to be unduly lenient. However, everyone involved in the justice system would welcome transparency, and if that is a move towards transparency, it is welcome.

Michael Matheson: I would like to turn to the proposal to extend the sentencing powers of the sheriff courts in solemn proceedings from three years to five years. Could you outline the practical implications that you think that will have for prosecutors and for your members?

Val Bremner: We discussed that before coming here. The figure that we have heard quoted is that perhaps around 20 per cent of the High Court's current business would come down to sheriff-and-jury level. The practical effect of that is that more of our members will be in court, prosecuting more cases; that is an inevitable consequence. The flip side of that is that, when they are in court doing those trials, they cannot then be preparing High Court cases. Again, it is a question of how best to use the resources that exist and of whether those resources are adequate. However, it is difficult for me to give an opinion as to whether they are adequate until we see, once the change goes ahead, how many cases come down and need to be prosecuted in that way.

Michael Matheson: Do you think that there could be serious resource implications if that is not managed properly?

Gordon Williams: There will probably be resource implications however it is managed. As Val Bremner says, there will be more sheriff-and-jury cases for fiscals to prosecute, because a proportion of those cases—let us say 20 per cent—would previously have been prosecuted in the High Court by advocate deputes.

Michael Matheson: If that change does go ahead and 20 per cent of the work of the High Court moves down to the sheriff court, is it just a case of waiting to see what the implications are, or should we be looking to ensure that certain resource provisions are made before change takes place? I am trying to get a feel for what can be done to ensure that problems are not encountered as a result of a lack of resources.

Val Bremner: Obviously, it would be better if work could be done in advance. I believe that the Crown Office and Procurator Fiscal Service has already considered the matter, but I do not know the details. We are not privy to any view that the COPFS may have formed, but it has worked out the implications of the bill for its legal and administrative support costs. I hope that it has taken account of the expanded requirement for sheriff and jury deputes.

13:30

Michael Matheson: What cases would you expect to indict in the sheriff court rather than the High Court? Can you give us any practical examples?

Val Bremner: The Crown Office would decide which cases would come down, but I would expect that drugs cases of lower value could come down and perhaps cases that now go to the High Court but that attract sentences of less than five years. Certain cases in which there have been robberies but in which no weapon has been used, or similar cases, could be considered. However, it is not for me to say what should happen; such decisions would be taken by those in the COPFS's High Court unit.

Gordon Williams: To be fair, previous committee witnesses have mentioned roughly the same kind of cases that Val Bremner does. John Ewing, who is the chief executive of the Scottish Court Service, was asked that question and he referred to drugs cases. Cases that involve assaults with weapons and stabbings in the street that might have been indicted as attempted murder, but in which the allegation of attempting to murder has been deleted and the case has been left as an attempt to endanger life, disfigure or impair could be considered. Cases involving death by dangerous driving under section 1 of the Road Traffic Act 1991 might also be considered. Such cases increasingly go to the High Court, as there is a public clamour for higher sentences for those who kill by dangerous driving, but such people do not always receive a sentence of more than five years—the sentence might simply be worth more than three years.

The marking prosecutor would have to make a judgment in deciding on the appropriate forum and, as with all judgments, people will never get things 100 per cent right. For years, cases have been dealt with in the High Court for which the accused has received a sentence of less than three years, or even less than two years, which is what the sheriff court's sentencing power was on indictment. Sometimes sheriff court cases are

remitted to the High Court and the accused receives a sentence of five, six or even seven years. It could be said that the Crown has got things wrong. Even the COPFS would agree that we do not always get things right, but unfortunately all the errors that we make seem to make the front pages.

Michael Matheson: What do you think about the suggestion that there could be a sentencing drift if sheriffs' sentencing powers are extended?

Val Bremner: We listened to SACRO's representation and, as solicitors who have practised in the sheriff court, perhaps we thought that something of a disservice was being done to solicitors and sheriffs. A number of highly qualified solicitors are well able to undertake the defence of persons who might hitherto have been dealt with in the High Court, but who could come to the sheriff court as a result of the powers that we are discussing. The same applies to sheriffs. There are many experienced sheriffs, some of whom are appointed as temporary judges to the High Court. It would be unfair to say that, because a case may now go to a sheriff court, there could be a problem with a sentence. It is not for us to comment on sentences, but we do not see any particular difficulties.

The Convener: Finally, I would like to check one thing with you. I understand that the aim is to shift business to sheriff courts from April 2004. Has the Crown Office's management consulted you about that prospect?

Val Bremner: No.

The Convener: Are you aware of the implementation date?

Val Bremner: No, I was not aware of the date.

The Convener: Okay. I thank the witnesses for giving evidence. We have not received a written submission. Do you intend to forward one? I hope that you will, as it would be useful for us in considering the evidence.

Val Bremner: We can certainly do so.

The Convener: Thank you very much.

I remind members that the next committee meeting will be on Wednesday 14 January, and that on Friday, there will be the practitioners' seminar in Edinburgh. At the next meeting, we will take evidence from Christine Vallely and Professor Dee Cook, who are authors of research for the Home Office on non-attendance by witnesses. In addition, arrangements are being made for a visit to HMP and YOI Polmont on 26 January.

I am sorry that the meeting has been so long, but it has been useful.

Meeting closed at 13:34.

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