JUSTICE 1 COMMITTEE

Wednesday 14 January 2004
(*Morning*)

Session 2

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JUSTICE 1 COMMITTEE

2nd 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:

Professor Dee Cook (University of Wolverhampton)
Hugh Henry (Deputy Minister for Justice)
Moira Ramage (Scottish Executive Justice Department)
Christine Vallely (University of Wolverhampton)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Douglas Thornton

LOCATION

The Chamber

Scottish Parliament

Justice 1 Committee

Wednesday 14 January 2004

(*Morning*)

[THE CONVENER *opened the meeting at 10:06*]

Item in Private

The Convener (Pauline McNeill): Good morning, everyone. Welcome to the second meeting in 2004 of the Justice 1 Committee. I ask members to do the usual and to switch off their mobile phones. I welcome formally our adviser, Christopher Gane, to the committee.

I ask the committee to agree that at future meetings we meet in private to discuss the content of the stage 1 report on the Criminal Procedure (Amendment) (Scotland) Bill. Is that agreed?

Members *indicated agreement.*

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

10:07

The Convener: Item 2 is consideration of the Criminal Procedure (Amendment) (Scotland) Bill. The committee will be aware that this is our last session of oral evidence on the bill—believe it or not. I refer members to the private paper that we have received, "A Study of Witness Non-Attendance at Wolverhampton Magistrates Court: a Comparative West Midlands Case Study". I ask members to note that the paper has not yet been published.

I welcome Christine Vallely, who is research fellow at the school of legal studies at the University of Wolverhampton, and Professor Dee Cook, who is the director of the regional research institute at the university. Welcome to the Justice 1 Committee and thank you for coming all this way to speak to us.

We have a number of questions for you. You will be pleased to hear that we are not too concerned to have you explain the differences between the Scottish and English procedures. We are interested in your research into why witnesses do not turn up. That issue is very important in relation to the bill that we are considering, because the purpose of the bill is to reduce the number of adjournments in the High Court and to create more certainty. As you will be aware, witness non-attendance is one of the main reasons for adjournments. That is the focus of this morning's meeting.

Mr Stewart Maxwell (West of Scotland) (SNP): Good morning. Can you give us a brief outline of the scope of the research that you have conducted? What courts did you examine? What was the nature of the offences in relation to which there was non-attendance? When did the research take place? Will you give the committee a general outline of the background to the research and why it was undertaken?

Christine Vallely (University of Wolverhampton): Good morning, everyone. The research originated from the cracked and ineffective trials data for England and Wales, which showed that many cases collapsed because of witness non-attendance. We were commissioned by a small local group, then funded through the Government Office for the West Midlands, to undertake a comparative study that was based in magistrates courts predominantly in Wolverhampton and Coventry, but also in two or three other sites in the west midlands. The focus was predominantly on what we call civilian

witnesses for the prosecution—not police witnesses, expert witnesses, defence witnesses or the defendant.

We started in November 2002 and finished in November 2003. We undertook a bit of retrospective analysis of case files and adopted a variety of methods, which started with the cracked and ineffective trials data, to consider reasons why cases collapsed. We also examined case files from the Crown Prosecution Service that went back for about six months. In case files from Wolverhampton and Coventry, we tried to identify any trends, such as whether—as the CPS believed—the witnesses' lives were so chaotic that they could not get themselves off to court on the right day, but we did not find that that was necessarily the case. We conducted a series of interviews with personnel in criminal justice agencies and with witnesses who had and had not attended court.

In January 2003, shortly after we started the research, a witness care pilot started in the west midlands, led by the CPS in conjunction with the police. We were asked in about May to examine the monitoring forms that the CPS had completed to evaluate whether the pilot was making any difference and having an impact on witness attendance. Those were the methodologies that we employed. Have I answered all the questions that you asked?

Mr Maxwell: You answered most of my questions. In a moment, I will pick up on a couple of points that you mentioned. I asked you whether some offences involved a greater likelihood of witness non-attendance than others did. Is that the case?

Christine Vallely: Yes. We found that non-attendance related predominantly to offences that involved violence, rather than property, harassment or even intimidation. Younger witnesses were more likely not to attend than older witnesses. The criminal justice system seemed to engage with younger people—people who are under 30—more than with older people.

Domestic violence is the key matter in the west midlands, where 20 to 30 per cent of cases that go to magistrates courts concern domestic violence. Such cases were by far the most likely to involve witness non-attendance. We should bear it in mind that magistrates courts have just over one witness per case and that the witnesses in such cases tend to be the victims. Reliance might be placed in a domestic violence case on a witness statement and a police statement, but the witness is much more likely to retract their statement, so those cases collapse.

Mr Maxwell: Will you explain what cracked and ineffective cases are?

Christine Vallely: Since about two years ago, magistrates all around the country have had to complete at the end of each case a form to say whether the case was effective—whether it went to trial. A case might not go to trial for a variety of reasons, some of which might be described as a good result—for example, if a person turns up and pleads on the day. However, a plea on the day is costly because of the expense of running the trial, booking the courtroom, having all the personnel and getting the witnesses. It is a good result, because a plea has been obtained without the problem of putting the witnesses to proof and going though evidence, but it is also a bad result in some respects, because it is an expensive gain.

As is being contemplated or already being done in Scotland, judges in England are being encouraged to give discounts for early pleas. That message has not been getting through, at least in the cases that we have been examining. People are still saying that it is better to wait and see, because the witnesses may well not turn up. Therefore, people will delay and delay.

A cracked trial is one that terminates on the day, and in which there is no further action. There is a list of about 11 reasons why that might occur, one of which is a late plea. A bind-over also counts as a cracked trial. Witnesses not turning up is another reason why cases crack. A further type is an ineffective trial, which involves a case not going ahead on the day listed, but being set for a future date. That is an adjournment and the hope is not to have too many of those. If witnesses keep on turning up and cases are adjourned, there will be witness fatigue—people tend to get a bit fed up, as you or I would. The statistics on that have been counted over the past two years or so and they form part of strategic steers and performance indicators for the Court Service.

10:15

Mr Maxwell: Correct me if I am wrong, but I think that you said that a chaotic lifestyle did not seem to be a reason why people do not turn up to trial. Perhaps it is a modern myth, but the generally held view is that a chaotic lifestyle is a reason why some witnesses do not turn up. You found that not to be the case, however.

Professor Dee Cook (University of Wolverhampton): That is correct. Our original research question tested that. It asked what it was about some victims and witnesses and their lives that rendered them either unable or unwilling to attend court. By the end of our one-year project, we had turned that question round. We feel that it is more appropriate to ask what it is about the operation of the criminal justice system and the support services that makes witness non-attendance more likely.

When we considered the characteristics of victims and witnesses who did not attend court, gender and ethnicity turned out not to be significant determinants. As Chris Vallely mentioned, youth was a determinant. The cases in which witnesses do not attend are most likely to be those involving younger, predominantly male defendants who are alleged to have been involved in a violent offence, rather than in a property offence. The other factor was whether the witness was likely to know the accused. We found that one of the principal reasons for non-attendance was intimidation.

There is a far greater likelihood of non-attendance in domestic violence cases. We interviewed victims and witnesses, some of whom had attended court and some of whom had not. We asked them about their experience of the processes and their reasons for not attending. Overwhelmingly, they gave reasons of fear and intimidation. They felt that the criminal justice system and the support services should be doing more to protect them outside and inside the court. They felt that simple things ought to be done for them. For example, they wanted to be notified in good time about when they were due to arrive. In many cases, people did not think that they had enough notice to attend court.

Aside from intimidation and problems with notification, there was a tranche of issues around personal and practical difficulties, which included child care, travel and getting time off work. We felt that those issues did not reflect what could be termed chaotic lifestyles among victims and witnesses so much as a lack of co-ordination of support to enable them to attend. Those findings debunked the myth, to a great extent. Many of the policy recommendations that came out of the research are far more to do with the criminal justice system than with the pathologies or biographies of the individuals who do not turn up.

Mr Maxwell: You mentioned early guilty pleas, the idea of which did not seem to be getting through to the accused. Could you expand on that a little? The idea is that, if the accused knows that an early guilty plea will result in a reduced sentence, the throughput of cases will increase and there will be less of a problem in the courts. You seem to be saying that, despite that, accused people are still not pleading early.

Christine Vallely: There are a variety of reasons for that. One question is at what stage the signal should be given to the defendant that there will be a discount for an early plea and whether the defendant should be told that the sentence will be reduced by X amount. I do not think that there are any guidelines on that. At the early stages of a case, or when different magistrates handle a case throughout its currency, a magistrate might feel that they do not know enough about the strength of the case to say what kind of discount they would give for an early plea. From talking to magistrates, I know that they have the problem of knowing exactly what to say, when to say it and how to signal the message.

A defendant who feels that the victim will retract—which may happen in domestic violence cases in particular—will weigh up the potential discount that they may or may not get, and which nobody is really pushing, against the chance that the case may not reach that stage. I was astonished by the number of times that a defendant facing a simple assault charge can be brought back to court for a variation of bail or child contact conditions, for example. They might have to go back because, when the prosecution was supposed to be ready, it was still waiting for a full file or for a copy of a videotape to be handed to the defence, perhaps because of a backlog in the copying department. The defendant may go to court many times in the course of a few weeks or months in respect of one charge. Given that the case may collapse and come to an end at any point, why should the defendant not wait and see? That is the problem. The message is not getting through.

Another problem, especially with magistrate cases, although it may not be the same in the Crown court, is that if the case relies only on the victim's evidence, there is a great chance that it might fold. The evidence gathering that the police are required to do seems to be ineffective at that level. If a defendant was presented at an early stage in the trial process with both a strong, good-quality case and the discount, there would be more chance that he or she would plead guilty at that earlier point.

Marlyn Glen (North East Scotland) (Lab): You have gone through the principal reasons for non-attendance and comprehensively debunked the notion of the witness deficit—that is not where the problem lies at all. I have a question on an issue that you have not covered. Is there a difference between the attendance or non-attendance of complainant witnesses and other witnesses?

Professor Cook: Non-attendance is a specific issue for victims in domestic violence cases, but the interesting point is that, in general, the patterns and numbers are not much different; the same reasons for not appearing were articulated by witnesses and victims. Intimidation seems to apply as much to witnesses as to the victims of crime. If anything, the non-attendance problem might be slightly greater for witnesses than it is for victims, but the reasons that the two groups give are similar. Non-appearance is often a result of the fear of reprisal or actions by people whom the victims or witnesses already know.

When we turned the question round and asked people who attended court why they did so, they gave the reasons of justice and duty, but nonetheless said that they felt fear and intimidation. They, too, suffered from notification delays, lack of support and lack of information about issues such as expenses, travel, time off and child care. In a way, we found that the issues were more systemic than individual and that they were largely not to do with whether the people involved were victims or witnesses.

Marlyn Glen: Did witnesses for the defence attend court more or less often?

Christine Vallely: We did not do research on the defence, because our brief confined us to considering civilian prosecution witnesses. However, in the course of the research, we came across a wealth of feeling in certain areas, particularly in the CPS, that defendants often play the system, delay and are absent and have to be chased. However, we are again talking about small numbers of non-victim witnesses. The statistics indicated that there was an average of 1.6 witnesses per case, so generally the only witness was the victim.

I will add to what Dee Cook has said. Our analysis of the case files threw up results that were slightly different from the qualitative results that we obtained from direct interviews with victims and witnesses. The statistics seemed to show that more witnesses who were not victims attended. It tended to be victims who did not attend.

I want to make a point about intimidation. In my view, the problem is fear of intimidation rather than actual intimidation. We did not come across many instances of actual intimidation. The feeling tended to be that because the case was in a magistrates court, the offender would not attract a large sentence even if he was found guilty. People knew that they would have to continue living in the area where the incident happened and where the defendant and his family live, so they would rather get on and not pursue the matter. Fear was a problem.

Dee Cook referred to problems of communication. There is a duty on the CPS to communicate directly with victims when there is a change in the charge. However, there is no duty on it to keep them informed of the progress of the trial or to contact witnesses to tell them what is happening. Often people told us that a case had been going on for ages, that the incident happened X months ago and that they had heard nothing since they made their statements. They did not know whether the defendant had pleaded guilty. One person said that they read in the newspaper that a defendant had pleaded guilty.

Communication is a serious issue. The witness care pilot that was introduced in the west midlands last January required contact with witnesses to inform them of the progress of cases. There was one very successful scheme in West Bromwich, which involved one person ringing all the witnesses before the case came to court to ask whether everything was still okay and whether they needed transport to be arranged. That was a big responsibility for one person, but it produced a significant increase in the number of witnesses attending. The personal touch and talking over in a friendly way what was likely to happen when witnesses arrived at the court worked well. That seemed to be what people wanted.

Professor Cook: The case study of victims who were supported by the scheme indicated that more than 90 per cent of them turned up on the day. Often the support is relatively low tech—a telephone call and regular personal contact. Victims and witnesses want continuity of support, from the incident through to aftercare. There is evidence that attendance can be enhanced significantly, especially in cases where there are vulnerable witnesses and witnesses who are victims in domestic violence cases. Where support systems are in place from the word go and there is effective liaison from the stage of reporting to the police onwards, attendance is significantly enhanced.

Marlyn Glen: You have talked about the factors affecting witnesses. Can you comment briefly on the risk assessment framework that you recommend?

Professor Cook: By the end of the research, we came to the conclusion that the risk assessment framework would be a framework for issues that the criminal justice system needs to address, rather than for individual risk factors. There are risks if victims and witnesses are young, male and involved in crimes—predominantly crimes of violence, rather than property crimes. If we are dealing with victims of domestic violence, there is a need for continuity of support from the incident onwards and regular contact on the progress of the case. There is a pressing need for links between the support services, the police and the CPS, so that there can be regular updates on the progress of the case and victim and witness fatigue does not set in. The risk assessments relate to the provision of services and support rather than to anything that is pathologically wrong with the lifestyles of the victims and witnesses.

Margaret Mitchell (Central Scotland) (Con): I want to tease out what lies behind non-attendance in domestic violence cases. Is it only the complainer who does not attend, or does non-attendance extend to other members of the family or household? Is the non-attendance of the complainer or other members of the household simply the result of intimidation or is something

else going on in the background, such as the complainer saying that, because things are okay now, they do not really have to go to court and the incident will not happen again?

10:30

Professor Cook: We are just completing a piece of work on specialist domestic violence courts for the CPS. We have found that it is rare that witnesses other than the victim are called. The stress is overwhelmingly on the victim as the key witness and the case stands or falls on her—it is usually a woman. Non-attendance is overwhelmingly non-attendance of the victim.

The reasons behind non-attendance are often to do with wanting to move on, either with the perpetrator or without. We came to the conclusion that, if a case does not proceed, that is not inevitably a bad result, as long as the woman feels that she is supported and that, if she has decided to retract, she has made an informed decision. We believe that unplanned non-attendance is still problematic but, if a woman makes an informed decision with support from community-based organisations or women's networks and she wants to retract, we do not see that as being too much of a problem. The difficulty comes when she is not supported and does not turn up on the day because she is afraid. We see that as a problem. I do not know whether that answers your question.

Margaret Mitchell: I was wondering about cases where the victim does not have community support and the couple have apparently resolved the problem themselves but the violence happens again.

Professor Cook: There is a lot of evidence that repeat victimisation is dramatically reduced with the advent of specialist domestic violence courts and where there is co-ordination of support. For example, we are coming across reductions of approximately 35 per cent in repeat victimisation in the Wolverhampton area. That is highly significant. Likewise, there has been a dramatic reduction in repeat victimisation in Cardiff, where there is a specialist court. The issue is not so much that there is a specialist system there; it is that the court offers a framework within which support can be co-ordinated between the criminal justice system and outside agencies, which seems to offer positive benefits. We are due to complete the research on 31 January, so we are close to the end, but that is the message that is coming out of it at the moment.

Margaret Mitchell: That is helpful, thank you.

Mr Maxwell: I seek clarification on one point. You talked about a reduction of 35 per cent. That sounds highly significant. Is that just in domestic violence cases?

Professor Cook: Yes. There is a 35 per cent reduction in domestic violence cases.

Bill Butler (Glasgow Anniesland) (Lab): You have talked about the need for continuity and co-ordination of support for witnesses and you said that that would tackle the root problem of non-attendance. Christine Vallely also mentioned the pilot for witness care and the fact that it seems to be having a positive effect. For the record and for the committee's information, could you say whether there are any plans to roll out that pilot programme for witness care?

Christine Vallely: In mid-May, when Professor Cook and I were in the middle of our case study, we were suddenly asked to evaluate that scheme, which was not part of our original project. We were told that the Home Office was keen to roll out the pilot project as quickly as possible and were led to believe that that might happen in the summer but, since then, we have heard nothing further about it.

A CPS-led scheme was being trialled in the west Midlands and a trial of a similar but police-led scheme—in Southwark, I think—had begun. As I understand it, those results were going to be compared to find out which was the best lead agency. We felt that it was better that the police led such a scheme, as they had charge of the witness from the start. When we subsequently interviewed victims and asked them what they thought of the CPS, they would say, "Who are they?" It seemed strange to us that the CPS would be put in charge of leading witness care when it had so little to do with witnesses. In fact, the prosecution fears that any contact with the witness might give rise to accusations of coaching them and of influencing and contaminating the evidence. We need to address the issue of the sanctity of the evidence and who should be put in charge of it.

We felt that, although the care scheme was going reasonably well—we should remember that it was still at a very early stage—it might be better if the police had the witness from the start of the process. After all, they are the face of things; they are the people whom the witness knows.

Bill Butler: Were the police the lead in the pilot?

Christine Vallely: In the west midlands scheme, the witness care team—such as it was—was specifically located in CPS offices. In the best model, police witness warners—who are civilians, not police officers—formed part of a team that liaised closely with the witness service, which is a voluntary organisation. When we evaluated the scheme in May, although it was still too early to say whether it was having a significant impact on the figures, we found that it was having an impact on witness satisfaction. Reviewing the scheme's attendance statistics in six or eight months' time

would give us a better picture of whether it was delivering concrete results and getting witnesses into court.

Bill Butler: Was the scheme changing the culture and the approach to the problem?

Christine Vallely: Definitely. These things take a bit of time; however, one problem with such an approach is that systems need to be in place. Although there were good, enthusiastic and committed people in the witness care pilot schemes, too much depends on them if the system is not embedded in the agencies' framework. As a result, problems arise as soon as those people move on.

Professor Cook: Given the contents of the Queen's speech and certain issues such as establishing a code of practice for victims and appointing a commissioner for victims and witnesses, the roll-out of witness care pilots forms part of a very dynamic policy context. At this stage, it is probably wrong to talk about a roll-out of specific witness care pilots. Instead, we should discuss embedding the notion of witness and victim care in structures throughout the criminal justice system. I believe that there is a commitment to put the victim at the heart of the criminal justice system and that that approach is being pushed even further.

Bill Butler: So the evaluations exist in order to come up with a system or approach that can be rolled out. Are you saying that, at the moment, you do not have that approach and that the pilot projects will produce it?

Professor Cook: Indeed. Practice is very variable. I should also stress that our research in the past year has shown that there are some real problems with data and information-sharing protocols and data protection issues. When voluntary and community sector organisations were involved in multi-agency support teams, which is a highly desirable approach, we found that there was some reluctance in some—not all—CPS circles to share information. As a result, there is a blurring of what is and is not possible with regard to information sharing, but a very positive team that wants to work collaboratively in the interests of victims and witnesses will make the approach work.

Bill Butler: So it comes down to a change in culture—the problem is attitudinal.

Professor Cook: It is largely attitudinal, because the mechanisms are in place in the UK under the Crime and Disorder Act 1998. The mechanisms for sharing information and data are there if the will is there. I go back to the example of the Cardiff fast-track domestic violence court, which has developed information-sharing protocols and risk assessments that operate across health, education and social care as well as the criminal justice system. Those things can be done.

The lessons of the research must be taken on board—we must get the collaborative, multi-agency act together. As Christine Vallely said, we came across a couple of examples of good practice. For example, the VIP—victim and witness information—project in Warwickshire is an information portal that deals with domestic violence, antisocial behaviour and a range of offences. It has a street-front location; there is a front door where victims and witnesses can call in and find out about the progress of their case. The information that the police have—up to a certain level of security—is available to everybody who participates in the portal, including voluntary and community sector organisations. That very interesting project, which is funded by the Home Office, started in October and will have very interesting results.

Bill Butler: Would it be possible to get more information about that project?

Professor Cook: We have spoken to Jan Kilgallon, who runs the project. As I say, it is a Home Office pilot project that started in October 2003 and offers an interesting way forward.

The Convener: Information about that project would be helpful, given the prominent issue of non-attendance of witnesses and the whole debate not only about the bill but about how to make the system more witness friendly. We would appreciate information about that project.

Margaret Smith (Edinburgh West) (LD): One of the suggestions in the bill is that measures should be put in place to compel people to be available to give evidence. In your view, when would it be appropriate to arrest and detain a witness in order to secure his or her attendance at court?

Christine Vallely: We have mixed views on the issue. It is possible in the system with which we are familiar to issue a summons when you know that a victim or witness is not going to attend court. Summonses are used variably. Some CPS offices believe that a summons should not be issued to compel a victim of domestic violence, for example, to attend, because that has an impact. The corollary for us is whether to issue a warrant for arrest for breach of that summons and therefore to criminalise a person who is a victim of domestic violence.

Some CPS prosecutors are happy to issue a summons, but not to follow that up with a warrant for breach. Magistrates' views also vary and the police have a different view about the matter. Their view is that a summons has to have teeth: if you are going to issue a summons, you have to show that you are prepared to follow it up.

Victims of domestic violence in particular—we have heard this even from advocacy support agencies—feel that they are relieved of the burden of prosecuting the case themselves if they are compelled to attend. They can say to their partner, “Look, I have done everything. You wanted me to retract and I have retracted. Now I am going to be compelled and the court says that I have to go.” However, there are still women who would not answer the summons. Certain issues should be taken into account in deciding whether to issue a warrant for arrest. Those include whether there are child protection issues and whether there are self-harm issues in respect of the woman herself. I do not think that we could say categorically, “Oh, yes—you must go ahead and issue the warrant, and you must arrest the person.” These are very difficult situations in which case-by-case decisions must be made.

10:45

Professor Cook: It is important to stress that, although there is a place for compulsion, we have looked at the patterns and reasons for non-attendance and the number of what we have called “deliberative non-attenders”—the people who do not turn up at court without just cause or a well-articulated reason—is relatively small. We are talking about a minority.

On the basis of this research, we believe that for the most part we can reduce non-attendance by creating better systems through the criminal justice system and better support. The issue of compulsion is relatively marginal, but it is important in cases of domestic violence. If a summons is issued, are we prepared for that to be enforced? Some practitioners argue that if not, word will get around that summonses do not have teeth and are not worth using.

As Christine Vallely rightly said, there is a very specific issue in domestic violence cases that may not exist in others. Risk assessments should be conducted before a decision is made to issue a summons and, in particular, a warrant for breach. Risk assessments must include the risk of self-harm to the victim. However, there is a view among women support workers in the voluntary and community sector that there will always be a place for compulsion when a women says that she does not want to attend but a risk assessment is conducted that indicates that her children are at risk. It is important to stress that there may be a place for compulsion when child protection issues are at stake. Our view is that if a decision to compel a witness to attend is to be taken in a domestic violence case, it should be taken in conjunction with voluntary and, perhaps, statutory sector support agencies. A risk assessment should be conducted before that happens.

Margaret Smith: You have focused very much on domestic violence situations, which are quite different from organised crime situations or situations in which the accused is known to the witness in a different way. What approach should we take in such situations?

Christine Vallely: In every case, I would be inclined to want to know what the consequences for the person might be. They might have children who were not part of the incident, but I would be concerned about issuing warrants to arrest without knowing the full background. There are very simple—apparently trivial—matters that must be addressed. For example, has the witness had proper notice of the hearing? We discovered that contact details may be inaccurate, which was astonishing to me. So much time may have passed since an incident took place that a witness may have moved or changed their mobile phone number. I would need to be assured that the witness had had effective notice, had not been misinformed or not informed at all and had made a deliberate choice not to attend.

Professor Cook: That is the point that we are making in relation to deliberative non-attenders. We are saying that there will always be a place for compulsion. In the case of deliberative non-attenders, compulsion is an issue, providing that it can be demonstrated that they have received due notification—in other words, that the system has not let them down in terms of information about the progress of the case. If that condition is satisfied, compulsion may be possible. However, on the basis of the research that we have done, we feel that there is so much slippage that one cannot assume that because someone does not turn up for a court hearing on a particular day they have simply decided that they cannot be bothered. In that situation, one cannot just issue a summons. There may be many other hidden reasons for non-attendance.

The Convener: One issue with which you may be able to help us is that of early disclosure of police witness statements. This relates to the need to tidy up the system and have early disclosure. If we have that, parties will be more prepared and cases will be more likely to go ahead. That is our theme. We have heard evidence about the purpose of police witness statements and the fact that they vary in quality. If they were of a better quality, it might almost be possible to use them as a precognition. Questions have arisen around that, however. What would the witness think if they knew that the statement that they gave to the police would be released to the other side pretty early on in the process? In some cases, the police tell witnesses that if they give a statement to them at the time, they might not have to appear in court. Any information that you might wish to give us on that point would be very useful.

Christine Vallely: We have not done specific research into that area, although we have come across examples of it, both through looking in case files and through talking to people. The question of the quality of police statements is interesting. It is extremely variable, although that does not necessarily correlate to the age or experience of the officer who takes down the statement.

On the second point, we came across countless instances of people being told that, if they gave a statement to the police, they would not have to go to court and nothing else would happen. Part of the message that the witness care pilot tried to convey to police officers was that they must not say such things when taking a statement. Various methods of getting that message through to police have been tried in a number of places in the west midlands, including having little cards with bullet-point messages to police to remember not to tell the witness that they will not need to go to court. It can be as simple as that. Much of the reluctance of witnesses is based on misinformation or a lack of information. It would be better if witnesses were told right from the start what the likely scenario was going to be or what the possible outcomes were.

We obviously want witnesses to go to court and we want people to be brought to justice. However, we do not want cases that are not strong and which might collapse to limp on for weeks or months at enormous cost. It is better to be up front, to give true information, and to put in the support at the start, so that organisations such as the witness service can tell people that they can have someone from the service talk them through things, that they can go to court and have a pre-trial visit to see what the courtroom looks like, and that they need not be afraid of the processes involved. Giving better, accurate information from the start is likely to lead to stronger cases. If a case is not strong, the prosecutor needs to take an early decision to discontinue and stop wasting time, money and effort on cases that are going to fold at a later date.

Professor Cook: I totally agree with that, but wish to add one small point about training. We came across mixed views about whether the police were actually being trained in victim and witness care. Practice is very variable, and there are training issues around better collection of evidence, better taking of statements and better relationships and linkages between the police and victims and witnesses. At the moment, despite the fact that we are being told that witnesses are at the heart of the criminal justice system, issues such as those that Chris Vallely has just raised cannot be resolved unless police officers are getting trained in such best practice.

The Convener: The report leading to the introduction of the Criminal Procedure (Amendment) (Scotland) Bill mentions the importance of court accommodation, particularly in cases where the witness might come across the accused. So far, no specific measures have been recommended in that regard, but how important is it to address that issue?

Professor Cook: Forgive us if we concentrate a lot on domestic violence—we are involved in work in that area. Witnesses in the situation that you describe are a key group as far as witness non-attendance is concerned. We looked at a range of courts, and the question of court accommodation is vital. Often, there is apparently very little that can be done with old, listed court buildings. However, the provision of separate entrances and exits, where that is possible, is vital if we are to address the issue of intimidation. Victims and witnesses could also be accompanied to court. It is low-tech stuff, which can involve the voluntary and community sector, Victim Support or the witness service simply accompanying somebody and showing them around the court.

Court accommodation is also important. If a victim or witness knows that they do not have to run the gauntlet past the defendant and various friends, relatives and supporters, they would be far more likely to give evidence. At the same time, there are issues around accommodation, child care and provision of refreshments. If you are going to keep people hanging around for two, three or five hours, you have to give them effective facilities to use during that period.

Another issue that will be raised in relation to accommodation relates to vulnerable or intimidated witnesses; there might be a need for video links and other facilities. The type of accommodation at the court is vital. There have to be separate rooms and the technology and infrastructure have to be available to enable that to happen.

We are finding that there is a stress on intimidation and fear so it might be that, as in England and Wales, the facilities for juveniles are extended to adults. The demand for such facilities is going to increase dramatically.

Mr Maxwell: One of the measures in the bill that we are considering is the possible detention or electronic tagging of reluctant witnesses. Given that you said earlier that attendance of witnesses was significantly enhanced by personal contact with the court system, even if it was as little as a phone call, do you believe that electronic tagging is necessary or desirable? If better systems were in place and there was more personal contact, would that deal with the problem in the majority of cases?

Professor Cook: I would overwhelmingly not agree that such measures are an effective and appropriate way of encouraging attendance. They send out the signal that the victim is being criminalised, which I think is appalling practice. We can use interpersonal and low-tech means of keeping in touch. There always seems to be a regression into trying to use controlling high-tech mechanisms that are simply not appropriate and that send out all the wrong messages to victims and witnesses. I emphatically do not agree with that idea.

Christine Vallely: I might not be as vehement as my colleague, but I would prefer to make sure that all the low-tech and obvious measures are taken first. Before we start to say that it is all the witnesses' fault, we should check what we are doing first and make sure that the systems are running smoothly and that we have their details correct. It could be as simple as that.

I stress that the cases that we have been considering are cases of assault in the magistrates court. They are not cases of grievous bodily harm or drug dealing. Although the type of case that we have been considering forms the majority of cases going to trial in England, they are not about the serious offenders that you are talking about.

The Convener: That is all the questions that we have for you. On behalf of the committee, I thank you and commend you for the evidence that you have given. It has been extremely valuable and your trip has been worth while, from our point of view.

We will hear next from the Deputy Minister for Justice. I suspect that the session will be long, so I will allow a two-minute comfort break.

10:58

Meeting suspended.

11:03

On resuming—

The Convener: I reconvene the meeting. Before we continue, I want to put one very important preliminary matter on the record. In the *Official Report* of last week's Justice 1 meeting, Stewart Maxwell should have an asterisk next to his name on the contents page. As anyone who reads the *Official Report* will see, he attended the meeting and had a lot to say. I just wanted to correct that for future reference.

I refer members to the letter from the Minister for Justice on the bill's provisions, just to alert them to the fact that their bundle of papers contains some information that they might have been looking for.

I welcome to the meeting the Deputy Minister for Justice, Hugh Henry. I also welcome Tom Fyffe, Sharon Grant and Moira Ramage, who are members of the bill team and might want to pitch in during the evidence session. The minister is scheduled to be with us until 1 o'clock, which I hope gives us ample time to ask our questions. In any case, minister, we will try to ensure that you get away at the due time.

Margaret Mitchell: I will start with the savings in legal aid that are expected from the new procedures. In its submission to the committee, the Scottish Legal Aid Board suggests that there would be a saving of £250,000 per annum. However, a detailed examination of the figures shows that that saving is almost entirely the result of shifting High Court cases to the sheriff court and that, without such a change, the new procedures would mean net additional costs to SLAB of about £750,000. Is that broadly correct?

The Deputy Minister for Justice (Hugh Henry): I assume that SLAB has done a careful calculation in that respect. I have no reason to doubt its analysis.

Margaret Mitchell: So you are quite happy for that to go on record.

Hugh Henry: Yes. I think that we are building our case from that point.

Margaret Mitchell: The bulk of the additional costs of the new procedures seem to be attributable to the introduction of mandatory preliminary hearings and managed meetings. That figure has been estimated at £875,000 of a total cost of £1 million. Does that mean that if High Court cases were not shifted to the sheriff court the new procedures would be more costly?

Hugh Henry: It would be hard to imagine why we would not shift cases from the High Court to the sheriff court. After all, that is an integral part of the overall package. We are not seeking to extract, process and cost one element while ignoring others. As a result, although we expect some parts of the proposed legislation to be more costly than others, we also expect that savings will be generated. We do not want to examine the process in such an isolated way. If we consider the legislation as a whole, we find that some parts will incur costs but that others will compensate for that.

Margaret Mitchell: I want to press you a little more. In appendix 1 of its submission, SLAB estimates that the managed meeting will cost £300,000 and the mandatory preliminary hearing £575,000. As a result, the net cost of the procedures will be £875,000. Is that the case?

Hugh Henry: I have no reason to doubt those figures.

Margaret Mitchell: The move from the High Court to the sheriff court is expected to save £1 million, which means that there will be a shortfall if that does not happen.

Hugh Henry: I cannot see why that move would not happen. Shifting business to the sheriff court is an integral part of the package and I see no reason why we would not proceed on that basis.

Margaret Mitchell: The fact is that you have accepted that, on a standalone basis, the new procedures will cost an additional £875,000. In other words, the proposals have a cost element.

Hugh Henry: Figures have been produced that suggest that a certain part of the process will cost more than others. However, another part of the process will compensate for that. We see the package as a whole and do not wish to proceed only with parts of it. In other words, we are presenting it as an entirety. Although one part might be more expensive than another part and certain costs might be incurred, we have anticipated that. I have no reason to doubt the figures that have been produced. We suggest that not to include the shift in business from the High Court to the sheriff court would seriously weaken the package.

Margaret Mitchell: I just want to establish that there will be legal aid costs in the new system and that the Executive understands and accepts that.

Hugh Henry: We accept the figures that have been produced and see no reason to doubt them.

Margaret Mitchell: Those figures come specifically from the managed meeting and the preliminary hearing.

Hugh Henry: That is correct.

Mr Maxwell: Margaret Mitchell has covered much of the savings and costs that were identified in the Scottish Legal Aid Board submission. Do you envisage any savings other than those mentioned by SLAB?

Hugh Henry: There are substantial potential savings to be made in relation to legal aid. There could well be savings to be made in certain parts of the administration of the process, which would be speeded up. A more efficient use of High Court time might produce savings but, at the same time, we hope that it will also enable the High Court to hear more complex cases.

The rationale behind what we are proposing is not cost-saving. We accept that money might sometimes have to be provided, but we are trying to improve the workings of justice and create a more efficient and effective system. We are trying to remove from the system some of the stress and strain on victims and witnesses, and ensure that justice is speedily done. We believe that we can make more effective and efficient use of our High Court resources than is currently sometimes the case. Although there might be some savings made through better administration and more efficiency, the rationale behind our ideas is better justice, not necessarily saving money.

Mr Maxwell: I accept that, but I wanted to clarify whether you envisaged that more efficient use of High Court time might lead to other savings.

I have one more quick question to follow up Margaret Mitchell's questions on the transfer of business from the High Court to the sheriff court. Do you believe that it is wise to go ahead with the proposal before the McInnes committee has reported?

Hugh Henry: I do not anticipate that anything that the McInnes committee is considering will prejudice what we are proposing. We anticipate that the shift of cases to the sheriff courts will take place in the spring of this year and there is no reason to believe that we should move away from that timetable. Discussions with the sheriffs principal are still going on about the shift of business, but I doubt that anything that comes from the McInnes committee will alter fundamentally the principles that have underpinned our current proposals.

Mr Maxwell: From what you have just said, it is clear that you still envisage that the shift will begin in April.

Hugh Henry: We have always said that it would be in the spring. Further discussions have still to take place and we will see whether anything significant comes out of those. However, as things stand at the moment, we have no reason to doubt that we will be able to adhere to that timetable. Clearly, if anything comes from those further discussions, we will have to reflect on that and keep the committee informed.

The Convener: Margaret Mitchell has dealt with the question of savings and costs in relation to legal aid. I want to develop that theme and talk about some of the issues that we raised with SLAB about representation. As we understand the evidence, High Court savings will mainly come from savings on legal aid costs because counsel will not automatically be available in the sheriff court. Am I right to assume that because of the savings identified, there is no question of changing the legal aid regulations to allow the routine appointment of counsel in the sheriff court under the proposal to shift business and extend sentencing powers to five years? Is that open for discussion?

11:15

Hugh Henry: I am not convinced that that would be absolutely necessary. We argue that many of the cases that are presently dealt with in the High Court could easily be dealt with in the sheriff court. One of the main issues now is that solicitors are not currently allowed to represent in the High Court. The complexity of some High Court cases—clearly not all of them—will not be hugely different to some sheriff court cases. I think that, if and when that shift from the High Court to the sheriff court takes place, solicitors will be more than capable of representing in the sheriff court in those cases that are effectively transferred.

If a particular set of skills is required, then a case for changing the regulations in that way would need to be made, but we do not anticipate that there will be problems. I would worry about making a presumption that advocates should start representing at the sheriff court, which might mean solicitors getting pushed into other areas. That said, I recognise the concerns that have been expressed to the committee, and which you yourself have just expressed, convener. It would probably be wise to suggest that, in the course of the review of legal aid that is now being carried out, some consideration be given to the arguments that have been advanced on the issue. If it would be helpful to the committee, I will take the matter back to the Minister for Justice and ask that it be brought to the attention of those who are engaged in the review.

The Convener: That would certainly be welcome. We must consider the principled issue around those cases where there has been an automatic right to a given level of representation, in other words senior or junior counsel. Many focus groups, particularly prisoner focus groups, have expressed opposition to the shift of business from the High Court to the sheriff court, because of that automatic right to the level of representation that is currently provided in the High Court. Do you agree that it is worth examining the principle again, in order to decide whether or not we should widen the scope for the instruction of counsel in the cases concerned, at least a percentage of which will be serious and complex cases? Indeed, that is why they are currently heard in the High Court.

Hugh Henry: There might be some such cases, but, in general, I am not persuaded that solicitors are not capable of carrying out the level of work that would be required in the cases that are to go to the sheriff court. It is, however, worth reflecting on the point that you have made, on which you have heard evidence from various witnesses who have argued their case. I think that the place to do that is in the review of legal aid. We will ensure that that issue is brought to the attention of those who are engaged in that review.

The Convener: That would be helpful. I want to ensure that we put to you all the points that we wish you to consider. I agree that, as you quite correctly point out, many solicitors will be well capable of taking on the added work. That is not disputed. It has been suggested to us, however, that we would have to examine whether there might be a gap in skills, as some solicitors have said that they would not wish to take on some of the new work. We would not want there to be a gap, simply because there will not be enough solicitors or solicitor advocates who are willing to take on the breadth of work involved in those cases where counsel are currently instructed. Would you examine the possibility that there might be a skills gap?

Hugh Henry: It is certainly worth looking into that, but I would point out that, simply because some solicitors are not comfortable that they have the necessary skills or experience to deal with a particular case, that does not mean that there are no other solicitors with the relevant experience or skills. There could well be more specialisation—as there is now—and people might concentrate on areas in which they are particularly comfortable. A person would not necessarily need to go to a solicitor advocate or an advocate—they might simply go to another solicitor with the necessary experience. There would not logically be a skills gap, but it would be better for us to reflect on the points that have been made and try to reach a conclusion.

The Convener: On extending sentencing powers in sheriff courts, the committee has heard concerns about substantial inconsistencies in the use of custodial sentences in the sheriff courts. Is it wise to extend the power of sheriffs in the face of such concerns?

Hugh Henry: It is difficult to engage in that issue; I would certainly not want to comment on sentences that sheriffs have given or to question the independence that those sheriffs have to make decisions. I do not mean to criticise High Court judges either, but criticism of sentences has not been confined to sheriff court sentences. You will be aware of a number of cases in recent months that have attracted criticism in the press and, indeed, from politicians, in which High Court judges have given sentences that some people think are inconsistent or inappropriate. It would be inappropriate for me to comment on those sentences, but I point out that the debate about consistency of sentencing is not confined to sentences that are given in sheriff courts.

Margaret Smith: I am sorry, but I would like to go back to the previous point that was made about sheriff courts. Would you be happy to accept that the legal aid review should also specifically consider the role of solicitor advocates? We have

spoken to practitioners and have found that solicitor advocates are concerned about what their potential role might be. They are currently not allowed to practise in the sheriff courts, but they might have an expanded role in some revised legal aid sense.

The availability of people who feel able to take on cases has been mentioned. I take your point about specialisation; however, the issue of smaller, more rural communities and courts has been highlighted to us. In the past, people might have tried to get counsel in such courts if they had a particularly difficult case and the local solicitor did not think that they had enough expertise. I want to record those concerns in the *Official Report*, as practitioners have raised such concerns with us.

Hugh Henry: I accept what you say and will take back the points that you have made to ensure that those who are involved in the review of legal aid reflect on what you have said about solicitor advocates.

The point that you make about rural practices is much the same as the point that I addressed earlier. We must reflect on the fact that a degree of expertise might be available from an advocate or a solicitor advocate, but it might also be available from another solicitor. I would not want to be party to a decision that made senior counsel the norm in more complex sheriff court cases. The point that you make is worth considering. We need to be aware of the repercussions of any decision that we take and we will reflect on what you say.

Margaret Mitchell: May I ask a question?

The Convener: Is it on the same point?

Margaret Mitchell: Yes. It is an elaboration of the point.

The Convener: The minister has made it clear that he will look at all the points that have been raised. If it is a different point, I will take it.

Margaret Mitchell: Okay. I will move on, but first I want to make a brief point. Although we are shifting the venue of these cases to the sheriff court, I hope that the gravity of the offences and the public's perception of the gravity of those cases will not be compromised. The link in all of that is whether counsel is appointed. If the minister is going to look at that, I will move on.

The Convener: The minister has said that he will do so. I think that I raised all the committee's points about the gravity of the offences. I also think that I am right to say that the minister has given a commitment that he will look at those points.

Hugh Henry: We will ask those who are engaged in the review of legal aid to reflect on the points that have been made. However, any conclusion that is drawn about the level of representation is not a reflection on the gravity of the case. The reflection of the gravity of the case would be seen in the sentences that are available to sheriffs. That is the issue. We believe that, given an increased range of sentences, some cases could be dealt with competently by sheriffs. The gravity of the case is determined by the sentence, not by who represents the accused.

Margaret Mitchell: The shift is because those cases would have attracted five years. What you said does not make any sense.

Hugh Henry: I mentioned the increased sentencing that is available to sheriffs.

Margaret Mitchell: In that case, the gravity would be the same.

Hugh Henry: Yes. The point that I am making is that the gravity is determined by the disposals that are available to the sheriff, not by who represents the accused.

Margaret Mitchell: Well, I beg to differ.

The Convener: I just want—

Margaret Mitchell: On a totally separate point—

The Convener: Hold on; please do not speak over me. I just want to ensure that we have got the point right.

In relation to Margaret Mitchell's point, we accept the principal point. We are not asking for automatic representation. In fact, we made a point of putting the question the other way around to the Scottish Legal Aid Board. We asked whether junior counsel should automatically represent those cases in the High Court.

However, given that that is the position, we want to look at the sentences that are available in those cases that are to be shifted to the sheriff court because of the nature of the offences. We have to look at the skills that should be available. We must also consider the concerns that we cannot shift those cases to the sheriff court, yet apply the same legal aid rules.

Hugh Henry: I accept that. We will ask the people who are looking at the review of legal aid to reflect on that. The point that I made earlier about representation in the High Court is that, although solicitors may be competent and capable of representation, they are not allowed to represent in the High Court. That is the difference. By extension, when a High Court case that may not be materially different to some of the cases that are being considered at present in the sheriff court, comes to the sheriff court, you cannot then say that solicitors are not capable of adequate representation. They are not allowed to represent in the High Court, but that is not the same as

saying that they are not equipped or capable of representing.

The Convener: Okay.

Margaret Mitchell: The separate point was on the McInnes report. If, for example, the McInnes report advocates that the district courts should be abolished, all the work from those courts would go to the sheriff court. If that happened, there would be an obvious impact on the sheriff court, as it would be squeezed; it would have to take the bottom end of the justice system work in addition to accommodating the top end. Is it not feasible that the McInnes report could have a quite considerable effect on what is proposed in the bill?

Hugh Henry: I do not want to speculate on what the McInnes report might say or do. If issues flow from the report when it is published, clearly we will consider them. I am not 100 per cent sure of the revised timetable for publication, but I anticipate that we will have an opportunity to consider the report before stage 2.

Mr Maxwell: I want to move on to pre-trial disclosure of evidence, particularly early disclosure. We heard a great deal of evidence that emphasised the importance of early and full disclosure of evidence by the Crown, particularly in relation to police witness statements. Recommendation 2(a) of Lord Bonomy's report is that a working party be set up to review how witness statements are taken and in what circumstances they might be disclosed to the defence. I understand that that working party has not been set up. Is that likely to happen, or have you decided that you will not have a working party on that recommendation?

11:30

Hugh Henry: Further discussions will certainly be needed between the Crown Office and Procurator Fiscal Service, the Executive and the Law Society of Scotland on a protocol on disclosure; the Crown Office is also consulting the Association of Chief Police Officers in Scotland. If we can come to some conclusion from the discussion with ACPOS and any discussion on protocol with the Law Society, there will probably be no need for a working party. However, if we cannot reach any conclusions, or still believe that there is a degree of uncertainty, we will reconsider the matter. I am not persuaded that we need to set up working parties if there are other ways of achieving the same thing, but if a working party could make a contribution, we will come back to the recommendation.

Mr Maxwell: The bill does not expressly implement some of the recommendations in the same section of Lord Bonomy's report—I am thinking particularly of recommendations 2(b) and (c). Why is that? There seems to be an implication that those things will happen, but that is not explicit in the bill.

Hugh Henry: A number of things have not been looked at.

We believe that it is a useful principle that everything reasonable should be done to make it easy for the defence to prepare a case early. Lord Bonomy recommended that

"The Crown should routinely issue a provisional list of witnesses to the defence"

as soon as possible after the petition stage, and

"provide to the defence information about material developments in the investigation of the case".

He also recommended that,

"Along with the courtesy copy of the indictment, the defence solicitor should receive a copy of all documentary productions"

that are not in their hands already. Lord Bonomy further recommended that the Crown disclose reports that would be used in evidence as early as possible, but the Crown Office and Procurator Fiscal Service is going further and intends to deliver reports and witness statements to assist the defence in its preparation.

Legislation is not always the best way to deliver change: protocol can deliver on some issues and further discussion on others. We believe that issuing a practice note outlining the procedures for issuing to the defence a provisional list of witnesses could be a better way to proceed than including some of the proposals on disclosure in the bill. The practice note could also outline good practice for delivering information to the defence as it is received.

There are a number of ways of achieving the desired improvements to the system without putting strict time limits in the bill. We want to retain flexibility in the system, and I think that we are doing that. I hope that, on reflection, people will be persuaded that that is the best way, rather than creating rigidity by setting everything in statute.

Mr Maxwell: I accept what you say about the need to retain flexibility in those measures, and a practice note might indeed be the best way to proceed, but I want to clarify and put on record that you intend to implement Lord Bonomy's recommendations 2(b) to (e), because they are not in the bill.

Hugh Henry: If you will give me a minute, I will look at those recommendations.

Mr Maxwell: You have mentioned several of them already.

Hugh Henry: Did you say recommendation 2(b)?

Mr Maxwell: Yes, 2(b) to (e).

Hugh Henry: Those recommendations should be covered by a protocol in the practice note.

Mr Maxwell: That is clear; thank you very much.

I have another point on early disclosure, which relates to the defence side. Did the Executive consider reciprocal disclosure by the defence? If so, why did you decide to reject it?

Hugh Henry: We are aware that that issue has come up. Our worry would be that it could have significant confidentiality implications for the defence and we think that it could cause more problems than it seeks to resolve.

We recognise that we are putting a significant onus on the Crown. You will be aware that there have been a number of general criticisms of the direction in which we have gone and of the extent of the movement that we have made. People have questioned whether, not only in the Criminal Procedure (Amendment) (Scotland) Bill but in other pieces of legislation, we have prejudiced the right of the accused to a fair trial. We have always tried to strike the proper balance. Although I can understand why someone would argue that every bit of evidence should be disclosed by both sides, I think that there is still an issue about how the accused conducts their defence that needs to be properly reflected. We do not think it sensible to consider full disclosure by the defence.

Mr Maxwell: You mentioned the emphasis on early disclosure by the Crown, which in some cases will put quite an onerous burden on it. Does the Crown have the resources available to achieve that?

Hugh Henry: Yes. Both the Minister for Justice and I have met the Lord Advocate, the Solicitor General for Scotland and Crown Office officials and they believe that they can meet the required commitments. In their view, the proposed package of changes represents a sensible attempt to improve the way in which the justice system works. They believe that they have the necessary resources and that the link to other changes in the Crown Office will enable them to respond to what they have been asked to do.

I would not want to suggest that it will be easy for the Crown Office to do what we have asked. We are requiring changes in culture on a number of levels. I am sure that the member will acknowledge that, with the bill and some of the other changes that have taken place in the Crown Office, we have seen a huge degree of culture change starting to take place. The Crown Office is highly enthusiastic about improving the way in which the justice system operates; it is very keen to improve the lot of victims and witnesses, particularly vulnerable witnesses, and it believes that it can meet any commitment that is made as a result of the proposed changes.

Mr Maxwell: I want to press you on the early disclosure of police witness statements, which are clearly a vital part of early disclosure to the defence. Do you think that, given the current quality of police witness statements, they are in a fit state—if I can put it that way—to be released, and is it desirable that the kind of information that is contained in those statements should be released? If not, what changes do you envisage will be necessary to the police's procedures for taking witness statements so that they can be released early to the defence?

Hugh Henry: You make a valid point about the quality of police witness statements. That is not a criticism. If such statements are going to be used in a different way at a different time, everyone concerned needs to reflect on what they do. That will put a degree of pressure on the police. Your point is well made—police statements could very well contain sensitive material and confidential information, so we need to be careful that something that has been included inadvertently, for the best of reasons, is not then used inappropriately to the detriment of a witness. There are sensitive issues that will need to be considered.

We believe in the fundamental principle of disclosure. I argue for the flexibility that I have mentioned, and training in the preparation of such cases will have to be considered in the discussions that need to take place with ACPOS. Such training is required for the sake of witnesses and of individual police officers; I do not want police officers inadvertently to face criticism because they have not been prepared properly for new situations. More training needs to be done and more discussions are required, but the problems are not insurmountable.

Bill Butler: The committee has received a substantial body of evidence that supports the principle of mandatory preliminary hearings, but it has also heard from many witnesses that a sea change in culture is required, especially in the legal professions and in the judiciary, to ensure that the new procedures are effective. Is the Executive satisfied that the necessary mechanisms are in place to support that change in culture?

Hugh Henry: I believe so. I have already referred to some of the changes that are taking place in the Crown Office. Clearly, I cannot speak for the defence, but I believe that the evidence that the committee has taken from those who represent the defence shows that they see the benefit of the changes. Changes in the court system are also required. The discussions that we have held so far indicate that all the parties see

the benefits of the new system and see that it will work to the overall advantage of cases. If refinements in the procedures or protocols or further training for Crown Office or court staff are needed, we will obviously consider that. Culturally, people are up for the proposed changes; they are willing to make them work and they see their advantages and benefits.

Bill Butler: You say that all parties see the possible benefits, but let us consider a possible disbenefit. In the evidence that the committee has taken, it has become clear that more than one, and perhaps several, preliminary hearings may be required in a case. What guarantees are there in the bill that repeated preliminary hearings will not simply replace adjournments as a cause of delay in High Court proceedings?

Hugh Henry: The issue is one of judicial management. I cannot give an absolute guarantee that repeated preliminary hearings will never take place—it would be foolish to do so. The issue is not only about good will, but about the practical benefits that will arise if repeated preliminary hearings do not take place. The purpose of the proposals is to try to resolve issues early and for relevant information to be exchanged. The new system will put an onus on judges to ensure that matters move more efficiently and effectively. To some extent, we must trust in our judges' ability to manage and to rise to the opportunities that will be available through the new form of judicial management.

As I said, it would be foolish to say that repeated preliminary hearings will never take place, but there is no reason to worry unduly. At the preliminary hearing, the parties will have to explain their state of preparedness to the judge in open court, and they will need to be prepared for challenge on the detail. Both parties will need to be ready for some pretty robust questioning about what they have done and to be prepared for the consequences of any inability to deliver on their part.

Bill Butler: You talk about state of preparedness. The bill contains no direct sanctions against those who fail to prepare properly for the preliminary hearing. Might that be a potentially harmful, serious omission?

11:45

Hugh Henry: Ultimately, the matter could be reported to the dean of the Faculty of Advocates, which would have internal consequences. I am not persuaded that introducing statutory penalties would necessarily be the best way forward. That could open up all sorts of other consequential implications, in that—

Bill Butler: We agree that that would not be the best way forward and that no one would wish to go down that path, but why does the Executive not view statutory penalties as a final option, besides a report being made to the dean?

Hugh Henry: There are a number of other measures. Those concerned would need to be prepared to go through the humiliation of a public dressing-down from a judge in the event that they had not done their work properly. That could have a detrimental effect on the reputation of those who are seeking other business. In extreme cases, the court might decide that there has been contempt of court. I would be concerned about using a sledgehammer to crack a walnut. We would be introducing something that could have unforeseen consequences, and then we would introduce further potential areas of litigation sanction. We could end up causing more problems than we seek to resolve. There are very few cases in which there are significant problems, but there are options open to us.

That said, this committee and others, in future discussions with the legal profession, may wish to return to the possible sanctions for those who do not carry out their job properly. However, I do not think that such sanctions would be a useful contribution to the package of measures in the bill. The ability to report to the dean of the faculty, the public dressing-down from the judge and the possibility of contempt of court are all useful measures that might have an effect. If there are problems in relation to the Crown, there are other ways of addressing that.

Bill Butler: That is very clear, minister.

The bill is not very explicit about the matters that may be disposed of at the preliminary hearing, although some indications are given. The question whether it would be possible to address matters of admissibility of evidence at that hearing has been raised with the committee. That would avoid the need to have a trial within a trial when evidence is challenged. Was that possibility considered by the Executive?

Hugh Henry: We considered carefully the admissibility of evidence and we seek to address the problems that are caused when issues of admissibility are raised in the course of a trial. At the preliminary hearing, part of the judge's management role will be to ask parties whether there are any preliminary matters that can be resolved before the start of the trial. Questions of admissibility would fall into that category. We expect judges to address those questions and we expect both parties to be able to answer them.

Bill Butler: So it would be down to the judge's management of that particular stage.

Hugh Henry: Yes. I cannot dictate what judges would and would not ask; however, both parties should be ready to be asked questions of admissibility.

The Convener: Let us turn to the issue of fixed and floating trials. We had a useful meeting with the bill team yesterday and, eventually, the penny has dropped—to a certain extent—about what you are trying to achieve. Nevertheless, I would like to get some of that on the record, so that we can be absolutely clear about what you want to achieve and how you wish to achieve it.

In its evidence, the Faculty of Advocates expressed concern about the construction of the proposed new section 83A of the Criminal Procedure (Scotland) Act 1995 and the suggestion that, if judges are in charge of fixing trials, in effect they will have a choice about whether to continue them. Given the fact that the new system is supposed to be centred around the certainty of fixed trial dates, rather than having sittings, we think that it is quite important that most of the trials are fixed rather than floating. That would seem to make sense. Would you want the majority of cases under that provision to have their dates fixed?

Hugh Henry: Yes. The concept of floating trial dates is really an attempt to ensure that we use court time effectively. There is no doubt that there are significant benefits in trials having fixed dates. However, we recognise that, from time to time—for whatever reason—trials may not be able to go ahead. If there is the potential for a back-up trial to be held, instead of wasting time, we believe that that should be looked into.

We propose that, generally, judges will determine the date of the fixed trial. However, on the day, if there was a potential problem in deciding which of two floating cases would proceed, that would be a matter for the Crown to determine. The bill is about giving people more certainty about when a case is likely to be heard; ensuring that witnesses and others are not substantially inconvenienced; and ensuring that there is the potential to slot other cases in—within limits—if something untoward happens with fixed trials. It is a matter of achieving a balance. You are right to say that, generally, trial dates should be fixed so that people can have a degree of certainty.

The Convener: Are you satisfied with the construction of that section? There is nothing in it to prevent a judge from choosing, under new section 83A(1), 83A(2) or 83A(3) of the 1995 act, either to continue with a trial or to fix it. Are you satisfied that simply expressing a policy objective will be enough to ensure that the majority of judges will see the need to fix a trial date rather than use the provision to float it?

Hugh Henry: That is a fair point. Our presumption is that a trial date should be fixed. We would be concerned if that did not happen, for whatever reason. You are right to say that it is something that we need to examine. We will go back and reconsider what is in the bill to see whether anything needs to be added to ensure that that presumption is absolutely clear.

The Convener: That would be helpful. We have discussed with many witnesses the practicalities of fixing trial dates for the prosecution and, in particular, for the defence. Some witnesses have said that the trial date should not be fixed until all the preliminary matters have been dealt with. Others have said that work must be done to fix the date, or the arrangements will not all come together. For the *Official Report*, will you clarify how the system will operate? Will you confirm that, as far as possible, when the preliminary hearing happens, work will take place behind the scenes to ensure that a trial date is already in mind?

Hugh Henry: Yes. We expect the judge to fix the trial date at the preliminary hearing. That does not mean that all trials will automatically start on that agreed date, but we expect the majority to do so. Sometimes, events may occur that change the date, but you are right to say that by the preliminary hearing, the judge should be able to fix the trial date.

The Convener: You do not suggest that, almost as a sanction, the judge will not fix the trial date until preliminary matters have been dealt with. The judge will not say, "I refuse to fix a trial date because you have not dealt with all the preliminary matters."

Hugh Henry: You are generally right.

The Convener: We have heard evidence from several victims organisations, in particular Rape Crisis Scotland, that they have been given assurances that crimes that involve sexual offences will have some priority in getting fixed trial dates rather than floating dates.

Hugh Henry: I am not aware that the Executive has given any assurance. We have certainly had discussions, but I do not believe that we have made any such commitment. I do not know about the Crown Office. It would be inappropriate for me to make a commitment on the Crown Office's behalf. We are sympathetic to the cases in which such organisations are involved and we want such cases to be dealt with as early as possible. We recognise the trauma and stress that are often involved in such cases, but it would be wrong to suggest that the Executive has made a commitment. I cannot speak for the Crown Office.

The Convener: I will draw your attention to the evidence. It was stated:

"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."—[*Official Report*, *Justice 1 Committee*, 7 January 2004; c 428.]

Hugh Henry: I am not aware that that commitment has been made. Perhaps the committee might want to speak to Moira Ramage, who had a discussion with Rape Crisis Scotland.

The Convener: I simply wanted to draw the matter to your attention.

Hugh Henry: Do you want Moira Ramage to say anything on the record about her discussions with Rape Crisis Scotland?

The Convener: If she wishes to.

Moira Ramage (Scottish Executive Justice Department): I confirm that Tom Fyffe and I met Sandy Brindley and explained that the preliminary hearing that we seek to introduce in a fixed-trial system will, for the first time, give cases that involve rape victims an opportunity to have an early fixed diet, but no assurance was given for every case. The judge is the only person who can decide that, having heard the parties. We are not in a position to give that assurance.

We are confident that such cases will have fixed trials, so perhaps Sandy Brindley has taken that as a form of assurance, but the Executive has given no assurance of that. We have simply said that the opportunity is available, for the first time, to give priority to cases that involve rape victims.

The Convener: That is helpful. We are very sympathetic to the evidence that we received from Rape Crisis Scotland, but it will be well understood that although sexual offence cases are the type of cases that should be considered for a fixed trial we do not want that opportunity to be confined exclusively to such cases. We probably want cases to be able to be considered for a fixed trial slot regardless of the crime. In correspondence with the Minister for Justice, Cathy Jamieson, we have already received confirmation that the Crown remains the master of the instance in respect of the priority of cases. It is important that that matter has now been cleared up.

12:00

Margaret Mitchell: I am encouraged by what the minister has said this morning. In proposed new section 83A, there is a presumption in favour of setting a fixed trial date. Would it not be more sensible for the fixed-trial option to be dealt with in proposed new section 83A(1), with the other options coming later? That slight difference of emphasis might help a little.

Hugh Henry: I am not sure. We will consider that suggestion before stage 2, to see whether there is any merit in it.

Margaret Mitchell: I would like to raise an issue that I did not have an opportunity to ask about before.

The Convener: Please make your question brief, as we are already behind time.

Margaret Mitchell: Often adjournments are the result of section 67 notices. We hear that, invariably, those are issued in complex cases because of a delay in receiving forensic evidence. That being the case, is the Executive examining the forensic resources that are currently in place, with a view to putting more finance into them? Doing so would ensure that there are not delays as a result of insufficient resources to tackle the work. That issue is raised time and time again when we speak to the prosecution.

Hugh Henry: I am not sure that there is a problem with resources, but there is a practical issue in relation to section 67. We have listened to some of the comments that have been made and think that, inadvertently, it may cause problems. We need to reflect on and to re-examine the issue. We will do that and attempt to establish whether a change needs to be made that will allow the intended effect of the provision, instead of unintended consequences.

The Convener: We will come back to the question of statutory time and section 67.

Margaret Smith: The bill proposes that in non-custody cases the preliminary hearing should take place not more than 11 months from the date of the first appearance of the accused. However, Lord Bonomy suggested that the period should be nine months. The Executive's position seems to be that that proposal would be "too onerous" for the Crown. Why does the Executive believe that eight months would be insufficient time in which to prepare an indictment, and that the proposal for a preliminary hearing to take place within nine months is unacceptable?

Hugh Henry: We do not think that it would be possible to prepare cases within that time. We are saying up front that the proposal would impose a burden and could not be achieved. As a result, cases would be lost. On this issue—probably more than any other—if we were to move in the suggested direction, not only would we not get the benefits of what we are trying to do, we would end up in a situation that is considerably worse than the current one. We believe that the proposals that we have made are realistic and achievable, although they are still challenging. We do not think that it is right to set a target that we know in advance cannot be met and that could cause problems that many of us would live to regret.

Margaret Smith: I want to go back to the question of resources. The bulk of the evidence has supported the extension of the limit to 140 days for custody cases. The defence witnesses have told us about late disclosures, section 67 notices and so on. It seems that some of the

proposals would, in giving more time to the defence, impose extra burdens on the Crown. At the moment the defence has only a couple of days in which to come forward with things, which I think would be extended to a minimum of a week.

Is the Executive satisfied that sufficient resources are available to the Crown not only to deal with the extra work that would be caused by managed meetings and preparation for preliminary hearings, but to deal with issues such as those that have come up in evidence on complex cases? To pick up on Margaret Mitchell's point, some evidence that we have heard and some informal discussions that we have had with prosecutors have been about issues such as expert witnesses and laboratory reports.

Hugh Henry: We think that the resources are sufficient and that there should be no problems. However, as I said, we acknowledge that there is a problem—as Margaret Smith says—in relation to section 67 and submission of evidence. We would be concerned about the consequences of issues that have been raised in discussions, so we have to look into that and will do so. Before we reach stage 2, we will come back to the committee on those issues.

Margaret Smith: The convener has received a letter from Moira Ramage. On the question about the average length of time that is spent in custody by someone who has not been granted bail, the letter says that the extra time is 34 days, over and above the 110-day limit. By my arithmetic, that is 144 days. We are therefore asking the Crown to do better than it has been doing until now.

Points have been raised on the need to have deputes and counsel in place as soon as possible after indictment, to ensure that preparation for preliminary hearings and so on can get under way as quickly as possible. Continuity is also an issue. Should there be greater continuity among the deputes who are assigned to cases? A legal aid matter also arises, in that one cannot get sanction for counsel until indictment. However, given that we would be introducing the whole preliminary hearing, is not there a real problem with tight time limits?

Hugh Henry: It is difficult for me to answer that question sufficiently. You are asking questions about Crown Office management and the way in which the Crown Office allocates its resources. The Crown is currently trying to allocate advocates to cases early. However, you may wish to explore the issue separately with the Crown Office because it would be wrong of me to suggest how it should use its staff and allocate people to cases.

I agree that there should be greater certainty and consistency: the Crown Office has been working on that and has made enormous improvements in its way of working and I know that it intends to do more. However, it might be useful for the committee to speak to the Crown Office separately.

The Convener: I want to clarify what you said about the operation of section 67 of the 1995 act. We have heard that the seven-day deadline prior to the preliminary hearing, during which all evidence and information must be submitted, is a slightly shorter period than the Crown Office has at the moment. Without section 67, that will be harder. Does that mean that you are departing from the principle that that is a firm deadline?

Hugh Henry: We believe that the problems that have been identified by the committee should be addressed by early disclosure. However, we are persuaded that the problem that the committee has identified through taking evidence on the provisions relating to section 67 is worthy of consideration; they might cause unintended consequences, which would be unfortunate to say the least. We will consider the matter and come back to the committee before stage 2.

The Convener: We had a useful discussion on that point with the bill team. I wanted to make sure that it was aired in public, just in case you are wondering why I am repeating things that I said yesterday.

Margaret Mitchell: It has been suggested that instead of automatically extending the 110 days to 140 days, the measures that are proposed in the bill should have a chance to bed down. If that were to happen, there might be no need to extend the 110-day rule. Has the Executive considered that?

Hugh Henry: We believe that the measures that we are proposing are proportionate, sensible, balanced and will lead to improvements. We have seen and heard nothing to suggest that we should depart from our current proposals.

Margaret Mitchell: Is not there a danger that when people work to a time limit and the deadline is moved, they will simply work to the new deadline and make no improvement? That has been suggested to the committee.

Hugh Henry: That comes back to the question of judicial management. I think that there will be some significant improvements as a result of the proposal. We are confident that through the judicial management of cases, the proposed time limits will lead to improvements. I am not sure exactly who it was that made the suggestion to which Margaret Mitchell referred, but we do not accept the argument.

Mr Maxwell: I take you back to the discussion on section 67 that we had a moment ago. Section 67 notices have become routine. Can you envisage a case in which the Crown comes before

a judge with new evidence within the new seven-day time limit, but the judge refuses to allow that evidence? I have difficulty envisaging such a scenario, but if the evidence is allowed, would we not end up with the same problem that we have with section 67 notices?

Hugh Henry: It would be dangerous for ministers to suggest what a judge can accept and refuse, so I do not wish to go down that line of discussion. We indicated that any provision that would allow the Crown Office to do anything should be on cause shown. The court would have to be satisfied that it was necessary. The judge could refuse to allow anything he or she wishes; it is the judge's right to do so and it would be wrong of me to suggest circumstances in which that might or might not be done.

Mr Maxwell: I accept that, but I am not asking you to envisage what a judge might or might not do. However, I believe that section 67 notices were not intended to be routine; they were supposed to be the exception rather than the rule, but have become the rule rather than the exception. Is there not a danger that we will end up in exactly the same position under the bill?

Hugh Henry: I do not think so. Cause would need to be shown and the court would need to be satisfied that such a notice was necessary. The court would exercise its judgment on that. You are right that that should be the exception rather than the rule, and I hope that that will continue.

The Convener: Given what you have just said, although I appreciate that it would be wrong of you to guess what judges might do in such circumstances, I want to put to you a question about what might happen in the albeit limited number of custody cases in which we try to set a date within the 30-day period when the 110 days has already been reached and preliminary matters have been dealt with. What would happen if there was a difficulty in fixing a date in that time, such that we would go beyond the 140 days? Who would you expect to raise a motion in the court to have the time limit extended?

12:15

Hugh Henry: Normally, the Crown would ask for the time to be extended. It would then be for the judge to consider whether to accept the application.

The Convener: I think that the current trend is for the Crown to be refused such applications unless there is very good reason for them. If, under the new system, there was a genuine problem, such as that a defence agent was double-booked and would be unavailable during the course of the days available within the 30-day window, would you expect the court to be at least sympathetic to the reasons why a date could not be fixed?

Hugh Henry: You are inviting me again to stray into the territory of, and to comment on, what I would expect judges to do.

The Convener: It is difficult not to do that. In my own mind, I know that the number of such cases will be limited, but it must be likely that they will happen. If there are only 30 days within which to fix the trial date, it is possible that a date could not for love nor money be found within those 30 days. Therefore, the time limit would have to be extended, but it is possible that the court could refuse that.

Hugh Henry: I am sure that, if a persuasive case were made and sufficient evidence were produced, the court would come to the right decision in the circumstances.

Marlyn Glen: I have some questions about witness non-attendance. Does the Executive have any research evidence on the extent to which non-appearance by witnesses is a serious problem in criminal courts?

Hugh Henry: Sorry—are you asking about the extent of the problem?

Marlyn Glen: Yes. Is it a serious problem?

Hugh Henry: It is certainly a problem in cases in which witnesses fail to attend. I will give the statistics that are in the report.

Table 7.2 in Lord Bonomy's report shows the reasons for motions to adjourn for the period January to March 2001. "Problems with witnesses" was the reason that was advanced by the Crown in 10 cases, by the defence in 13 and jointly in three. In total, there were 26 motions to adjourn for that reason between January and March 2001.

Marlyn Glen: I ask because there has been some concern expressed about the possible treatment of reluctant witnesses. I wanted first to establish the seriousness of the problem.

Hugh Henry: If we were to extrapolate those figures over the whole year, there could be over 100 such motions. To some extent, the matter will depend on the seriousness of the case, but there is a problem.

One individual could have a very significant impact on a range of other people. If a trial did not go ahead simply because a witness did not turn up, that would certainly be serious for the victim. As Marlyn Glen will be aware, we have given considerable thought and effort to trying to improve the way in which victims are treated by the judicial system. I understand why the proposals have been made.

Marlyn Glen: Obviously, we are aware of the progress that has been made on helping vulnerable witnesses. Does the Executive have any research evidence on the reasons why witnesses fail to turn up?

Hugh Henry: No, but I think that all of us are aware that a number of reasons are involved. One reason could be fear on the part of the witness who might have something to fear from the accused. Another reason might be that the witness has evidence on the accused but does not want to damage the interests of the accused. Although a range of reasons are involved, we do not have research evidence that would give any great detail on that.

Marlyn Glen: You will be aware that we have been taking evidence about non-attendance of witnesses. We have been considering the difference between what might be called recalcitrant witnesses and those who are reluctant or vulnerable. Will a witness who is faced with the loss or curtailment of their liberty be entitled to legal aid?

Hugh Henry: Yes—that is being examined.

Marlyn Glen: Thank you. Could the preliminary hearing or first diet in the sheriff court provide an opportunity to identify witnesses who might cause difficulties in that regard?

Hugh Henry: Yes, that diet would provide a useful opportunity. I hope, however, that both parties would by that time have undertaken sufficient work to identify witnesses who might be reluctant. I am not saying that that will happen in all cases, but Marlyn Glen is absolutely right to say that that is a useful point to which consideration should be given.

Margaret Smith: In the case of Du Plooy v HM Advocate, the Court of Appeal indicated that, in line with existing practice, the court was expected to explain why an allowance was not given where there was an early plea of guilty. It also indicated that there was "no practical difference" between existing Scottish provisions that give the courts discretion in this regard and the English provision that requires the court to have regard to a guilty plea. Given that decision, is section 17 necessary and, if so, why?

Hugh Henry: I am sorry, are you moving on to address sentence discounts?

Margaret Smith: Yes—I am asking about the discount that follows a guilty plea.

Hugh Henry: I think that that could make a useful contribution. We are aware of some of the concerns that have been expressed in that respect. It is important to point out that a sentence discount is not automatic. The difference is that, if someone tried to use the facility and the judge decided that a sentence discount would not be provided, the judge would be obliged to explain why the sentence discount was not being applied. There could be a right of appeal against the refusal.

I understand the concerns that have been expressed that the provision might enable those who are guilty of serious crimes to use a device that would allow them to escape a significant sentence. I believe, however, that the right way to go forward is to leave responsibility with judges to decide whether application of a discount is appropriate: a sentence discount is not automatic. Another safeguard is built in, in that someone who pleads guilty has the right to appeal against refusal of the sentence discount.

Appropriate safeguards are therefore built in to the process. The provision would not necessarily lead to people's simply using it as a device to escape the consequences of their actions. Decisions would be down to the judge.

Margaret Smith: You mentioned that the issue is controversial. Many people think that a person who is guilty of rape or murder should not get any discount. Did the Executive address the fundamental question of whether there should be a discount at all?

Hugh Henry: Yes, we considered that question. As you know, we await further clarification and we will review the proposals. There will be court of criminal appeal judgments on cases that are about to be heard. Once we have details of those judgments, we will reflect on them. We are aware of the controversy and will find out what the court of criminal appeal has to say. We will reflect further on the matter before we come back to the committee, but we believe that safeguards are built in to the process that would address cases such as those to which Margaret Smith refers.

Margaret Smith: Two benefits of entering an early plea have been suggested. First, witnesses would not have to give evidence, which would be helpful for some witnesses in sexual offence trials and very bad murder trials, for example. I have much less sympathy with the second suggestion, which relates to a procedural benefit. It has been suggested that entering an early plea would be easier on the system and would allow quicker flow of cases through the High Court. However, the key benefit is the impact on witnesses of an early plea's being entered.

The committee has heard evidence that, even in cases where sentence discounting might be an important consideration, a proportion of complainers would have preferred to give evidence. Indeed, Rape Crisis Scotland's evidence suggested that, in some cases, the views of complainers are not even taken into

account in discussions about whether a guilty plea should be accepted, although their best interests appear to be at heart. That is a very paternalistic attitude. What is the role of the victim in potential plea bargaining, if I can put it that way? Did the Executive consider the possibility that some witnesses might want their day in court?

Hugh Henry: Plea negotiation is a matter for the advocate depute. It would be inappropriate for me to enter into such a dispute or debate. However, Margaret Smith will be aware that victim statements can potentially be introduced, which is a significant departure from where we were previously. Those might be a solution in the type of cases to which she refers. Some people might want their case and their side of matters to be presented—which is what the victim statement will do—but equally, others might prefer not to be anywhere near a court if they can help it. A balance must be struck.

Our proposals should improve matters. Margaret Smith says that she accepts the first suggestion about benefits to victims and speedy resolution of justice, but she is not so convinced about the benefits of speeding up cases in the court system. It should be remembered that speeding up cases would allow more victims to have their cases heard more quickly; other victims would therefore also be beneficiaries of an improved court system.

Margaret Smith: I hear what you are saying.

When we touched on early pleas in the evidence that we heard from Professor Cook and Christine Vallely earlier this morning, it came across that they felt that, rather than compel witnesses to turn up and pressure the accused to plead guilty because they would get a sentence discount, it would be better to put in place a good witness care programme. That would be more likely to ensure that witnesses in, for example, domestic violence cases would turn up and give evidence against an accused. It would also ensure that a good quality case was in place and that there was an early indication of what the discount might be. Rather than the discount alone being a trigger for a guilty plea, measures such as good witness care, which could ensure that the accused would think that there was a good possibility that somebody might come to give evidence against them, could be as important as the discount.

Also, if the defence was considering what impact a potential discount would have on the sentence, it would be better to ensure that the accused knew about that impact sooner rather than later in the process, because they would otherwise be inclined to hang on until the last possible moment and to wait to find out whether the witness would withdraw their evidence.

12:30

Hugh Henry: You raise a number of useful points. The level of the discount would be a matter for the judge; it is not for me or any other minister to comment or decide on. However, Margaret Smith makes a persuasive case about the general care of witnesses and support for victims. Anything that could be done to give witnesses more confidence, to make them more relaxed and to remove the stress and terror that are sometimes associated with giving evidence, would make a case go better.

You will remember that other things are being done: the Crown Office now has a victim information and advice service, which can do some of the things that you identified as being necessary. Margaret Smith is right that it would be wrong to consider sentence discounts—or, indeed, any other part of the system—in the abstract; other improvements need to be made and other pillars of support need to be introduced. We are doing that with victim statements and the victim information and advice service. Taken together, those will make a significant difference.

Mr Maxwell: This morning, we heard evidence that witness attendance was significantly enhanced by low-tech measures such as personal contact with the witnesses, or a phone call to inform them when the case was, what was happening and what was likely to happen when they turned up at the court. The evidence was that the vast majority of problems with witness non-attendance would be solved by putting better systems in place, not by threats of tagging witnesses, restricting their liberty or even detaining them. Professor Cook and Christine Vallely were very confident about that evidence on the back of their research in the west midlands. Is tagging witnesses necessary or even desirable if most cases of non-attendance can be solved in such a low-tech fashion?

Hugh Henry: You make a valid point about other measures, some of which have been tried elsewhere. The Crown Office is currently considering some of measures that you mentioned, such as telephone contact. If we can introduce what you describe as low-tech measures, or other measures that are not as severe as tagging, that is the right thing to do and it is the way to go. However, there could still be a residual number of cases in which tagging could have a beneficial effect. If tagging will ensure that a witness is able to give evidence and that the case will not be prejudiced, it is worth considering. However, Mr Maxwell is right that if there are other measures that could make a contribution, they should and will be considered. The Crown Office is examining some of those issues.

Mr Maxwell: I am glad to hear that. Obviously we are talking about a minority of cases in which witnesses fail to attend; if we accept the evidence that we heard this morning, the majority of cases would be resolved by a phone call or an improvement in systems. There is also an extremely small minority of cases in which, no matter what the court does, the witnesses refuse to attend, so disrupting the trial. Given that the number of such cases is very small, do you still believe that we should go down the road of electronic tagging for those people?

Hugh Henry: Yes. We know that such cases are a minority—the statistics that I quoted to Marlyn Glen indicate that, relative to the number of cases being considered in the judicial system, the number is small. Nonetheless, non-attendance can have a significant effect on a case and a huge effect on a large number of other people who are also scheduled to give evidence. It can also delay inordinately justice for the victim. We should remember that, in some cases, the witnesses might well end up in custody. If we are saying that, in the small number of cases that you rightly identify, we are better to keep the witnesses in custody, that is fine. However, it is right that we should consider alternatives to keeping them in custody. In the white paper, we said that we would undertake a pilot scheme to consider how such alternatives might work and we remain committed to that. It will be interesting to see what comes out of it.

The Convener: While we are on the subject, I will rewind to the question of discount for an early plea. I do not know whether the cases that we have read about have led to the proposal that the sheriff should consider a discount. It is important that Parliament, as opposed to the court, has a policy position on the discounting of sentences. Is it appropriate for Parliament to have a say in what the discount should be? I am a bit uncomfortable that a third of the sentence should be the maximum; that is probably too much. As a matter of principle, should Parliament have a position on the law on the maximum discount—and on how early the plea should be to earn the discount—without interfering with the discretion and the right of the sentencers to determine what the discount should be?

Hugh Henry: That is a difficult matter, convener, because it is for the judges to determine what a sentence should be. Under the bill, it will still be for the judges to decide, because a discount is still a determination of a sentence of a particular length. It might be worth asking the Sentencing Commission about the matter.

The Convener: Is it not legitimate for Parliament to say that the position in law is that there should be an early plea in the process and not a late one and that that should determine whether a discount is given? In theory we could legislate that the discount should be no greater than 10 per cent to 15 per cent of the sentence. The sentencer would then have to operate within the legal limits. I am not saying that that would be desirable; I am just saying that it is legitimate for Parliament to hold a view on what the parameters of the discount should be, otherwise it will be left to the courts—as has been the case so far—to determine what the law of Scotland should be. They have said that the discount should be no greater than a third of the sentence, but Parliament has not discussed that.

Hugh Henry: I understand what you are saying. Part of the difficulty is that each case is entirely different and the judge makes a decision based on the facts of the case in question. We could say that the discount should be no more than 5 per cent of the sentence, for example, but there might be cases in which the judge decides that a discount of 10 per cent would be more appropriate. If we stipulated a figure of 10 per cent, the judge might decide to go to 12 or 15 per cent. I will certainly take the point of principle back to the minister, but at the moment we are not persuaded that it would be right for us to introduce such fetters. We think that the matter is best left with the judges, although we will reflect on what you say.

Mr Maxwell: One of the most controversial proposals is trial in the absence of the accused. Does the Executive have evidence on the extent to which solemn proceedings in Scotland have been disrupted by the non-appearance or disappearance of the accused?

Hugh Henry: From an examination of the High Court sitting lists for 2002, we know that there were at least 90 warrants to apprehend accused persons who had failed to attend for their trials. Without examining the individual cases, we cannot say whether it would have been appropriate for the court to have allowed the case to proceed in the absence of the accused, but we know that, in those 90 cases, around 1,630 witnesses had been cited to attend to give evidence. Their attendance had to be cancelled, with the result that they would be required to be cited again, in the event that the accused was apprehended. That shows that a significant number of people are affected.

Mr Maxwell: You said that there were 90 such cases. For clarification, could you express that as a percentage of the overall number of High Court cases so that we can understand the extent of the problem?

Hugh Henry: We believe that that amounts to about 3.5 per cent of High Court cases.

Mr Maxwell: So the accused does not turn up for some reason in about 3.5 per cent of cases.

Hugh Henry: Yes.

Mr Maxwell: Is the Executive satisfied that the accused can have a fair trial if the whole trial is conducted without their being present? Is it at all possible to have a fair trial in such circumstances?

Hugh Henry: Yes. It is clear that that would happen in exceptional cases. There are two situations in which we could envisage a trial being held in the absence of the accused. The first is a situation in which the accused has received the indictment, knows that the trial is imminent, deliberately absconds and, in spite of the best efforts of those concerned, cannot be apprehended. The other situation could arise during the trial, but I will leave that aside, as you did not ask about it.

It is clear that there is the potential for the accused to try to frustrate justice. There are precedents in England to indicate that we can be confident that the proposal is acceptable. I accept the argument that trial in the absence of the accused is not desirable. Although that is not how we believe that justice should be delivered, we do not believe that justice should be abandoned simply because an individual has absconded. The victim and society have rights. If the evidence and the case were sufficient and the judge believed that the trial could proceed, it would be right to proceed. However, we are aware of the concerns that have been expressed.

A robust case can still be made to support the victims of crime for whom justice is frustrated, sometimes in cases of serious offences. It is right that they should have justice delivered. However, it is also right to reflect on some of the evidence that the committee has taken. We will consider whether any of the arguments are persuasive and whether arguments can be made about trials in absence depending on the stage that a trial has reached. At the moment, our view remains that it is right to have such trials and that they are capable of being undertaken. However, it is also right for us to take cognisance of the evidence that the committee has received.

12:45

Mr Maxwell: We have heard robust evidence against the proposal, although most people accept that if the accused absconds after evidence has been delivered in court and the summing-up stage has been reached, the situation is different. We have also heard evidence that, if a trial proceeded in the absence of the accused and the accused was subsequently apprehended, an appeal would almost automatically be lodged on the basis that the accused could not have had a fair trial. How do we square the circle of protecting victims and witnesses by forcing them to undergo a trial in the absence of the accused when they might have to undergo another trial if the accused is subsequently apprehended?

Hugh Henry: If such a situation transpired, it would be right to have that concern, but in two recent cases in England—R v Jones and R v Singh—convictions were upheld on appeal, which gives us confidence that trial in the absence of the accused can be done. In December, the Court of Appeal upheld the conviction and seven-year sentence of Gulbir Rana Singh on three counts of conspiracy to launder money. The court held that his account of why he could not attend the trial was unbelievable and so was not a ground for appeal. It also found that, as the accused deliberately absented himself from proceedings, the trial could not be deemed unfair on the basis that the accused was not present.

In another recent example, a robbery case was adjourned when the accused absconded late in the proceedings, after the victim had given evidence. The accused is still at large. I could also give examples of sexual offence cases that have had to be abandoned that show why we believe that the proposal is right. The two English cases that I mentioned give us sufficient confidence that we can withstand the challenge that you identified, but we will reflect on the evidence that the committee has heard.

Mr Maxwell: I assume, therefore, that you do not think that European convention on human rights issues are involved.

Hugh Henry: That assumption is correct.

Mr Maxwell: The European Court of Human Rights has concerns about trial in the absence of the accused, although I accept that the cases that it has considered involved the European system, which is more investigatory, rather than the adversarial system. I will not repeat my questions, but given that we have an adversarial system and that a defence lawyer must take instruction from their client to construct a proper defence, how can a defence lawyer participate in the trial in the absence of the accused, without information about the lines of defence and the defendant's view of the case?

Hugh Henry: I think that we would have to test the Crown case. That is one of the major issues. In effect, the conclusion that we will all have to reach is about where the balance of fairness and justice lies. We are not talking about removing rights from an accused who absconds. It is clear that they have the right to attend the trial if they so wish. If they choose not to do so, however, is it right and fair that the other side cannot have its case heard? The defence lawyer retains the ability to challenge the Crown case. I believe that they could do so robustly. There is also a precedent:

under the Sexual Offences Act 2003, the agent can act without instruction. The proposal is not something that has not happened before.

Mr Maxwell: I accept what you are saying and I understand where you are coming from in respect of fairness to victims and witnesses and of the interests of justice. However, people who work in the area of defence have said to us in evidence that they would not be willing to take on such cases. Do you have any fears about whether it would be difficult to find people to represent an accused if they had not met or spoken to them?

Hugh Henry: No. I understand that some people might be reluctant to do so. Clearly, it is their right not to defend in circumstances in which they feel uncomfortable. I respect that right. There are other ways of providing defence in such cases. I am thinking of the panel of solicitors who indicated that they would be prepared to act in those circumstances. I do not think that the problem is insurmountable.

Margaret Smith: I do not think that anyone disagrees with the points that you have made about victims and about justice being frustrated. However, let me put the example to you of cases in which identification of the accused is crucial. I presume that, if identification was the main plank of the prosecution's case, the accused would not be able to be tried in their absence. I also presume that that would be at the discretion of the judge. Surely if the basis of the case is identification of the accused and they are not in court to be seen by the jury, justice could be frustrated. The jury might feel disinclined to find the person guilty.

Hugh Henry: I suspect that the Crown would not pursue the case. As you have said, it would be clear that identification of the accused was the critical issue in the case.

Margaret Smith: We had a helpful informal discussion last week with defence counsel and prosecutors. People across the board had concerns about the issue. One suggestion was that, instead of going down the route that the bill proposes, it would be better and more effective to raise the sentence for absconding, which currently is about two years. That would mean that, when a solicitor, solicitor advocate or counsel was dealing with an accused who was likely to abscond, they could sit the accused down and make it clear to them that, if they absconded, they would be likely to see a five, seven or 10-year increase to their sentence. The suggestion of 10 years was made by one of the defence solicitors who was present at the discussion. Whereas trial in the absence of the accused seems to go to the edges of whether a trail is fair, the suggestion for increased sentences for absconding is within the bounds of justice.

Hugh Henry: I understand the arguments that are being made but, to be honest, I am not convinced that, for some of the people concerned, the difference between two years and four years or between five years and 10 years would be material; if they did not want to spend any time incarcerated, it is clear that they would show no interest in participating.

One could imagine a situation in which a major drug dealer had considerable assets stowed away throughout the world, on which they knew that they could live comfortably. To someone aged 45 or 50 who was considering whether to take their chance turning up in court or to abscond, and who was facing a 10 or 15-year sentence in any case, the thought that, if they absconded, the penalty would be an extra five or 10 years might not make that much difference. Given their age and the resources that they had available to them, they might be prepared to gamble on the assumption that they could live out the remainder of their life in some comfort elsewhere. I suppose that such a gamble could be taken. I do not know whether the penalty that you are suggesting would be a deterrent to some of the people whom we are talking about.

Margaret Smith: The glib response might be that, in a situation involving all the factors that you have just highlighted, I would hope that the person would be kept in custody in the run-up to the trial and would not be given the chance to abscond.

Hugh Henry: They could be kept in custody, but you will be aware that, in some recent murder cases, people have been allowed out on bail in spite of the Crown's efforts; I know of three such cases in my constituency in the past year.

The Convener: That is a good point to close that part of the discussion on, because we have not mentioned bail; I am glad that you raised the issue. We have exchanged some useful information on bail with the bill team, but I want to deal with the issue on the record.

It has been suggested to the committee that there might be some problems with the way in which section 14 is constructed, in that a sheriff or judge who was considering the granting or refusal of bail would also have to consider a restriction of liberty order as an alternative to custody. Through discussions with the bill team, we have established that there are two different decisions—the first is about the granting or refusal of bail and the second is on an application for a restriction of liberty order as an alternative to custody.

A couple of points arise from that. One can take the view that, in the vast majority of cases, any solicitor whose client is detained in custody is bound to make an application for a restriction of liberty order and that that is going to be quite

cumbersome. I will mention the other issue—even though it has been cleared up—because the Sheriffs Association raised it. Sheriffs and judges have 24 hours in which to consider whether to grant or to refuse bail, but it can take a considerable number of days to ascertain the suitability of an accused person's accommodation and therefore their suitability for a restriction of liberty order, so they could not get such reports within the 24 hours. Will you confirm that the way in which the bill is constructed means that the decision about someone's suitability for a restriction of liberty order is not covered by the 24-hour period?

Hugh Henry: I can confirm that the issues that the committee raised in discussions with officials are valid concerns and that we will reconsider that aspect.

The Convener: Does that mean that you will also examine our concerns about the fact that a separate application for a restriction of liberty order might be made in the vast majority of custody cases? I cannot see why a solicitor whose client was going to be detained would not just make such an application, which means that a lot of applications would be made.

13:00

Hugh Henry: I understand your concerns, but it is already the case that, if someone is refused bail, he or she can apply for a review of the initial decision. I am not sure how what is proposed would be substantially different from the current situation.

The Convener: In that case, why is the provision in the bill needed?

Hugh Henry: The provision is necessary for the bail condition. Your principal question was whether it would lead to more appeals and challenges. It would probably not lead to more than happen at present. However, your first point was valid and we will reconsider the matter. We will also examine a pilot of the measure's use.

The Convener: It would help if you addressed that point, which we might deal with in our report.

My final question goes right back to the beginning of the bill, but I must ask it. We have spoken to many witnesses on and off the record. Is it your understanding that the judiciary fully support the proposals for the new preliminary hearing system, or have they just commented on the pros and cons?

Hugh Henry: We believe that most judges are in favour of the proposals. I suppose that a judge who does not like the system could be found somewhere, but we are content and relaxed that the majority think that the system would be beneficial.

The Convener: Although most witnesses have had criticisms, the consensus is that introducing preliminary hearings is a good thing, if they can be made to work. That is important, but I appreciate that consensus will not be reached among 32 judges.

Members have no final points to clear up. It is just past 1 o'clock—that is not too bad. I thank the witnesses for their useful and valuable evidence.

That brings us to the end of the oral evidence sessions on the bill. We have now to put our minds to the task of writing the report. I remind members that our next meeting is in committee room 3 on Wednesday 21 January, when we will simply consider the report. Arrangements are being made for a visit to HMP Polmont on 26 January; the programme for that will be circulated to members by e-mail, as usual. I thank members for their contributions and attendance.

Meeting closed at 13:03.

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