JUSTICE 1 COMMITTEE

Wednesday 19 April 2006

Session 2

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JUSTICE 1 COMMITTEE
11th Meeting 2006, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Bill Aitken (Glasgow) (Con)
Karen Gillon (Clydesdale) (Lab)
Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Desmond McCaffrey (Adviser)

THE FOLLOWING GAVE EVIDENCE:

Cliff Binning (Scottish Court Service)
Wilma Dickson (Scottish Executive Justice Department)
Paul Johnston (Scottish Executive Legal and Parliamentary Services)
James Laing (Scottish Executive Justice Department)
Scott Pattison (Crown Office and Procurator Fiscal Service)
Noel Rehfisch (Scottish Executive Justice Department)
Elizabeth Sadler (Scottish Executive Justice Department)
Richard Wilkins (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald
Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 4

Scottish Parliament

Justice 1 Committee

Wednesday 19 April 2006

[THE CONVENER *opened the meeting at 10:41*]

Criminal Proceedings etc (Reform) (Scotland) Bill: Stage 1

The Convener (Pauline McNeill): Good morning and welcome to the Justice 1 Committee's 11th meeting in 2006. I apologise for the late start. We had a briefing which, as usual, took longer than we imagined: the Criminal Proceedings etc (Reform) (Scotland) Bill is a large one, as the Executive officials who are here probably know. We have received one apology, from the deputy convener, Stewart Stevenson, who has other business.

Agenda item 1 is the Criminal Proceedings etc (Reform) (Scotland) Bill. I welcome the officials from the Scottish Executive bill team: Wilma Dickson, Paul Johnston, Cliff Binning, Scott Pattison, Noel Rehfisch and Richard Wilkins. I thank them for appearing before the committee. We have a number of questions for them.

Margaret Mitchell (Central Scotland) (Con): I have questions on bail reform. The bill will codify the circumstances in which bail can be refused, yet you will be aware that the Glasgow Bar Association and the Procurators Fiscal Society see that as a retrograde step and believe that common law has the necessary flexibility to deal with the issue more advantageously. How do you respond to that?

Wilma Dickson (Scottish Executive Justice Department): The Sentencing Commission for Scotland considered the issue carefully and took the view that, on balance, the advantages of clarity for all concerned, including those who appear before the courts, outweigh any dangers of inflexibility. Ministers considered the evidence from the Sentencing Commission and took the same view. The substantial advantages are transparency, clarity and fulfilling the Executive's responsibility to set out a clear framework for the law in legislation. Ministers took account of the points that Margaret Mitchell mentioned, which I suspect were made during the Sentencing Commission's consultation on bail as well as in evidence to the committee. I presume that she is talking about evidence that the committee has had in writing, which of course we have not seen, as it is not yet available to us. In fact, that is a repeat of a discussion that the Sentencing Commission has had. Ministers agree with the commission that the advantages of setting out clearly in legislation the criteria for bail outweigh the possible difficulties. There is always a vulnerability to challenge in the courts—that is what the courts are for.

Margaret Mitchell: The policy memorandum mentions the non-exhaustive list of factors that may be relevant to the court's assessment of bail. Does that cause a problem in that it does not provide the clarity that you hope the codification will achieve?

Wilma Dickson: Section 1 does two things. First, it lists the prime reasons for refusing bail under the European convention on human rights and then it gives an illustrative list of circumstances that the court may take into account. The list is deliberately not exhaustive, because other circumstances might arise.

For example, the committee raised previously the question whether the court could take into account non-court orders such as antisocial behaviour orders, which are not specifically listed, and the answer was that they could because the list is only illustrative. The advantage of an illustrative list is that it would not erode the court's discretion to take account of whatever appeared relevant when a case came before it on the day. A list would give a substantial guidance framework, but it would not constrain the courts too much.

10:45

Margaret Mitchell: I will put the question another way. Would it be possible to keep the flexibility of common law, without codifying, and merely give the reasons for refusal of bail in court?

Wilma Dickson: That could be done. However, ministers made it clear that they wanted to be as helpful as possible to the courts so that they could spell out the reasons for refusal as reflected in ECHR jurisprudence and with the help of a guiding list. There is an underlying recognition that the decision is always one for the court and that we should not constrain the court's discretion to take a particular decision on a particular day. Therefore, the list should be illustrative rather than exhaustive.

Margaret Mitchell: So it is your view that by codifying you will not restrict the courts' discretion or the flexibility that they currently enjoy in common law.

Wilma Dickson: Courts would in any case be constrained by ECHR jurisprudence. Making the list illustrative rather than exhaustive is deliberately designed not to impose an artificial constraint on courts. If we tried to be exhaustive—we did consider that—we would end up with a list that would be so long that it would be more or less

unprintable because we would have to think of every possible order or circumstance. We would be sure to miss something out and, anyway, cases provide circumstances that no one has thought of. We must give courts the right to decide on the day that, in all the circumstances of a case, something is a relevant consideration. Scott Pattison might want to say more about that.

Scott Pattison (Crown Office and Procurator Fiscal Service): What Wilma Dickson said is correct and I whole-heartedly agree with it. Common law is accessible to lawyers and is understood by them and by the courts. The law on bail, including the grounds for considering whether to oppose bail and remand an individual, dates back to decisions from the 1970s onwards. For the public's benefit, it is useful to have in a bill a clear statement of the grounds for opposing bail and remanding an individual, simply because that is less impenetrable for the ordinary man in the street than is the common law.

Margaret Mitchell: I am aware that a colleague wants to ask a question, but I want to make one more point. Is there not a danger that an illustrative list would result in a hierarchy of things and that what was on the illustrative list would become more important than something that was not on it? Could we not achieve transparency and making the law less of a nightmare for non-solicitors and the listening public by the court just explaining the reasons for refusal of bail, without what has been described as the cumbersome and unnecessary procedure of codifying existing law? Are we not creating problems by doing that?

Scott Pattison: Again, I emphasise the fact that the list is illustrative in the first instance. I would not expect sheriffs to feel fettered by it at all. There is a two-pronged approach of setting out clearly in the bill what the grounds are for refusal of bail, but leaving discretion to the court. There is also a requirement in the bill for the court to state its reasons for refusal, which creates the transparency I think we would all like in this area.

Mr Bruce McFee (West of Scotland) (SNP): Frankly, does all this not just create a bit of a dog's breakfast? We are told that the illustrative list is in the bill for the public's understanding: "There's this list of things and you can be refused bail if you meet any of the criteria. But by the way, it isn't exhaustive. There might be something else." Would it not be easier simply to leave the situation as it is just now, given that the courts, as you correctly say, will be required to state the reasons for refusing bail? If your intention is, as you said, not to fetter the court's discretion, why is the list in the bill in the first instance?

Paul Johnston (Scottish Executive Legal and Parliamentary Services): It might be worth emphasising that the first principle that is set out in the bill on what the court must consider is that the court

"must have regard to all material considerations".

The principle is that the court must consider everything that is relevant.

Mr McFee: Is that different from the situation now?

Paul Johnston: No. That states the position now.

Mr McFee: Exactly.

Paul Johnston: However, the bill illustrates the types of circumstances that might be relevant in a case. It must be arguable that that helps to clarify the situation. The bill says that everything must be considered and describes circumstances that might be relevant to a case.

The Convener: I have no difficulty with how you present the provisions, which makes sense in some ways. There is another way of proceeding, which Margaret Mitchell and Bruce McFee suggest. However, the explanatory notes say that:

"The provisions codify the current common law".

This morning, you are trying to draw us away from the idea of codification, because you are saying that the list is illustrative. Do you agree that you might have used the words "illustrative" or "not exhaustive" in the explanatory notes? That is our problem. In many submissions that we have received, respondents have drawn to the committee's attention their view that codifying the law on bail refusal would be a dangerous road to go down.

Paul Johnston: In codifying the law, it would be impossible to set out every situation that the court required to consider. At common law and in Strasbourg jurisprudence, it is essential that the court can consider all the circumstances of a case. That is what proposed new section 23C(2) of the Criminal Procedure (Scotland) Act 1995 specifies. However, it goes on to describe circumstances that the Strasbourg court has recognised as being of relevance to whether bail is granted.

The Convener: If that is the Executive's position, do you agree that it would have been helpful not to use the word "codify"?

Wilma Dickson: Section 1 tries to do two things: to set out clearly the key ECHR grounds for refusal, which could relate to the codification point, and to provide helpful illustration for clarification.

The Convener: I will cut to the chase. I have heard and understood what you have said. You are saying that you are not attempting to codify the law. Is that correct? Either you are or you are not.

Paul Johnston: We are putting the law on a statutory footing, whereas at present, the relevant law is common law. I tried to emphasise that, in codifying the law, it would be impossible to be more prescriptive. The court's discretion must remain.

The Convener: So you are codifying the law.

Wilma Dickson: Yes.

The Convener: It was said that the list was illustrative, so I presumed that you were trying to move away from the idea of codification.

Wilma Dickson: We are putting in legislation what it is possible to put in legislation without encroaching on the court's discretion. We are trying to strike a balance. As Paul Johnston said, under the ECHR, the court must have free and unfettered discretion in its role as an independent and impartial tribunal.

Mr McFee: I have difficulty with codifying something in an illustrative way or illustrating something in a codified way. You are telling me that you are codifying part of the law and illustrating something that might—somewhere or nowhere—arise some time in the future. In effect, you are creating a hierarchy with two tiers: issues that are considered important enough to be codified and everything else that is not in the bill. I suspect that that will leave court decisions open to challenge.

Wilma Dickson: What we are doing in proposed new sections 23B and 23C of the 1995 act is saying—straightforwardly, we hoped—that

"Bail is to be granted to an accused person"

except where certain circumstances apply. New section 23C sets out the grounds on which bail might be refused. We then make it clear that

"In determining a question of bail, the court is to consider the extent to which the public interest could, if bail were granted, be safeguarded by the imposition of bail conditions."

The provisions try to set out in relatively simple terms a framework for consideration that simply reflects what courts do at present, which is presuming in favour of bail while considering whether there are grounds for refusing it or whether any risk could be contained by bail conditions. If not, the court might make the decision to remand.

Mr McFee: If the bill was to be passed as it stands, would it alter in any way whatsoever the way in which the system operates at the moment?

Paul Johnston: The bill reflects the clear ECHR tests that apply to decisions on whether bail should be granted. The proposed new provisions should reflect the way in which the system operates at present.

Mr McFee: That might be true in your experience, but presumably there had to be a reason for drawing up those provisions. Do the courts take cognisance of ECHR regulations at the moment? I suggest that the answer is yes.

Paul Johnston: Absolutely.

Mr McFee: Then, if your interpretation is right and the bill is passed, the new provisions will make not one whit of difference.

Wilma Dickson: We have always said that the minister's commitment was to set out clearly the framework within which bail operates and leave the decisions to be made in each case by the court, which is the only body that is in a position to know the circumstances of any one case. The proposed provisions set out the framework within which the courts operate. The provision requiring reasons to be given in every case also helps to clarify and improve public understanding of the functioning of bail.

The Convener: I think that we had better move on from that topic.

Margaret Mitchell: I want to pursue one other aspect of bail. If the Crown does not oppose the granting of bail to an accused who is awaiting trial, the convention seems to have been that the court does not oppose it. The bill changes that. Why?

Wilma Dickson: The law is not 100 per cent clear on that point at the moment. From cases such as Spiers v Maxwell and another recent case, the general understanding is that the court cannot refuse bail unless there is opposition from the Crown. The ministers' feeling is that as an independent and impartial tribunal, the court's discretion cannot be fettered in that way. It might not mean an enormous change in practice, but to underline the centrality of the court, the bill says that the attitude of the prosecutor towards a question of bail does not fetter the court's discretion. The bill also gives the court power to ask questions. Of course, courts already have the power to ask questions and they do that in many other circumstances, but it rarely happens in questions of bail.

Scott Pattison: That is right. The change proposed by the bill is consistent with strengthening the court's position as the arbiter of liberty and allowing the court to test the Crown's position on bail. Again, I do not see that occurring routinely, although it would be open to the court to question the prosecutor whenever it so wished. In most cases where the Crown does not oppose bail, the prosecutor's response would be that there was no legal basis for opposing bail in the statutory or common-law criteria of either ECHR or domestic legislation. I would call it a change to the common law that strengthens the court's position as the arbiter of liberty. We are comfortable with that.

Margaret Mitchell: I welcome the provision and you have explained further why you are quite happy that the court would be able to challenge the position by questioning the fiscal and seeking more information than it does at present.

11:00

Marlyn Glen (North East Scotland) (Lab): The Executive has previously stated, in paragraph 14 of the policy memorandum published along with the Bail, Judicial Appointments etc (Scotland) Bill, that under existing common-law rules serious repeat offenders should be granted bail only in exceptional circumstances. In the light of that, what difference will this bill's provisions on bail for certain serious repeat offenders make in practice?

Wilma Dickson: As we have said, the bill sets out the current practical position. There will be very few circumstances in which there would not be justifiable grounds under ECHR for refusing bail to someone who has a serious previous conviction of the type described and is on a charge for a similar serious offence, on the ground—given that there is a demonstrable track record—of there being a risk of further offending.

You are right to think that the bill does not make a fundamental change to the current position. It underlines to the court the need to take into account the exceptional circumstances that justify bail in such cases.

Marlyn Glen: So there is no practical difference.

Will the limited advantages of the domicile of citation condition be outweighed by the anticipated breaches of this technical condition by vulnerable accused—particularly individuals with chaotic lifestyles who tend to move frequently—with the resultant severe penalties?

Wilma Dickson: I take the point. However, the feeling is that it is important to be able to get in touch timeously with an accused who is on bail. A vulnerable accused may well use "Care of my solicitor" as their domicile of citation. I imagine that that is quite common. The provision in the bill applies only when the domicile of citation is the accused's normal place of residence, so there is a degree of flexibility. If I were a very vulnerable accused, I imagine that using "Care of my solicitor" might be a better option for me and for my solicitor.

Marlyn Glen: But you are in a position to make that choice. I am concerned about the issue raised by the Disability Rights Commission. I wonder whether the bill meets the duties to avoid discrimination, in particular in relation to young offenders who have difficulty comprehending what is happening. We would not expect them to be able to make such a choice.

Wilma Dickson: I have not seen the submission, but I doubt whether we could be accused of discrimination when the provision in the bill simply sets out a reasonable process for ensuring that an accused keeps in touch and that the court can keep in touch with them. Once we see the submissions, we will be happy to consider the points that are raised. It is difficult to say too much, but I would not have thought that the procedure is an obvious vulnerability.

Scott Pattison: I do not think that it is, but I will be interested to see the submission in due course. We must remember that in most cases the individual who presents a domicile of citation to the court is legally aided and has the benefit of legal advice from the outset. That is an important safeguard.

Marlyn Glen: Thanks. I would appreciate it if you were to consider the matter. I have a general concern that vulnerable offenders should be clear about what is happening to them.

The Convener: Is the provision to which Marlyn Glen refers only for summary cases?

Wilma Dickson: No. Bail applies throughout.

Mr McFee: The Sentencing Commission's consultation paper draws the conclusion that the average daily remand population in our prisons has increased by a third over the past 30 years. Is it the intention of the bill to reduce the number of remand prisoners and, if so, how will it achieve that objective?

Wilma Dickson: The intention in the bill is to set out clearly the law on bail and to support better targeted initial bail decisions. We have no target for increasing or reducing the number of prisoners on remand; the approach is very much the one that was laid out by ministers in the bail and remand action plan, which acknowledges the partnership whereby the Executive sets out the framework for bail and the courts take the decisions. It would therefore be difficult to set a target for increasing or decreasing remand.

Mr McFee: Given that the bill makes provision to increase the maximum sentence in certain cases in which bail conditions have been breached, what work has been done to estimate the effect on average daily remand figures in the short, medium and long term?

Wilma Dickson: The Scottish Prison Service considered the bill's overall impact, which has less to do with the effect on the daily remand population than it has to do with the effect on the daily prison population. Some provisions might impact on remand and some might impact on sentenced prisoners, who might receive higher sentences for breach, for example. I think that the SPS wrote to the committee to express its view.

The SPS thought that the potential impact of the whole bail package, including the tightening up of enforcement, which is not included in the bill, might amount to 25 to 35 additional prison places a year. However, the SPS calculated that the increase in the prison population would be partially or wholly offset as a result of the fine enforcement provisions, which will lead to more effective administrative fine enforcement before the imprisonment stage is reached. Currently, some 61 prison places are occupied every night by fine defaulters; obviously many more people go in, but I think that the average sentence is 11 days.

Mr McFee: What is the Executive's view on the matter?

Wilma Dickson: We agree with the SPS.

Mr McFee: Did the Executive calculate the figures?

Wilma Dickson: Yes.

Mr McFee: Did it do so before it received the SPS's view?

Wilma Dickson: We gave less consideration to the prison population, which is a matter for the specialist expertise of the SPS, than we gave to other matters. As part of our work on the bail and remand action plan we undertook modelling on the possible impact of provisions in the bill—I think they are all well in line.

Mr McFee: Do you mean that the Executive's projections were roughly in line with those of the SPS?

Wilma Dickson: Yes.

Mrs Mary Mulligan (Linlithgow) (Lab): Part 2 of the bill is on proceedings. The report of the McInnes committee favoured the setting of time targets as a means of improving the speed of the summary justice system. What targets currently exist? Are the witnesses involved in further work to develop targets?

Scott Pattison: Police forces in Scotland are subject to a 28-day target for the initial reporting of cases to procurators fiscal. Thereafter, the Crown Office and Procurator Fiscal Service has internal targets on the timeframe for proceedings in the ordinary course of events. The targets are clear and information about performance against those targets is published on our website. There is also a joint target for the COPFS and the Scottish Court Service on the conclusion of proceedings in the ordinary course of events, which Cliff Binning might say more about.

No one thinks that legislation can deliver everything and it is worth saying—I am sure that the committee will be interested to hear this—that, in tandem with the bill, a number of significant work streams are in place in which the current targets are being carefully considered.

There is a considerable amount of joint working between the Crown Office, the Association of Chief Police Officers in Scotland and the Scottish Court Service on securing the best system model for summary justice. A number of matters that are not covered in the bill are being considered in that context. For example, what is the optimum time for an intermediate diet within the spectrum of summary prosecution? We are also considering whether the targets are working to their optimum effect.

Cliff Binning (Scottish Court Service): In support of the all-through target that the Scottish Court Service has jointly with the Crown Office for the disposal of summary criminal business, the SCS has a target to dispose of 85 per cent of summary court cases within 20 weeks of their first calling in court. Current performance is about 81 per cent. That target contributes to the overall target for the throughput of summary court business.

There is also a joint target to reduce the number of adjournments of High Court business. Following High Court reform, we have made progress in substantially reducing the number of adjournments.

Noel Rehfisch (Scottish Executive Justice Department): The topic was the subject of debate in the deliberations of the McInnes committee. I back up what Scott Pattison and Cliff Binning said about the work that is under way to ensure that cases progress through the system as quickly as possible. The McInnes committee received a number of submissions and some members of the committee were in favour of a rock-solid time limit beyond which cases simply could not proceed. However, the majority of the committee concluded that, ultimately, the people who would benefit from that would be offenders in cases that, for one reason or another, did not make it through all the phases in the time available.

Obviously, time limits and targets play an important role in ensuring that we get cases through the system as quickly as possible. The McInnes committee considered having an absolute target, but the risk of having such a target is that, even if one develops the system to more optimal levels, there will always be cases that take longer and an absolute target would benefit the accused rather than the community.

Wilma Dickson: In parallel work streams—not as part of the bill—we are seeking to improve the management information on, for example, the time that cases take, both overall and from stage to stage. It is hard to set properly calibrated targets until one has good, real-time management information, so a lot of work is being done on that.

Mrs Mulligan: I appreciate that the targets do not necessarily need to be in legislation and that things will happen without that, but is the Executive considering including provisions on targets in the bill?

Wilma Dickson: No, I do not think so. We considered setting a statutory target for summary cases but we concluded that that would not be beneficial, for the reasons that have been articulated. We are working through a number of channels. The national criminal justice board brings together all the stakeholders and has a number of high-level goals. It is managing a programme of work including work on the system model, on the improvement of management information and on other areas, such as improving the handling of warrants.

A lot of background activity is going on. The bill gives us a more flexible framework, but making that work is about developing partnerships between the stakeholders rather than just about changing the law. A lot of work is going on behind the scenes.

Mrs Mulligan: We will concentrate on the bill, then; perhaps we will come back to statutory targets at a later stage.

Undertakings are used at the moment, but there seems to be an expectation that there will be an increase in the use of undertakings under the bill. What level of increase do you predict, and what steps are being taken to ensure that the police, the courts and the prosecution will be able to deal with any increase in practical terms?

11:15

Wilma Dickson: On the scale of use, there has been some pilot activity, particularly in Grampian, in which we have looked at the greater use of undertakings. Undertakings reschedule the process. They do not change the workload, but they involve work at an earlier stage. We have to be clear that this is not just about getting cases into court quickly, as that would just shift delays, with cases stacking up in court. The process needs to be considered end to end, which is where the system model work comes in. I do not think that we will have a 10 per cent plus or minus target for undertakings, as the system model work will give us a better spec for the kind of cases in which undertakings would be appropriate, in the context of the end-to-end court process. Just shovelling stuff in rapidly at the front end without working out what consequences that will have for the back end will not work.

Scott Pattison: This is one of the significant work-stream areas that I referred to earlier. The Crown Office and Procurator Fiscal Service is working closely with the police and the Scottish Court Service to work out the optimum use of undertakings from locality to locality. There is a still a lot of work to be done between the partners on this area, but our initial view is that a one-size-fits-all approach might not work from jurisdiction to jurisdiction. The best approach in the first instance is probably to consider the categories of crime that might be best reported by way of undertakings. We are considering the process carefully and trying to work out in which cases undertakings would be appropriate. We see undertakings as a major opportunity to speed up business, provided that we can model the process properly and move incrementally on the changes.

I do not know whether I have answered all your questions, but significant work is going on to consider undertakings. For example, key work is on-going between the police and the Scottish Court Service on whether the police should be provided with access to information about court scheduling and the number of undertakings slots that could be available. That would allow the police to begin to use some of the provisions in the bill that relate to police officers authorising undertakings on the street, so to speak. A host of practical issues require to be addressed but there are a number of significant opportunities to benefit the system as a whole.

Mrs Mulligan: Is there anything that you would consider introducing to ensure that you do not get that bulge at a later stage?

Scott Pattison: The essential way to progress would be to move incrementally. We could start by considering the categories of crime that should be reported by way of undertakings and revisiting the Lord Advocate’s guidelines to the police on liberation and the use of undertakings. We can gradually increase the use of undertakings so that we do not have a big bang in the system and cause the bulge to which Wilma Dickson referred. If we move incrementally and gradually increase the numbers over the first year or two of the new system, we will find out what the optimum percentages are. For what it is worth, those percentages might change from jurisdiction to jurisdiction in line with changes in the spectrum of crime.

Mrs Mulligan: On different jurisdictions, you said that you have already started considering undertakings in more detail in Grampian. Do you expect undertakings to roll out in different areas once the bill is passed, or will they come in everywhere at once?

Scott Pattison: We have not got that far yet in the thinking on the on-going work stream. We will have to clarify our thinking and planning in relation to which cases should be reported in that way and then begin to look further at the jurisdiction approach.

We could have a mixture of the two approaches. For example, we could introduce the new system on the same day in a number of jurisdictions and then move towards ensuring that a certain percentage of crimes are reported by way of undertakings. This is very much a work in progress, but the partners are excited about the opportunities that it presents.

Mrs Mulligan: Although the measure has been welcomed, concerns have been expressed that introducing additional conditions might cause further problems. For example, the police might not know an individual's circumstances.

Wilma Dickson: The Lord Advocate will issue guidance to the police on the imposition of conditions. However, we acknowledge the problem that you have highlighted, which is why section 6 also contains a reserve power to be used as required to support consistent use of the new power by stipulating that a more senior police officer with more experience must sign off the conditions. That reserve power will be used if problems emerge, but the first line of approach will be the Lord Advocate's guidance to the police.

Mike Pringle (Edinburgh South) (LD): As well as the project in Grampian, there is the West Lothian criminal justice project, which, as we were told on our visit to Linlithgow sheriff court, has been very successful in getting people into court more quickly. Has any thought been given to rolling that out?

Wilma Dickson: We intend to consider any lessons of general application that can be learned from the Grampian and West Lothian projects. However, as Scott Pattison has pointed out, the solution for a very rural area might not be the same as that for a densely populated urban area. As a result, after drawing out the general principles, we might have then to apply them slightly differently, depending on local resources and circumstances.

Scott Pattison: Although it is still early days, some significant lessons and themes have emerged from the various pilots, including prompter reporting; increased use of undertakings at the front end; closer joint working between the reporting officers and the procurators fiscal who are marking the cases or taking the initial decisions; and involving the defence solicitor in the process. Moreover, the Grampian and West Lothian projects have used different models of early disclosure that the system model work stream that I mentioned earlier will examine carefully. We will take all those themes into account in working up the best system model for summary justice.

Noel Rehfisch: As Scott Pattison has made clear, some very interesting developments have emerged from the pilots. They are being factored into the wider summary justice reform programme, of which this bill forms a crucial part. We should also bear in mind the fact that, to date, the work in Grampian and West Lothian has applied only to selected samples of the system, not to the whole system itself. Before we decide whether to implement particular provisions, we will need to be confident that they will not have any unintended consequences when they are multiplied out into the whole system. However, that is part of the current underpinning work.

The Convener: Are you able to tell us, off the top of your head, two or three key points of delay in the summary system?

Scott Pattison: Yes, but I should point out that the Justice Department's work on system model reform is looking at that very issue.

In the past, some police reporting has taken place later than it might have done. Moreover, the churn of business in the summary system could be improved by better joint working between the procurator fiscal and the police to ensure that cases are prepared and ready for the first trial diet. I think that that is all that I want to say at this stage. There have been issues relating to reporting and case preparation, on which I think we can do better in our relationship with the police.

The Convener: I have to offer an observation at this point. When you ask practising solicitors what they want out of a summary justice bill, you get the answer, "We want a speedier system." Most people would say that a summary justice system is supposed to speedy. Getting speed in the system must be at the heart of the bill, but this morning you have been talking about models that are still in the planning process.

I am having difficulty in pointing to a concrete mechanism for speeding up the system, in the way that I could in relation to the Bonomy reforms. I appreciate that there are different reasons for delays in the High Court, but it would be helpful if at some stage we could get an idea of your thinking about what the key reasons for delay are. What in the bill will change all that? I do not know whether I can really see the point in legislating if there is nothing to say about what will actually drive that process. Glasgow is not always the best example, because the courts are so busy, but we have heard that intermediate diets there are not as effective as they could be. What mechanisms do you think can change all that?

Noel Rehfisch: It is important to stress that there are two tracks of work running here. We have talked a lot about the second track—the one that underpins some of the work that we are discussing—and we hope that as a result of that work we can make the most of the bill's provisions,

if it is passed. In part 2 of the bill, there is a long list of different procedural changes, which is very much derived from the recommendations of the McInnes report.

It is probably worth saying a couple of words about the way in which McInnes looked at the summary system. The committee started from the start of a summary case and went through the process, looking at different aspects of the process and trying to determine where there were specific difficulties with sticking points or procedures that led to perverse incentives being in place or to cases being unnecessarily churned. As a result of that, McInnes produced quite a lengthy report with a number of specific procedural recommendations. None of those recommendations will, in itself, revolutionise the system but, taken together, the recommendations should have a significant effect on ensuring that different bits of procedure can be dealt with more quickly, that fewer witnesses are called to court to give evidence and that the failure of the accused to appear is dealt with more effectively. The McInnes committee provided the Executive with a toolkit approach, involving a number of different procedural provisions, which you can now see in part 2.

Wilma Dickson: For example, stress is put on electronic communications, on more effective use of the intermediate diet and on more effective provisions on agreement of evidence. As Noel Rehfisch says, those are cumulative elements, rather than there being one big thing.

Desmond McCaffrey (Adviser): The speed of the process is a matter of some concern to the respondents and to the convener. It had been our understanding that the intermediate diet stage would be akin to the preliminary hearing, when the judge would get a grip of the case, and that the Crown would disclose at that stage that which it was obliged to disclose and would produce the statements of the witnesses, and that the defence would say what its defence was. The idea was that, thereafter, only the matters that had to go to trial would go to trial, rather than the knock-on situation that we have at the moment, with everything being sorted out at the trial diet.

As the summary of key points states, the Executive is

"Introducing improved measures to ensure that only witnesses whose evidence is disputed are obliged to give evidence at trial."

None of that exists at present. The only thing that exists is the provision that the defence has to tell the Crown what its defence is. At that stage, there is no obligation on the Crown to tell the court who its five witnesses are, for instance. If it did so, the defence might say that it disputes only the evidence of Constable Bloggs and Constable Wilson, but agrees the evidence given in the other witnesses' statements. That would mean that the trial would be a proper trial.

It was my understanding that the legal aid provisions were going to change in line with that, so that legal aid would be provided until the intermediate diet and that thereafter, going to trial would be the same as in the High Court. In other words, if a case goes to trial, it goes to trial, rather than have 80 cases calling at Glasgow sheriff court every day, of which only 10 actually go to trial. That was my understanding of the situation, but the matter does not appear to be addressed in the bill—I refer in particular to the provision that

"only those witnesses whose evidence is disputed are obliged to give evidence at trial."

11:30

Scott Pattison: I wonder whether, to some extent, that is already covered under existing obligations on the Crown and the defence to be prepared for the intermediate diet and under the duty of the court to assess the state of preparedness of the parties at the intermediate diet, as well as the existing duties on both the Crown and the defence to identify the uncontroversial evidence. My instinctive response is to say that the parties are already under legal obligations to come to the intermediate diet prepared. They must be frank with the court about their state of preparedness.

There might be issues around the timing of intermediate diets that could be addressed by our system model work. Intermediate diets are routinely—but not statutorily—held 14 days before the trial diet. I know that some of the on-going work is dealing with whether that period should be pulled back to an extent to allow a proactive judiciary to act assertively with the parties and to be in a position to fix a further intermediate diet to hold parties to account on what they say at the first intermediate diet. I take the point that the bill does not deliver on timing.

The Convener: It is the obvious question. If you have been considering the timing aspect, why is that not covered in the bill? It does not seem as if we are ready. This area was covered in the Bonomy report, which went into the issues of timescales and the role of the judge. Surely some of that translates to summary justice. You are thinking about altering periods at the moment. Why have such aspects not been considered under the bill?

Wilma Dickson: The Bonomy report and the Bonomy bill—which became the Criminal Procedure (Amendment) (Scotland) Act 2004—gave us a clear end-to-end model for a fairly confined number of cases. What we are dealing

with here is 96 per cent of the total number of cases. It is not quite so easy to put a definitive model in the bill without a great deal of background work being undertaken in parallel.

Is there a concern on the part of the committee that there is not enough in the bill to make effective use of the intermediate diet? If that is the concern, we can take the matter away and look at it.

The Convener: Yes. We saw evidence prior to our scrutiny of the Criminal Proceedings etc (Reform) (Scotland) Bill that intermediate diets do not work—that they are failing to achieve their purpose. We have even asked what the point of them is. A defence mechanism will always kick in when we ask anybody that question. However, we have considered that point many times.

I hear what you say about such things being cumulative and about the overall effect. It is clear from our discussion that a lot of the work is still at the planning stage. I feel that a lot more should be apparent to us at this point so that we can make a judgment on the key objective of the bill, which, I would have thought, is to speed up the system. I do not feel that I can make a judgment on that until I know what is going on with the models that are being drawn up. Your summary is a fair one: our key concern is probably that there is nothing on offer with regard to how to correct a system that is currently not meeting its objectives.

Wilma Dickson: I wonder whether it would be helpful if we gave the committee a background briefing paper on the overall work programme. We can also find out whether there is any way of making sections 18 and onwards, which deal with preparation for summary trial and which provide for the need to notify the defence and to change the time limit in relation to proof of uncontroversial matters. I think that you are saying that you would like to see something more definitive, like the detailed preliminary hearing specification that was given in the Bonomy report. Is that correct?

The Convener: Yes. Given that Scott Pattison suggested that the timescale might be adjusted, we should know whether that is proposed.

Scott Pattison: The timescale for the intermediate diet is not prescribed by statute at the moment. A move to hold the intermediate diet four weeks before the trial diet can be achieved by means of a protocol between partners and effective programming of business; it does not require a statutory change to be made. I underline the commitment of not just the COPFS but all partners to providing a speedier system and the significance of the work that is on going to achieve that.

The Convener: I do not doubt that commitment for a minute. However, the committee is expected to scrutinise a bill when not all the information is before us, because, as you have argued, it is not necessary to put everything in statute. We need to judge whether the objective of speeding up the system will be achieved in full knowledge of what is going in the bill and the models that you are considering putting in place.

Wilma Dickson: Would it be helpful for us to give the committee a paper setting in context the bill and the other work streams?

The Convener: Yes.

Wilma Dickson: Although some of the provisions on bail are in the bill, some elements of the bail and remand action do not require to be prescribed in legislation.

The Convener: It would be helpful to have such a paper, because I would not be confident saying in our report that the Executive would achieve its objective of speeding up the system without knowing what was going on in tandem with the bill.

Wilma Dickson: That is fair.

Margaret Mitchell: There is a need to home in on the intermediate diet. I appreciate that the legislation around the Bonomy reforms was different, but, nonetheless, I would like to see more emphasis placed on the importance of the intermediate diet. At the moment, it all seems to be a bit of a lucky bag: parties might be ready, or they might not be. It should be made clear that all parties are fully expected to be ready by the time of the intermediate diet. If they are not ready, the judge will question them as to why not and a dim view will be taken of any lack of readiness, unless there is good reason for it. That would have an immediate effect. Anecdotal evidence suggests that in the High Court the preliminary hearing and the ability of parties to work together to ensure that everything is in place for the trial diet are saving time. I do not think that it would be impossible to achieve that in the summary system. We are just talking about a change of emphasis, albeit an important one.

Wilma Dickson: We take the point that you want to see the overall summary justice work programme.

The Convener: Yes. I move on to the subject of trial in the absence of the accused. As you know, the committee dealt with trial in absence under solemn procedure when it considered the Criminal Procedure (Amendment) (Scotland) Bill, to which we made a number of amendments. Why, in the case of summary justice, have you decided to go back to having a full trial in the absence of the accused? Does it not seem odd to have a number of limitations as to when a trial can proceed under solemn procedure but fewer restrictions on trials under summary procedure?

Wilma Dickson: The ministers' view, which is reflected in the policy memorandum, is that under the ECHR there is no bar to holding a trial in the absence of the accused, as long as the individual has been duly notified of the date of the trial. In summary courts, the volume of non-appearances and the contempt of the court process that that reveals are a serious issue.

Whereas in the High Court enormous difficulties can be caused by one or two cases of non-appearance, in summary courts the problem is more the volume of such cases, which cumulatively undermine respect for the court. Therefore, given that the consequences for the offender are much less serious in summary cases than in solemn cases, ministers felt that we should legislate for trial in absence from the beginning in summary proceedings.

The Convener: We are all familiar with the arguments against trial in absence, which were rehearsed during the passage of the Criminal Procedure (Amendment) Scotland Bill. Obviously, one genuine obstacle concerns the position of the solicitor who will be unable to obtain instructions from a client who is not present during the trial. Surely that will cause some problems.

Wilma Dickson: We understand that some solicitors may not wish to continue to act in the absence of a client who can instruct them, although precedents exist in other areas of the law for a solicitor to act in the best interests of a client who cannot give instructions. The bill provides that, where the court considers it to be in the interests of justice to do so, the court should appoint legal representation on behalf of the absent accused. Where the identification of the accused was a major issue, it is doubtful that a court would proceed with a trial in absence.

The Convener: If the court appoints a solicitor, the same problems will arise, in that the solicitor will need to establish the wishes of the accused who is not present. Therefore, even if the court is given those powers, real difficulties will still arise. The court might face the position that solicitors are genuinely not prepared to act in those circumstances.

Wilma Dickson: We understand that difficulty, but trial in the absence of the accused is not without precedent and is common in other European jurisdictions. No bar to a trial in absence is inherent in the European convention on human rights, provided that the individual is clearly notified in advance. The bill provides that, once an accused has pled not guilty and it is clear that a trial will be held, the accused should be notified not only of the date of the trial but that the trial may go ahead in their absence.

The Convener: What figures are available on the volume of non-appearances?

Wilma Dickson: We have figures only for convictions for failure to appear, which probably underestimate the total. There are around 3,000 convictions a year against the various failure to appear provisions, but most of those concern bail.

Mike Pringle: Given that the accused, like the solicitor, will know that the trial could go ahead in their absence if they fail to turn up, is the bill trying to force more accused persons to conclude that the trial will go ahead anyway even if they do not turn up? On the other hand, although no responsible solicitor would tell an accused person that they should not turn up for their trial, if the accused is made aware that their solicitor will not act for them in the event of their failing to appear at the trial, a contradictory message could be sent out. Will the provisions be used almost as a stick to ensure that people turn up for their trial?

Wilma Dickson: It is fair to say that ministers are concerned about the fact that people do not show up for their trial. By making it clear that the trial may go ahead in their absence, the provisions may provide an incentive to people to show up at their trial.

Mike Pringle: If, as we have heard, solicitors refuse to act on behalf of absent accused, how will the provisions help the situation?

Wilma Dickson: We have not seen the evidence that the committee may have received from various solicitors' representatives, but it is not without precedent for a solicitor to act when they are not able to take direct instructions.

11:45

Scott Pattison: We all want to get to a situation in which by the time cases reach the stage of the intermediate diet, parties are routinely prepared and solicitors acting on behalf of the accused have full instructions. One caveat is that the prosecution will want to use the trial in absence procedure very sparingly. If a solicitor has been fully instructed, if the accused was present at the intermediate diet but fails to turn up for the trial, and if, for example, a vulnerable victim and vulnerable witnesses are involved, it is possible to imagine a situation in which a sheriff sees everything in the round and proceeds to trial in absence in the interests of justice.

I understand solicitors' concerns and I look forward to reading their submissions, but I do not think that in every case a solicitor would rule him or herself out of representing at a trial in absence. If we make the systemic improvements that we want to make, it is possible to imagine a situation in which solicitors are fully instructed routinely at intermediate diets and are ready for trial.

The Convener: We tend to revert back to the point that we discussed earlier about the importance of the intermediate diet. If that part of the system worked effectively and the preparedness of the parties, including the full instruction of the solicitor, were established, the trial would be more likely to go ahead.

Scott Pattison: It is crucial to the whole system that intermediate diets work to optimum effect. There is clear agreement about that.

Mrs Mulligan: Let us consider sections 33 to 35, which increase the custodial powers of sheriffs in summary courts. Such courts could soon deal with some serious cases. Would that remove the option of the jury trial for many alleged offenders? Could it be seen as weakening the participation of laypersons in the court process?

Noel Rehfisch: The proposed increase to a maximum custodial sentence in summary cases of 12 months was a specific recommendation of the McInnes committee. It was based on that committee's premise that the sheriff who sits summarily is an experienced judge. If we look at comparable jurisdictions abroad, for example, we see that the current level of sentencing power of a sheriff sitting on his own is quite low.

Another argument for that change is to do with efficiency, to which we have alluded several times. At the moment, a number of cases that go to the solemn courts are not as serious as some of the significant solemn cases that go to trial at the High Court. The argument is about seeking some form of business redistribution to ensure that every level of the system deals with the business that it ought to deal with and managing that as effectively as possible.

The independence of the prosecutor who makes the marking decision about which level of court a case will end up in is not affected by the change in the bill. Obviously, the prosecutors will be aware of the higher sentencing limit in the system and they will need to exercise proper discretion in that regard. Perhaps Scott Pattison wishes to add something.

Scott Pattison: The decision as to which forum or court an individual is prosecuted in is for the procurator fiscal, subject to instructions from Crown counsel and the Lord Advocate. To that extent, an accused person in Scotland does not have a right to a jury trial or an option for one. The decision is for the prosecutor based on consideration of the evidence in the case, the seriousness or otherwise of it and the available sentencing powers of the court.

The bill proposes to increase the common-law sentencing power of the sheriff to one year. Sheriffs have a one-year sentencing power available to them in a number of statutory offences including under misuse of drugs legislation. We have a judiciary that is used to sentencing on a one-year limit.

The bill raises the common-law ceiling to mirror that which is imposed by a number of statutes at the summary level. Some work that has to date been dealt with through sheriff and jury prosecutions will be redistributed as a result of the increased sentencing power in summary cases. The modelling work that we have done thus far, which is continuing, suggests that 500 to 550 cases per year may be dealt with by the sheriff sitting summarily rather than with a jury. That is reflected in the financial memorandum.

Noel Rehfisch: I will follow up that answer and address Mary Mulligan's second point, which has not been addressed. Scott Pattison rightly pointed out that our modelling to date indicates that, based on current case loads, about 550 cases per year that prosecutors would have marked to the solemn courts will in future be heard at the sheriff summary level. You asked whether that will result in a significant dilution of the involvement of laypeople in the system. The McInnes committee did not find any huge crisis of confidence in the sheriff summary level, at which the sheriff determines guilt or innocence and also passes sentence. However, issues arose about the role of lay justice and whether that should continue—we will come to that matter later.

To add to Scott Pattison's comments on the figures, in recent years, the business in the sheriff summary courts has been in excess of 90,000 cases a year. We are talking about a shift of 500 or so cases, which is not a significant proportion of the case load. In those cases, the process will be presided over entirely by a professional judge. Our view is that, given the proposed changes to and investment in the lay justice system, the overall package will not dilute lay involvement in the system.

Mrs Mulligan: You have probably answered my supplementary question, but I will ask it anyway. Safeguarding Communities-Reducing Offending has suggested to us that the increase in the custodial sentencing power raises the possibility of an increase in the number of people in our prisons, which would go against the Executive's direction of travel of reducing the prison population. Given the numbers that you have just quoted, what would you say to SACRO on that?

Noel Rehfisch: Our response would be twofold. First, it is clear that the intention of the changes is not to be more punitive in respect of any particular offence. For example, for any statutory offence that can be tried only summarily at present, the sentencing limit will not change. The increase to 12 months is about providing headroom in the summary system to deal with slightly more serious

cases that, in the view of the McInnes committee—which ministers accepted—could relevantly, competently and capably be dealt with in the sheriff summary court.

On two occasions in recent years, there have been increases in the maximum sentencing level in the sheriff solemn courts. The same sheriffs, albeit with a jury, are responsible for determining sentences in those cases. To date, there is no evidence that those increases have led to what might popularly be described as sentence drift. We are confident that the judiciary will continue to consider individual cases on their merits. The measures are about having the appropriate level of business in certain sectors of the system.

Mrs Mulligan: The prescribed sum will also be increased. Has the Executive considered whether raising the level of fines could be counterproductive? For example, the measure could result in increased difficulties for those who already have difficulties paying fines. It could also mean that, if people cannot pay fines, the custodial route could be used instead.

Noel Rehfisch: Again, there are two prongs to my answer. First, to echo what was said about custodial sentences, there is no intention to increase the maximum fine that can be imposed as a disposal for a particular offence. The intention is that cases that would previously have to go to the sheriff solemn court to receive a sentence that was felt to be fit will now come down to the sheriff summary level. Secondly, the introduction of the new system for fines enforcement, which I am sure we will come on to soon, involves the creation of fines enforcement officers, who have a range of ways of enforcing fines and, critically, an advisory and assistance function. We hope that that will lead to the system being much better informed about the ability of people to pay and that it will be able to manage outstanding fines much more effectively.

Cliff Binning: I have a brief point to add. Currently, circumstances in which the level of fine that is imposed reaches the existing limit are the exception rather than the rule. The general population of fines and the levels of penalty imposed in respect of those fines will not change because of the increase in the upper limit of the fine. The intention is to capture the few cases that, under other circumstances, would fall to be prosecuted under the solemn procedure.

Mrs Mulligan: You say "few", but you gave figures earlier for the custodial cases. What do you mean by "few"?

Cliff Binning: I cannot give a precise estimate, but a typical fine in the sheriff court under summary procedure would be about £200. Only rarely would the fine get into four figures. The number of cases that fall into that category would certainly be in the tens or the low hundreds.

Noel Rehfisch: Just to follow up on that, one could imagine a situation in which there was a breach of a statutory obligation, which is quite a simple case, but the penalty available—possibly to be imposed on a company—is quite high. As Cliff Binning said, we do not consider at all that simply having a £10,000 ceiling on the summary sentencing limits will lead to the judiciary thinking, "Well, we have this new power. Let's use it in cases where we wouldn't previously have used it." That is not the intention at all.

Mr McFee: On the points on imprisonment, you seemed to suggest that the powers would not be used for cases that would normally be heard in the sheriff summary court. However, none of the provisions in the bill would prevent that from happening. Is that correct?

Noel Rehfisch: Yes. It will remain for the prosecutor to mark the case at the appropriate level and it will remain for the judge to determine the most appropriate sentence, having regard to the facts and circumstances of a case. We certainly do not think that we should intervene through legislation in the sentencing decision.

Mr McFee: I am not suggesting that you think that. However, the implication of what you said earlier was that cases that normally come to the sheriff summary court would not attract higher disposal tariffs, but that clearly is not the case. They will be available and the question is whether the court will use them.

Wilma Dickson: Yes.

Mr McFee: So the possibility of sentence drift exists.

Wilma Dickson: It is fair to say that it does. One of the concerns in the Bonomy report about increasing sheriff solemn sentencing powers from three to five years was that sentence drift would occur—that is, the concern was that an offence that would have previously got a lower sentence would get a higher sentence simply because that was available. We have been monitoring that carefully and we have commissioned a large, independent evaluation of the Bonomy reforms, which will come back to the committee. However, so far, we have seen no evidence of sentence drift happening. There is no evidence that the availability of a penalty alters a judge's assessment of the seriousness of an individual case. I accept the point that, in theory, the penalty is available, but no evidence from the previous two increases has suggested that judges' judgments have been skewed.

Mr McFee: Time will tell.

12:00

Mike Pringle: Noel Rehfisch spoke about the higher fines—of up to £5,000 now and up to £10,000 in future. Those fines will apply not to individuals but to companies, businesses and corporate bodies. Is that right?

Noel Rehfisch: Absolutely. Provisions in the Criminal Procedure (Scotland) Act 1995 dictate certain things that a judge must do before deciding on the level of fine to be imposed. Assessment of means, for example, would be covered by that.

The Convener: We move now to a different topic.

Mr McFee: Yes—I want to ask about fiscal fines and enforcement. Clearly, there is a whole new range of areas in which fiscal fines can be the disposal. How does the Executive respond to concerns that, in introducing such a system, it is encouraging fiscals to act in a quasi-judicial way and to impose fines without any knowledge of the background of the case, the circumstances, or the ability of the individual to pay the fine?

Scott Pattison: Fiscals have been using fiscal fines for almost 20 years, since their introduction in the 1980s. The limit was increased in 1997 to £100. Since then, prosecutors have become experienced and much more knowledgeable in the use of alternatives to prosecution generally and fiscal fines in particular.

The arguments on whether the powers are quasi-judicial or otherwise were first set out in the Stewart report in the 1980s. The fiscal fine, once accepted, does not count as a conviction against the individual and the philosophy has always been that that is an important safeguard. It is also important to acknowledge that alternatives to prosecution—fiscal fines in particular—represent what can often be a proportionate and prompt response to particular types of low-level offending.

It will not have escaped the notice of committee members that the bill makes an alteration to the disclosability of fiscal fines. If an individual accepts a fiscal fine under the new regime, the fine can be referred to in court proceedings in the two years following that acceptance. That, I suppose, is to ensure that fiscal fines are not regarded as a soft option but are seen as having some teeth. The enforcement provisions assist with that as well.

You asked whether prosecutors would be acting in a quasi-judicial way. I would argue that, for as long as there has been a procurator fiscal and a prosecutor in Scotland, he or she has been acting in a quasi-judicial way. The act of bringing criminal proceedings against a person is a significant one, which interferes with that person's life. We have always trusted our prosecutors to assess the evidence and the circumstances of the offender, and to take the important decision on whether proceedings should go ahead. To allow—as we have done for the past 20 years or so—the ability to offer an alternative to prosecution that does not amount to a conviction once accepted goes no further in philosophical or jurisprudential terms than the trust that we have always placed in prosecutors to bring criminal proceedings.

Mr McFee: I had wanted to ask whether a fiscal fine was viewed as a conviction. The bill says that it is not. However, if information about a fiscal fine were introduced in court when an individual appeared in a similar situation 12 months later, it would act in the same way as a conviction would. Does a fiscal fine not have the effect of a conviction?

Scott Pattison: Such information is presented to give the court a full picture of an individual's background. We do not want to see alternatives as a soft option; it is important to have a proportionate, prompt and effective response to the huge range of offending for which alternatives can be used. However, we must ensure that the court is aware of all that it should be aware of. The balance is struck by the provision in the bill that says that the accepted fiscal fine can be referred to or disclosed only for two years. The bill ensures that a court knows an individual's background, but a fiscal fine falls short of a conviction.

Mr McFee: If a fiscal fine is not a conviction, is it an admission of guilt?

Scott Pattison: Not in strict terms. When an individual accepts the opportunity to pay a fine in response to an offer by the public prosecutor, that involves no admission of guilt.

Mr McFee: So a fiscal fine is not a conviction or an admission of guilt, but it can be disclosed within two years in sentencing an individual who reappears in court.

Scott Pattison: The weight to give to the fiscal fine would be a matter for the court.

Mr McFee: The information could be used.

Scott Pattison: Yes.

Mr McFee: Although a fiscal fine is not a conviction or an admission of guilt.

Scott Pattison: Yes.

Mr McFee: That is interesting.

Paul Johnston: The provisions are clear. When an offer is made to an individual, they must be informed of the consequences of that offer. The individual will face a choice. If he or she rejects the offer, they are likely to proceed to trial. If the offer is accepted, the individual will be aware that acceptance of the offer might be disclosed in subsequent proceedings within two years.

Mr McFee: I understand that an individual could be aware of that. I could be aware that I was to be knocked down by a number 10 bus, but that would not mitigate the situation when that happened.

The bill will introduce an opt-out system for fixed penalties. If the individual does not opt out, the method that will be used for disposing of an incident will be the fixed penalty. If an individual was not present when the penalty was issued or for some reason did not understand it, I presume that there would be a form of presumption of guilt through silence if anything came back to court. Does that not go against natural justice?

Scott Pattison: I disagree that there is a presumption of guilt. On receipt of an offer of a fiscal fine or any other alternative to prosecution, it will always be open to an individual under the new regime to elect to have their day in court. The individual who enters the court process would be presumed innocent throughout that process until he or she was convicted.

The justification for the deemed acceptance of alternatives to prosecution comes largely from the work of Sheriff Principal McInnes, who found that almost 75 per cent of rejected fiscal fines—some pitch the figure higher—end up as very early pleas of guilty in the court process. A huge amount of cases slip into the court almost because of apathy or because of somebody’s chaotic lifestyle or whatever. The new regime will ensure that the courts are not unnecessarily clogged with low-level offending. That is a clear justification for the new approach that is proposed in the bill.

Mr McFee: Section 43 in part 3 will add to the 1995 act new section 226D, which provides those who collect fines with the option of seizing a vehicle to cover unpaid fines. We talked about that the last time we spoke—you said that you would examine it. My concern is about proposed new section 226D(3), which will allow immobilisation or impounding of a vehicle that is registered under the Vehicle Excise and Registration Act 1994.

I will give two brief scenarios to illustrate my concern. If I decided to buy a car on hire purchase or by leasing it, the owner of the vehicle would be the leasing company or the bank and I would be the registered keeper. I am extremely worried about the appropriation of third-party goods, which the bill does not seem to address. My second scenario involves a company vehicle. Although it is common for the registered keeper of such a vehicle to be the employee who uses it, it will be owned by the company. What justification is there for the appropriation of third-party goods?

Cliff Binning: The answer to that is that we do not envisage circumstances in which it would be appropriate to seize third-party goods. A key point in this general area is that the application of a seizure order—the impounding of a vehicle and, when appropriate, its subsequent disposal—will have to operate within a well-defined regulatory regime. Checks and balances will have to be built into the regulatory process to ensure that appropriate steps are taken and the relevant investigations are made so that that the clamping or disposal of a vehicle is not done contrary to the interests of a third party. We will have to examine such matters in some detail.

Mr McFee: Would not the best regulatory regime be the law? It is clear that proposed new section 226D(3) of the 1995 act would permit the seizing of a third-party asset.

The Convener: We would like to examine the provision in more detail because we have concerns about a number of aspects of it, but we do not have time. Following what Cliff Binning has said, it would be helpful if the Executive would consider the matter further, not just for the reasons that Bruce McFee gave, but because we would prefer some of the rules that would apply to be in the bill rather than in guidance. For example, the bill could say when the provision could be used, what exemptions there would be and what the court was allowed to take into consideration. We might be talking about a drafting problem. As Bruce McFee said, it appears that the provision will capture the registered keeper, who is not necessarily the owner.

Wilma Dickson: We take the point. Rather than simply provide guidance, the intention was to spell out the arrangements in regulations that would come before Parliament. We can take the issue away and think about it. When we wrote back to the committee on a number of points, we undertook to consider some of the policy issues that had been raised. All I will say is that we had intended to give Parliament the chance to examine the detail in regulations, but I think the committee is saying that it is not happy with that approach. Is that correct?

Mr McFee: I will reverse the scenario. I could own the vehicle but not be the registered keeper, which would mean that it would not be possible to collect the fine from the person who should pay it because the bill gives a specific definition of the owner.

Wilma Dickson: We do not doubt that there is a need to clarify the details. Our intention was to do so in regulations that would be subject to the negative procedure, but we will consider whether that is sufficient or whether more detail should be provided in the bill. Would that be fair?

The Convener: We can give a series of situations in which problems might arise. For example, the owner might have defaulted on their fine, but the car might used by the rest of the

family. All sorts of scenarios might cause us to be concerned about the fact that the bill provides for such a power without qualifying it by setting out the circumstances in which it might be used. We will almost certainly come back to the matter at stage 2, but it would be helpful if you could give it consideration.

12:15

Mr McFee: Very briefly, on alternatives—

The Convener: Please be very brief—

Mr McFee: What are work orders and how will they operate?

Mike Pringle: I would like to add to that question. Is it envisaged that work orders will be imposed on rich people who would be well able to pay fines of as much as £10,000 but who would be seriously hampered in going about their business if they were subject to a work order? Alternatively, is it envisaged that work orders will be used for people on low incomes, to ensure that their income would not disappear?

Scott Pattison: I will try to respond to all those questions. Our department is working on the detail of our new marking or decision-making policy in the light of the bill. A stream of work is going on and we will have to submit the detail of the policy to the law officers, so the thoughts on work orders are early thoughts. Section 40 provides for work orders, which are another alternative to prosecution that will operate on a deferred prosecution model. Procurators fiscal will be allowed to offer offenders a period of community-based reparatory work as an alternative to prosecution. The deferred prosecution model that the bill proposes is similar to the current arrangements for social work diversion, in that an individual will have to complete the work before he or she can escape prosecution. If the work is not completed, the fiscal will be advised and the option of taking proceedings against the individual will remain. I venture to suggest that there will be a strong presumption in favour of criminal prosecution in such circumstances.

The bill proposes a ceiling of 50 hours on the number of hours of work that can be imposed under a work order, so the approach will be different from that of a community service order, which is an alternative to custody that is offered at the other end of the prosecution process. The work order is intended to be an alternative to prosecution that presents an individual with the opportunity to do community work.

Mr Pringle asked about the financial background of individuals who might be offered work orders. Our early view is that an individual's means are irrelevant to the choice between prosecuting and offering an alternative to prosecution. Such a decision should be based on the individual's offending background and the nature of the offence. However, if it is decided that an alternative to prosecution is appropriate, perhaps because the offence was of a low-level nature or the individual has few or no previous convictions, the individual's means might be taken into account in a decision about whether to impose a fiscal fine, offer a work order or issue a compensation offer. The individual's means might be particularly relevant to the choice between a fiscal fine and a work order, although I reiterate that those are early thoughts.

For a young offender who had offended for the first or second time, prosecution might be a disproportionate intervention that might lead to disproportionate results, given the individual's circumstances. However, the young offender might not have the money to pay a fiscal fine, so it might be legitimate for a prosecutor to consider the person's means in making the choice between alternative approaches. However, an individual's means should not be considered in the context of the decision whether or not to prosecute, because such an approach would be fraught with potential inequity—

The Convener: When are we likely to see some detail on the matter? The committee's difficulty is that much of the work is still in progress. We do not know what a work order is, because as far as we are aware work orders do not currently exist anywhere. We need information about the framework in which the new concept would be used.

Scott Pattison: Do you mean specifically on work orders or on the Crown's marking policy in general? There are a number of issues.

The Convener: In the first instance, we need more information on the work orders.

Scott Pattison: We are happy to take that question away and to provide further information in writing. As members will see from the provisions, it is envisaged that the work order regime will be piloted. I hope that there will be a pilot in an urban area and one in a more rural area so that a comparison can be made. There will not be a big bang in relation to work orders upon commencement of the legislation. We are happy to get back to the committee in writing.

The Convener: We need to know the definition of a work order, when it can be used and how it will differ from a community service order and we need that detail before we can be satisfied that we want the provision to proceed and the scheme to be piloted. Will it be possible to let us—

Scott Pattison: I do not see why we cannot get back to you with written information on that. There

is a fair amount of detail in the bill, but I accept your point that a further submission would be helpful.

The Convener: The work order is a new concept, which is why we want to be clear about it.

Scott Pattison: Indeed.

Mike Pringle: May I follow that up? You talked about compensation and about not taking into account a person's means. Will the Crown Office and Procurator Fiscal Service know how much damage has been done when it decides how much the fine will be or how much compensation should be paid? Someone could smash up a car and do £600 of damage. When I sat in the district court, I needed to know how much damage had been done before I imposed a compensation order. If I did not know, I deferred the case. Do you envisage that you will have all the relevant information about income and that you will know how much damage has been done? If you do not have that information, how will you decide on the compensation?

Scott Pattison: That is a difficult question. At the moment, the police try to provide information on individuals' backgrounds and employment status, but we have to recognise that when the police are dealing with a person during an arrest they are not dealing with a willing customer, so the information on employment status and earnings is often incomplete. Under the summary justice reforms, we are exploring the reporting regime with the police to see whether we can capture more information on people's circumstances.

It is unlikely that the procurator fiscal will ever receive the sophisticated level of information that a justice of the peace or a judge receives when an individual is in court and is represented by a solicitor who advises the court of that person's circumstances. That is an acute situation in that the person is about to be sentenced. We are considering ways of capturing much more information about people's means. Although a person's means might not be relevant to determining the amount of compensation that should be awarded, it is relevant to the instalment regime that will be imposed. If the regime is too harsh, the individual will default and we will not have maximised use of the alternative to prosecution.

Mike Pringle: Can I ask one brief question on that?

The Convener: Please make it very brief.

Mike Pringle: Will you also know how much damage has been done to the plate-glass shop window, the car or whatever, so that you can alter the compensation that is paid to the victim? Will you have that information?

Scott Pattison: Yes. In the vast majority of cases, we already have that information at the reporting stage. Sometimes the exact value is not known and a subsequent report is provided by the police, but if a police report lacked that information the procurator fiscal would invite the reporting officer to clarify the value of the property. Many cases are prosecuted to obtain compensation for the victim. The advent of the compensation offer is a significant step because the prosecutor can obtain early compensation for the victim without forcing them to go through the whole court process.

Margaret Mitchell: I return to the disclosure of acceptance of a previous fixed penalty within a two-year period. I understand that that is discretionary and that it will not happen automatically. Can you confirm that that is the case?

Scott Pattison: At the request of the court, the prosecutor can advise the court within the two-year period that an individual has had specific fiscal fines.

Margaret Mitchell: I will be more specific. When a person is convicted and the schedule of previous convictions is automatically handed to the judge, what will be the situation with regard to acceptance of fiscal fines?

Scott Pattison: I do not believe that the fiscal fines would be on that schedule, although I stand to be corrected by colleagues if I am wrong. My understanding is that the procurator fiscal would, on receipt of a request, advise the court of the acceptance of a fiscal fine.

Margaret Mitchell: In other words, the judge would have to say, "I have information about the previous convictions but I would like to know about previous fixed penalties."

Paul Johnston: Yes. In that situation, the fiscal would be entitled to disclose the existence of a fixed penalty. The legislation is clear that the existence of fixed penalties that have been accepted may be disclosed but that they will not appear in any schedule of previous convictions.

Margaret Mitchell: You say "may be disclosed". That is what worries me. Will disclosure be instigated by the fiscal or the court? I think the legislation is silent on that. How would someone know whether the penalty related to, for instance, a speeding offence or a drug offence? We require a lot of further information.

Wilma Dickson: Are you asking us to clarify who would exercise that discretion?

Margaret Mitchell: Yes. I would also like to know in what circumstances the discretion would be exercised and whether there is any proviso for the offence being an analogous one or whether the disclosure would apply to any fiscal fine—

Mr McFee: Or, indeed, whether there is more than one person who could reveal the acceptance of a fiscal fine.

The Convener: Given that there has been a change in the policy and the fiscal fines are to be disclosed, we would want to know everything that there is to know about that, including whether the fines of people who were working with at-risk children and adults would be eligible for disclosure in relation to the standard and enhanced certificates.

Wilma Dickson: We will get back to you in that regard.

The Convener: I am being advised that I should also ask whether the fines would be eligible for disclosure in relation to the fit and proper person tests that local authority licensing committees use. We would like to know what the implications of the policy change will be in terms of the courts and any other relevant area, such as those which I have mentioned.

Wilma Dickson: Essentially, you are asking about the extension to analogous bodies of the point that you raised in relation to the Criminal Injuries Compensation Authority

The Convener: Yes. It would be helpful if you could clarify those points.

I want to spend the last while discussing the establishment of justice of the peace courts. We are going to have a round-table discussion on this matter with relevant witnesses, but Mike Pringle has a couple of questions to ask at this point.

Mike Pringle: Some people have said that the increase in the level of the fine to £500 will mean that a huge amount of work is not going to end up in the district court and that this proposal is a back-door way of getting rid of district courts. What are your views on that?

Scott Pattison: There is scope for a range of summary business that is dealt with in the sheriff and district courts to be taken out of the summary system by virtue of the increased range of alternatives that are available. You will see that the financial memorandum suggests that, based on the parallel marking exercises that have been carried out, between 10 per cent and 20 per cent of the current work could be taken out of the system, at least initially.

We are committed to maximising the use of the summary courts, including the JP court. I have referred to the work that is under way on the new marking or decision-making policy and the need for that to go to law officers. We are using this as an opportunity to review marking policy in general in the Crown Office and Procurator Fiscal Service. It is likely that we will move to an outcome-focused model and that we will examine prosecutions, police reports and so on in that light. We will take almost a problem-solving approach to prosecutions by asking what the best response to the facts might be, whether there are alternatives, whether the court should be used to make a public denunciation in a case involving a serious offence and so on.

Clearly it is in the interests of everyone in the system for the justice of the peace court to be used to maximum effect, as it is for all the solemn and the summary courts. There is no agenda to remove work from the district court—in fact, the shadow marking that we have done suggests that cases that could be taken out of the system will come from the sheriff summary court and the district court.

12:30

Mike Pringle: Does the Executive intend to establish a JP court in each sheriff court district? Some people have implied that we are going to end up with only one JP court in every sheriffdom, but that is not right, is it?

Cliff Binning: The intention is to provide a configuration of courts—sheriff court and JP courts—that will preserve local access to justice. The intention is to work up the model of that configuration sheriffdom by sheriffdom, taking full account of several factors such as business profile and local community interests. The idea that there would be only one JP court per sheriffdom is far removed from any configuration of courts that we envisage.

Mike Pringle: I now turn to something that is a concern to me, and might also be to others, which is the question of who the new justices are going to be and how they are going to be trained. There is an implication that each current justice of the peace is going to be offered a five-year contract. We have visited several places where a number of justices—too many in one area—are not as competent as they might be and so have not been given court duty for one reason or another. Sometimes that has been because they were not willing to undergo training. If, under the provisions of the bill, all those people are to be offered a five-year contract, I am concerned that we will end up using people who have not been in the justice system, who are not competent and who have not done the appropriate training.

We are all aware that in some areas training by district court associations is extremely good, while it is non-existent in others. The bill suggests that JPs will have a three-day residential refresher course. If we are talking about serious training, I wonder whether three days is anywhere near enough.

Richard Wilkins (Scottish Executive Justice Department): It might be helpful to deal first with the second of those points.

The bill envisages that there will be an on-going training requirement for all JPs that will be set by the Lord President. Part of that is likely to involve all JPs undertaking a refresher course within the first two years of the new system coming into existence.

That would not be the only training requirement. We expect that there will also be an obligation to undergo a minimum number of days training each year. That might not be as many days as some of the really good local authorities currently provide but, as a minimum, it will be a significant improvement on the current situation in which there is no minimum training requirement. The Lord President will set a requirement for every future justice of the peace to undergo a minimum number of days training each year. It would not just be one three-day course in two years; they will have to undergo on-going training every year.

The point about full justices who might be offered appointment is similar to one that was made to the Scottish Court Service, and we are actively considering it. Anyone who signs up to a new five-year appointment under the new system will have to promise to undergo training and to be available to meet the future sitting needs of the area. We anticipate that anyone who does not want to train will not sign up to the five-year appointment in the first place.

Concern has been raised with us about whether the current wording of the bill provides sufficient safeguards to ensure that the cohort of lay justices that will carry over to the new system is the cohort that we want. We are currently considering various ways in which we could tighten up the safeguards to ensure absolutely that the provisions in the bill will enact ministers' policy intentions. A concern that is similar to the one that has been raised with the committee has been raised with us.

Wilma Dickson: We recognise the problem, but there is some difficulty in setting out a European convention on human rights compliant model that falls somewhere between ending all contracts and giving all full justices a chance to move across. We could end all contracts and start from scratch, but that would be disruptive and it would send a negative message to many good JPs. We must be mindful of the ECHR implications for judicial independence. Similar points have been made to us and we are actively considering the matter, but it is not straightforward.

Mike Pringle: Will you now get sight of all the evidence that the committee has been given?

Wilma Dickson: Yes.

Mike Pringle: I urge you to look at two submissions that we received—I will not say which at the moment. I am sure that you will take cognisance of them because they raise serious issues about reappointment.

Wilma Dickson: We understand the point. We have received similar submissions, but I flag up that balancing the ECHR requirements and the requirements to take across the folk who are competent is quite tricky. We are currently actively considering the matter.

The Convener: Thank you. The panel members will be pleased to know that that ends our questioning. You have clearly been doing a lot of work. We have learned that the bill is very large.

We are grateful for the time that you have spent with us in private and public meetings to talk us through the bill's main provisions. As I said, we require more detail on some matters. If you need clarification of what those areas are, you can liaise with the committee clerks. I thank the bill team for coming along and for their efforts this morning.

12:37

Meeting suspended.

12:45

On resuming—

Subordinate Legislation

Police Act 1997 (Criminal Records) (Scotland) Regulations 2006 (SSI 2006/96)

Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2006 (SSI 2006/97)

The Convener: We move on to item 2, which is our consideration of subordinate legislation. I welcome once again to the committee James Laing and Elizabeth Sadler from the Justice Department. Members will recall that we heard from them at our last meeting, when we first discussed the regulations. I raised concerns about the regulations, as did other members, and I put on record my serious concern that the Executive did not consult on the regulations.

The content of the regulations appears to be substantial. In addition to the fee increase, a number of other issues arise, including the extension of the scope of information that can be gathered and the number of posts that are covered. I notified James Laing and Elizabeth Sadler about a couple of issues in advance of the meeting as I thought that it might be helpful to the committee if they clarified the issues for us today.

At our previous meeting, we heard the officials say that the regulations do not extend significantly the range of posts that are eligible for checks. However, for the purposes of any report that we might make, I thought that we should be aware of the type of post that will be included. I also thought that we should know why the Executive did not consult on the level of the fee increase.

I note what the officials said in evidence, namely that the Scottish service is cheaper than that in England and that many organisations expected to pay a fee. However, it has been drawn to my attention that the fee has already been advertised. If my information is correct, the advert does not mention that the fee is levied under regulations that are subject to annulment by the Justice 1 Committee. People may think that the fee is a fait accompli, but annulment is always a possibility.

We have also been made aware of the Scottish compact between the Executive and the voluntary sector. The failure to consult may be a breach of that compact. I understand that any measure that affects the voluntary sector—which the regulations do—should be the subject of consultation.

Those are the kinds of issues on which we would like the officials to shed light. The answers will inform the committee; they will be helpful in our decision whether to let the regulations pass without comment or to seek to annul them.

Elizabeth Sadler (Scottish Executive Justice Department): Is it possible to drop the blind?

Mr McFee: That is part of our interrogation technique.

Elizabeth Sadler: I was a bit concerned about that. [*Interruption.*]

The Convener: Is that better?

Elizabeth Sadler: Yes, thank you.

I thank the convener for inviting us to attend another committee meeting and I am grateful to her for alerting us to the points that she has raised. Shall I respond to them in turn, convener?

The Convener: Yes.

Elizabeth Sadler: Right. The first point is on the extension to the range of posts that are eligible for checks. Scottish statutory instrument 2006/96 sets out the eligibility for enhanced disclosure checks. With two exceptions, the regulations cover the same categories of employment as section 115 of the Police Act 1997, which they replace. With the two exceptions, there should be no increase in the number of checks.

The regulations allow enhanced checks to be carried out for the full range of posts working, on a paid or unpaid basis, with adults who are at risk or with children, as defined in the regulations. Previously, only a standard check was possible for some of those posts. That is achieved by removing the requirement that only people who work with those groups on a regular basis are eligible for an enhanced check, which means that people in all posts working with adults at risk and with children, as defined in the regulations, are now eligible for an enhanced check. That allows a more comprehensive check to be carried out and removes a deficiency in the previous regulatory regime that Sir Michael Bichard identified in his report. He argued that the distinction involving a test of regular contact was unclear and had produced an inconsistency of approach between the standard and enhanced disclosure. He also felt that the distinction was wrong in principle because the true risk analysis was whether the person worked in a position where a child or an adult at risk was likely to trust that individual, not frequency of access.

For example, it is now clear that school crossing patrols and school janitors are eligible for enhanced checks, whereas previously some local authorities were requesting standard checks for those employees. That means that the overall number of checks should not greatly increase as a result of the regulations, although there will be an

increase in the number of enhanced checks with a counterbalancing decrease in the number of standard checks. The two new groups of people who are eligible for an enhanced check—that is, to whom eligibility is extended—are those who sit on fostering panels or adoption panels. Those individuals take sensitive decisions about the suitability of people as foster and adoptive parents and it is important that they are fit and proper people to take those decisions. Between 400 and 500 people in Scotland sit on such panels and are now eligible for an enhanced check, which makes around 500 extra checks.

Do any members wish to pick up on that before I move on to the second point?

Mr McFee: Would that eligibility extend to elected members who are also members of adoption or fostering panels?

Elizabeth Sadler: If an elected member sits on a panel, they will be eligible for a check. The regulations create eligibility for a check, not a requirement to have one.

Mr McFee: So it is only eligibility.

Mike Pringle: Did you say that school crossing patrols—lollipop people, as we call them—will have enhanced checks?

Elizabeth Sadler: They will be eligible for an enhanced check. At the moment, it is for the employer to decide whether to carry out a check. The regulations apply to a person who is in a child care position, which a lollipop man or woman would be. Some local authorities have interpreted the fact that they have short working hours as meaning that they do not have regular access to children and were therefore requesting only a standard check. The regulations now allow for those post holders to have enhanced checks if their employers so decide.

Mike Pringle: That is interesting because, only today, the City of Edinburgh Council launched a scheme to try to get people to act as lollipop people because there is a desperate shortage of them. It seems to me that, if local authorities opted for an enhanced check, it would put more people off, but that is just an observation.

Margaret Mitchell: Who would decide whether to have an enhanced check for the fostering panel or adoption panel members? Who would be the employer? Would it be the local authority's head of social work?

Elizabeth Sadler: It will be the local authority. I am not an expert on this, but I understand that each local authority has a panel of experts and has different arrangements for recruiting them and how their checks are organised. Ultimately, the chief executive of the local authority would be responsible.

Margaret Mitchell: Is there any advice or guidance from ministers to the effect that they would expect enhanced checks to be carried out routinely? Eligibility is just a grey area. What would make someone carry out an enhanced check? Would it be a feeling that something was not quite right or would they do it routinely? The regulations lack clarity and certainty about how those provisions would apply.

Elizabeth Sadler: Our responsibility is for Disclosure Scotland and the way in which it operates. How individual employers and individual departments within the Executive implement their policy is not my area of expertise.

Our colleagues who work with fostering and adoption panels requested that panel members be brought within the scope of an enhanced disclosure check, partly because there is a risk—probably slight—that if people who wanted to harm children were on one of those panels, they could approve unsuitable people to become foster carers and adoptive parents. I imagine that, as a result of the regulations, they will issue guidelines on the procedures that they expect to be followed for an enhanced check to be carried out.

The Convener: Thank you. I think that that ends the questions on that particular point.

Elizabeth Sadler: The next question that you asked was why the Scottish Executive decided not to consult formally on the fee increase. Ministers recognised that the fee increase would be unwelcome. They also recognised that they had little or no flexibility for reducing the fee increase, given the need to allow both BT and ministers to recover their subsidy to date and to cover their costs over the rest of the contract. Ministers therefore decided that a consultation exercise was unlikely to achieve anything.

Ministers concluded that it was preferable to give users advance notice of the programme of changes, including the fee increase, and they took care to ensure that everyone was fully informed in advance. That included writing to the top 500 users of Disclosure Scotland on 8 February. That letter made it clear that the increase in fee was subject to the consent of the Scottish Parliament being obtained. Disclosure Scotland also alerted users to the planned fee increase when it issued its February invoices, and further details were provided on the Disclosure Scotland website. I understand that the website also made it clear that the fee increase was subject to the Scottish Parliament's approval.

As I mentioned, the fee is still significantly less than the £36 that is charged in England and Wales. We and Disclosure Scotland have, so far, had very little reaction to the fee increase, and the new fee was successfully introduced on 1 April.

The Convener: This question is perhaps for ministers, but I put it to you anyway. I would not like this situation to arise again. I acknowledge that, over the four years, the number of cases that were predicted did not happen. By now, we should have some basis for knowing what the figures are likely to be. Can you say anything about what might happen in the future to ensure that there is an incremental increase rather than a substantial one?

Elizabeth Sadler: The contract with BT allows the fee to be increased once every three years. The first fee increase was deferred last year because of the performance problems that Disclosure Scotland had back in 2004. We believe that the projections for the number of cases are now far more robust than the projections on which the original fee was set. On the basis of the likely volume of cases, we anticipate that any future fee increase will be to cover inflation only. Certainly, the figures for 2005-06 suggest that the current projections are pretty robust. However, we cannot account for any changes that might result from the Bichard proposals, which are some years away and could result in a fundamental change in the whole system anyway.

The Convener: I am a lot happier today than I was a few weeks ago, knowing the kinds of posts that might be affected by this. I hope that we will not be in this situation in the future. I assume that the fact that I have not received lots of e-mails from affected organisations means that they are resigned to the fee increase, although I could be wrong.

The only issue that remains a concern for me, arising from the Bichard recommendations and the whole issue around the 1997 act, is that we should be careful to ensure that we get the balance right between protecting children and ensuring that we are not unnecessarily preventing adults from working with children when they are innocent parties. I believe that, when you previously gave evidence to the committee, you said that the regulations will, in Scotland, extend the scope of information that an enhanced certificate can gather.

13:00

Elizabeth Sadler: The scope of information that can be gathered remains the same; however, the number of organisations from which it can be collected has been increased. Under the regulations, what is essentially non-conviction information can now be gathered from the armed forces, the Royal Military Police, the police on Jersey, Guernsey and the Isle of Man and Garda Siochána. It is unlikely that there will be many cases where information will be provided, but Bichard identified it as a potential gap in the existing system. For example, although an individual might have been subject to discipline in the armed forces for a relevant offence, that offence might not have reached the criminal record. Such matters might be relevant in considering a person's suitability for a post.

The Convener: But, according to the *Official Report*, you told the committee:

"the regulations extend the scope of information that can be gathered for an enhanced check."—[*Official Report*, *Justice 1 Committee*, 29 March 2006; c 2782.]

I presume that, in addition to increasing the number of organisations from which information can be gathered, the regulations will allow more information to be gathered.

Elizabeth Sadler: The only extension in that respect is more of a technical matter. Disclosure Scotland will now be able to seek information from the Driver and Vehicle Licensing Agency and the Passport Agency and to ask for national insurance numbers, but simply for the purposes of confirming identity. It will be able to check a database that shows, for example, that Elizabeth Sadler with passport number X, driving licence number Y and NI number Z is the same Elizabeth Sadler who lives at a certain address.

The Convener: So that is what you meant when you said that the regulations extend the scope of information that can be gathered.

Elizabeth Sadler: Yes.

Mr McFee: Surely the fact that more organisations can be asked for information extends the scope of information that can be gathered. For example, if the person in question happened to be a major general, you would not be able to get information on him if you could not ask the Army for information.

Elizabeth Sadler: We can ask the same information from the Army that we can ask from a police force.

Mr McFee: Yes, but if the person in question was a soldier, there would not be much point in asking the police for information on him. The scope of information has been extended because you can ask more organisations for information.

Elizabeth Sadler: I was trying to distinguish between the ability to ask for information from more organisations and the ability to ask for different information.

Mr McFee: Yes, although as I said it might not be relevant to ask for information from an organisation that has had no contact with the individual in question.

Convener, the point is that this is simply a charade, because we are being bounced into

making this decision. The reason why your postbag has not been full of representations from agencies is that they have already received letters saying that the fees are going to go up again and have simply accepted it. Quite frankly, we are just being used as a rubber stamp. Setting such a precedent is not desirable, and I certainly do not want the situation to be repeated. Organisations should not receive letters saying that something is going to happen, with a wee footnote saying that the Justice 1 Committee has to tick certain boxes first.

The Convener: The committee has the option of not rubber-stamping the regulations, which is why I put the issue back on the agenda. I, for one, am not prepared to agree the regulations if I am not satisfied. We could have chosen to make no comment on them but, for reasons that all members have outlined, it is important that at the very least we receive assurances that this will not happen again. Some of the regulations make quite substantial changes to the current situation and it is my view that they should be dealt with when we consider the primary legislation that implements the Bichard recommendations. At least I have a bit more of an understanding of the issues. If eligibility is not being extended to that many additional posts, then I am not too concerned about that—I can see the point in that—if there is no real extension in the scope of the information that is gathered. However, I agree with Bruce McFee that extending the number of organisations from which information can be demanded extends the scope of the information. Perhaps the regulations will be seen as a forerunner of the Bichard recommendations when the Parliament comes to consider the implementation of those.

I have received e-mails about a couple of cases in which false allegations that appeared in enhanced certificates resulted in individuals being sacked. Therefore, I am concerned that the regulations as a whole do not protect everyone in the system. However, I do not think that the regulations before us would allow us to do anything about that. Probably, the primary legislation that the Parliament is still to consider will be more relevant in that regard.

I can reassure Bruce McFee that I will certainly not rubber-stamp regulations that I feel have wider implications. For that reason, I took the liberty of making a few calls to organisations that I thought might have an interest. My overall impression was, as has been said, that the organisations are not happy with the fee increase but that they are resigned to it. I have received no formal correspondence on the issue.

Mr McFee: I did not suggest that the convener would rubber-stamp anything, but there seems to be an expectation that the committee would simply rubber-stamp the regulations. That is implicit in the fact that, before the increase was authorised, information was sent out suggesting that the changes would be implemented.

I want to return to the justification that Elizabeth Sadler gave for the increase in fees. Part of the justification was that the Executive had to recoup money. Is that correct?

Elizabeth Sadler: Yes.

Mr McFee: Can we get more detail on the figures? How much will the Executive need to recoup because it failed to get the estimates right in the first place?

James Laing (Scottish Executive Justice Department): The financial position to date is that BT, which made a significant capital investment at the start, will have a recurring deficit at the end of this year of somewhere in the region of £7.5 million. Year by year, the Executive has supported Disclosure Scotland to a total of about £4 million. Part of that money is spent on providing checks at no cost for volunteers. Thus, the total deficit so far is probably about £11 million or £12 million for the first four years of operation.

Margaret Mitchell: Although the committee is right to raise reservations about the assumptions that have been made about how the order will be dealt with, the extension of the eligibility for enhanced checks to people who work with, but do not have regular contact with, children or with adults at risk is an important change. I want that change to be put in place as soon as possible, because the issue should not be whether a person has regular contact, but the position that they hold. People in some positions—for example, a janitor—are automatically considered as people who can be trusted. We need only remember the Soham case. I very much welcome the fact that such positions will now be covered as a result of the order.

Mr McFee: I have one further question. The Executive note on the regulations states:

> "In September 2005, DTZ Pieda Consulting carried out research … This research showed that an annual total of around 500,000 applications could be expected for the remaining 8 years of the contract with BT. On that basis, and because the PPP Agreement requires that BT can recover its costs over the lifetime of the Agreement, Scottish Ministers have decided that the fee should rise."

This might not be a question for the Executive witnesses before us, but were public-private partnerships not supposed to remove the risk from the public sector?

The Convener: The witnesses are not required to answer that.

Mr McFee: The question may be outwith their remit and is probably better addressed to ministers.

Elizabeth Sadler: The contract in question is a fixed-term contract. Under the terms of the contract, BT is allowed to recover only its costs. Ministers also have costs under the contract. The £20 fee is based on current projections of volumes for the remainder of the contract. We are confident that those projections are more robust than the original projections. A fee of £20 is required if the Executive and BT are to break even over the course of the contract. This is not a case of people making a profit, but of recovering their costs.

Mr McFee: To be fair, the question should probably not have been directed to you. The principle that underlined PPP was that it was supposed to remove financial problems or risk from the public sector to the private sector, but, yet again, we have bailed out. Thank you for answering; political questions can be asked elsewhere.

The Convener: Yes, please.

Do members want to produce a report or take other action? Having heard from the officials, I feel that many points about the regulations have been clarified. However, I suggest that we produce a short report that draws attention to the fact that no consultation has taken place, particularly with the voluntary sector. We can note the points that have been made about the costs that the Executive has borne for four years and the fact that the fee is £36 in England. Notwithstanding that, a point of principle is involved. The increase is also retrospective, because it applies from 1 April. Are members happy with that suggestion?

Members *indicated agreement.*

Elizabeth Sadler: I will make one point about the voluntary sector. Ministers have made it clear that they will continue to cover the cost of disclosure for volunteers who work with children and with adults at risk. In the next few months, we plan to rationalise how free checks are processed by allowing voluntary bodies to register directly with Disclosure Scotland as registered bodies. That means that they will no longer have to use the central registered body in Scotland. The CRBS will continue to provide a service for processing free checks, particularly to smaller voluntary organisations, but we are discussing with the voluntary sector how to achieve that. I emphasise that we are in discussion with the voluntary sector about issues as they relate particularly to that sector.

The Convener: That is helpful to know. Do members have any other points for our report? We will attach to it the *Official Report* of our meeting, which speaks for itself.

I thank both witnesses for appearing. I am sorry for dragging you along for a second time, but it was important to do so. Now that the committee has asked questions, we know at least a bit more about what the regulations are intended to do.

The committee's next meeting is on 26 April, when we will hear oral evidence for our inquiry into the Scottish Criminal Record Office and the Scottish fingerprint service.

Meeting closed at 13:13.

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