JUSTICE 1 COMMITTEE

Wednesday 10 May 2006

Session 2

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JUSTICE 1 COMMITTEE
15th 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)
Graham Ross (Scottish Parliament Access and Information Directorate)

THE FOLLOWING GAVE EVIDENCE:

Cliff Binning (Scottish Court Service)
Nicola Brown (District Courts Association)
Graham Coe (District Courts Association)
Johan Findlay (District Courts Association)
Phyllis Hands (District Courts Association)
Andrew Lorrain-Smith (District Courts Association)
Rodger Neilson (District Courts Association)
Kay Polson (District Courts Association)
Noel Rehfisch (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 10 May 2006

[THE CONVENER *opened the meeting at 09:58*]

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

The Convener (Pauline McNeill): Good morning and welcome to the 15th meeting in 2006 of the Justice 1 Committee. All committee members are present. I ask everyone to ensure that they have nothing on their person that will interfere with the sound; I am sure that the broadcasting staff would be grateful for that.

Agenda item 1 is a round-table discussion on the Criminal Proceedings etc (Reform) (Scotland) Bill. The meeting will be a departure from the usual way in which we take evidence from witnesses. I invite everyone to say who they represent.

Desmond McCaffrey (Adviser): I am an adviser to the committee.

Rodger Neilson (District Courts Association): I am the chairman of the District Courts Association.

Stewart Stevenson (Banff and Buchan) (SNP): I am the member for Banff and Buchan and deputy convener of the committee.

Phyllis Hands (District Courts Association): I am the secretary of the District Courts Association and principal solicitor for district courts at North Lanarkshire Council.

Mrs Mary Mulligan (Linlithgow) (Lab): I am the member of the Scottish Parliament for Linlithgow and a member of the committee.

Graham Coe (District Courts Association): I am a justice of the peace in East Lothian and chairman of the District Courts Association training committee.

Margaret Mitchell (Central Scotland) (Con): I am a member of the committee and MSP for Central Scotland.

Nicola Brown (District Courts Association): I am the manager at Dundee district court and chair of the DCA associates group.

Graham Ross (Scottish Parliament Directorate of Access and Information): I work for the Parliament's research service.

Noel Rehfisch (Scottish Executive Justice Department): Good morning. I am part of the bill team.

Richard Wilkins (Scottish Executive Justice Department): I am also a member of the bill team.

Cliff Binning (Scottish Court Service): Good morning. I am director of operations with the Scottish Court Service.

Andrew Lorrain-Smith (District Courts Association): I am a justice of the peace in Midlothian and former chairman of the District Courts Association.

Mike Pringle (Edinburgh South) (LD): I am a member of the committee, MSP for Edinburgh South and a former justice of the peace who sat on the bench.

Kay Polson (District Courts Association): I am the secretary to the DCA training committee and a depute clerk of court in Aberdeenshire.

Mr Bruce McFee (West of Scotland) (SNP): I am an MSP for the West of Scotland region, a member of the committee and a former JP who did not sit on the bench.

Johan Findlay (District Courts Association): I am a justice of the peace and chairman of the District Courts Association communications committee.

Marlyn Glen (North East Scotland) (Lab): I am an MSP for North East Scotland and a member of the committee.

10:00

The Convener: Thank you. We will debate three aspects of the bill, starting with its impact on the role of the lay judiciary. After about half an hour, we will discuss the proposals for court unification. Finally, we will discuss the proposals for the appointment, training and appraisal of JPs. The aim of the discussion is to get as broad a range of evidence as we can. We have with us members of the bill team, who will be able to provide clarification.

I thank the District Courts Association for its thorough submission, which was extremely helpful. The submission raises issues other than those that I mentioned; if there is time, we will hear about those issues from the DCA representatives.

Rodger Neilson, who is chairman of the DCA, will outline the impact that the bill will have on the role of the lay judiciary. Anyone who wishes to speak thereafter—which I encourage—should indicate that to me and I will ensure that they have sound.

Rodger Neilson: We believe that the proposals in the bill will take us a step towards achieving

some of the things that we would like to achieve, such as a more consistent way of appointing and training justices, so that what we do on the bench is satisfactory. Many of the proposed changes should help achieve to that.

However, some of the proposals leave us a little concerned about the amount of business that could come before the courts. If we are going to put resources into providing a better-trained lay judiciary, we want to ensure that there will be enough business in the courts. The proposals to divert people from prosecution should take away some of the business from the courts.

We are concerned that there will be no increase in our range of powers. We feel that some of the proposals will give the prosecution powers that we in the district courts do not have.

We need time to see how the changes will bed down. Under the unified system, the justices want us to continue to have a range of experienced legal advisers to help us in the way that they have helped us in the past. It looks increasingly as if the proposals from the Scottish Court Service on the appointment of legal assessors should provide that. We hope that experience and expertise will not be lost; many of our present clerks want to transfer and to continue to give us the legal advice that we will require in the new JP courts.

Stewart Stevenson: I will ask about some of what Rodger Neilson said and what is in the submissions. Will you help us to understand whether a role for the defence could or should be sensibly introduced when the fiscal seeks to make an early decision or offer? Could the bill be amended to meet the association's concerns about fiscal compensation orders and fiscal fines? Interaction between the defence agent and the fiscal could be formalised to address those concerns. It might be interesting to hear whether that could be done.

Phyllis Hands: The problem lies in the fact that the defence agent becomes involved only after being instructed by the person who is likely to receive the offer or to be prosecuted, who will not be aware of the procedure that the fiscal will follow until he has been contacted. He might not have sufficient funds to employ an agent, so funds would have to come from the Scottish Legal Aid Board. The legal aid system would have to be changed so that it was front loaded, to allow a solicitor to make investigations or to engage with a fiscal before any plea was made or decision was taken. The problem is that the accused might not find people who were willing to act on their behalf.

Another problem is that the fiscal sits in isolation—usually in an office somewhere, harassed by the volume of work—and does not have the time to spend on discussing individual cases all the time. The procurator fiscal is not accountable to anyone. Fiscals say that they are accountable, but we have yet to find any accountability from the fiscal's office. Fiscals act on one report from perhaps one and a half police officers. It would be difficult for the defence to become involved at the proposed early stage without a prosecution taking place.

Stewart Stevenson: I suspected that that might be your answer. That leads to a slightly more difficult question. Is the implication that the fiscal should have no power to offer fiscal compensation orders or fiscal fines? The logic of the answer is that they should not have that power.

One difficulty is that we have something that is neither fish nor fowl. We have a system in which the defence is perhaps inadequately represented in the consideration, determination and making of offers. If the entrenching in the bill of some practices is flushing out the fact that we are not being fair to the accused, should fiscals not have that power? Such practices benefit considerably the system's operational efficiency, but they may or may not be just. I am interested in your views.

Andrew Lorrain-Smith: To some extent, Stewart Stevenson has hit the nail on the head. Our original objection to the fiscal having the power was that it would challenge the basis of our adversarial system. In cases at the lower end, the provision is not very unjust, but it becomes more unjust the more that it is used. Someone for whom appearing in court is, in itself, a huge issue will perhaps seek the easy alternative of paying the fine and getting it off his chest; I am always aware of that. At the other extreme, when even the fiscal considers the usefulness of fiscal fines to have petered out, the person appears in court as a first offender. In that situation we will have muddied the waters further and made it more difficult for those who seek to come up with the right answer, after due consideration, to deal with the person.

The Convener: Do you oppose any use of fiscal fines or just the provisions in the bill?

Andrew Lorrain-Smith: We opposed fiscal fines when they were first introduced, because we felt that the fiscal was being asked to do something that put him in the position of being judge and jury. Some time has passed since then and many people say that there is a place for the fiscal fine. It is very convenient to be able to deal with someone who has strayed a little for the first time in his life without having to go to court. Members must remember that the facility also exists for someone to plead guilty by letter, which means that for the person who strays for the very first time the matter can be dealt with in court comfortably.

As an individual, I maintain my objection to fiscal fines. If I am giving the views of all those within the District Courts Association, I must admit that I hear people saying that there is a place for fiscal fines for less serious offences or for cases in which someone who has previously been of good behaviour strays or behaves in a manner that the fiscal thinks is worth dealing with.

The Convener: That is helpful. However, I point out that a fiscal fine does not currently result in a recorded previous conviction, whereas under the bill it would.

Andrew Lorrain-Smith: I acknowledge that to an extent. That is true.

Margaret Mitchell: You will be aware that the McInnes report highlighted the fact that minor cases were being shunted up to the sheriff court because of a lack of confidence in how the district courts and JPs—I speak as someone who sat on the bench as a JP for many years before I became an MSP—were handling minor cases. Was that justified? If there were problems, where did responsibility for them lie? What improvements could be made?

Your submissions indicate that there is concern that if the type of fiscal fine that is proposed in the bill is introduced, fiscals could have more powers than JPs in certain circumstances. I invite you to comment on those two aspects.

Rodger Neilson: You mentioned the confidence of fiscals in the district courts. I do not know what fiscals are thinking when they sit in their offices around the country, but I know that in my area in the north-east there was a time when it was understood that the fiscal preferred to put cases to the district court than to the sheriff court because the district court was issuing sentences that he felt were more appropriate. I suspect that the story varies round the country.

I am not sure why it has been asserted that the Crown Office does not have confidence in the district courts and is not prepared to put cases to them. It is certainly true that the amount of business in the district courts has decreased, but that is because of the increase in diversions from prosecution. There may be a lack of confidence in some areas, but I do not think that that is necessarily the case in all areas.

10:15

Noel Rehfisch: Having listened to the discussion, I thought that it would be helpful to offer a few observations from the Executive's point of view, although some of the issues were discussed during the previous evidence session.

Ministers feel that alternatives to prosecution can be appropriately used, as they are in a number of cases. In some cases, the information that is available will not be adequate. However, using alternatives to prosecution can have a number of benefits for the system as a whole and, in some circumstances, for the accused person. I stress that an offer is made of an alternative to prosecution and that that offer can always be declined if the person thinks that it is unreasonable or based on unreasonable information. Such a course of action would probably lead to the case being marked for prosecution, and that prosecution might well take place in the district court.

If an alternative to prosecution is offered and accepted, there are clear benefits to the accused of a non-court disposal that does not lead to a criminal record or a criminal conviction. I accept that the provisions in the bill mean that previously accepted fiscal fines will be disclosable in any subsequent criminal cases for a period of two years, but that is not the same as saying that the bill will give the person a criminal record. There is a distinction. There is no acceptance of guilt in the acceptance of a fiscal fine.

The Convener: I will stop you there, because I want to be clear about this. For the first time, the bill introduces the concept that, during any subsequent court case, previous acceptance of a fiscal fine will be disclosed as if it were a previous conviction.

Noel Rehfisch: I can clarify that. The information would be brought before the court in the same schedule as a previous conviction. However, it would be made clear that it was an accepted fiscal fine. The judge would be well aware that acceptance of a fiscal fine does not equate to an admission of guilt. The purpose of the provision in the bill is to ensure that the sentencer in any subsequent case has as wide a picture—

The Convener: Can the judge use that information to increase the sentence that they would otherwise have given?

Noel Rehfisch: The judge can use the information as part of all the information that is used in reaching the ultimate decision on a sentence.

The Convener: So it is exactly the same as a previous conviction.

Noel Rehfisch: Yes—if there were to be subsequent criminal proceedings in respect of the person. However, if the person were asked whether they had any previous convictions, the answer would be no. It would not be classed as a criminal conviction for the purposes of disclosure, for example, or of the rehabilitation of offenders.

Mike Pringle: At the moment, the justice of the peace gets a sheet of paper listing convictions. In the future, will that sheet of paper contain a list in which number 1 is a conviction, number 2 is a conviction, number 3 is a fiscal fine, and number 4 is a fiscal fine, or will the two categories be separated?

Noel Rehfisch: I am not sure of the exact form in which the information will be provided. I imagine that all the information would be included on a single schedule, but that there would be clear differentiation of the fiscal fines to demonstrate that they were not previous instances in which a person had been found guilty of an offence.

Stewart Stevenson: I am not sure that I can see anything in the bill that addresses those issues.

Noel Rehfisch: The bill makes it clear that the conviction would be disclosable for a period of two years, but it does not go into the practical operation of the system.

Stewart Stevenson: Since the bill team is clearly referring to documents of which the committee is unaware, could it formally let the committee know what the intentions are in this regard? That will mean that we make decisions on the bill on a proper basis.

Noel Rehfisch: The issue was raised at the previous evidence-taking session that we attended and is covered in the subsequent letter that we sent to the committee. I refer Mr Stevenson to that letter. However, if the information in the letter is insufficient or if further clarification is required, we would be happy to assist in that regard.

The Convener: We thank you for the rather extensive letter that you sent. It goes into matters in a great deal of detail and members might need some time to take in its contents.

Mr McFee: I notice that the language is becoming almost interchangeable. You said that the conviction would be disclosable for two years. That was probably a slip-up on your part, because it is the fiscal fine that will be notifiable to the court. However, I think that that mistake gives an example of how the fiscal fines will be viewed by a court. I support fiscal fines but I am concerned that it seems that we are being told that, although a fiscal fine will not give someone a criminal record, it will give them a criminal history in relation to that matter being presented to court, if that happens within 24 months of the fiscal fine being made.

What is the thinking behind that? You say that it will give the court a fuller picture, but that fuller picture is clearly not for the benefit of the person who is accused. Do you agree that, if you were described in court as someone who had no criminal convictions but 23 fiscal fines, someone on the bench would be likely to take a dimmer view of you than they would otherwise have done?

Noel Rehfisch: It is unlikely that someone would have a lengthy string of fiscal fines because, when considering how to deal with a case, the procurator fiscal should consider whether someone is a persistent offender.

I accept the fact that the fiscal fines will appear alongside the schedule of previous convictions. However, a fiscal fine does not mean that someone has been found guilty by the court. It will be stated quite clearly that they have accepted the offer of a fiscal fine. I stand by what I said before. The purpose of allowing the fiscal fine to be disclosable for that period of time is to ensure that the court has a fuller picture of the person's recent interactions with the system. For example, if the fiscal fines were part of what turned into a string of persistent offending, it might be of benefit for the court to be able to see that entire course of conduct.

The Convener: I want to move away from this subject now.

Nicola Brown: On the issue of procurators fiscals' confidence, or lack of it, in the district courts, the picture across the country is patchy. The confidence of procurators fiscal depends on how well supported the bench is in individual courts. Many courts have designated trainers and clerks and a very well-supported bench. Statistics show that procurators fiscal continue to put relevant cases to such a court. I operate in Dundee, where I used to be a procurator fiscal depute and now manage the court, a position in which I have training responsibility for our bench. At a time when overall district court business is decreasing by 10 per cent, ours has increased by 25 per cent. That is as a result of communication between all the criminal justice partners in Dundee—the fiscals, the defence agents and the bench. Our bench has demonstrated that, with proper training, advice and support, the district courts can deal with cases at the more serious end of the scale. That has been borne out by statistics that were laid before the McInnes committee.

Mrs Mulligan: On the issue of the support that is offered to the bench, could you say a bit more about the role of the clerk to the court? We have heard concerns that their role will change when they become part of the Scottish Court Service. How can we manage the situation so that we still have people who are able to offer the support that makes the bench effective, given that we have two separate systems at the moment?

Nicola Brown: I am concerned that the bill's provisions on the training and support of JPs would represent a drop in standards for many of

the benches across the country. For those benches that were hitherto poorly supported for a number of reasons, the bill will represent an increase in standards. At the moment, clerks have a training role that involves appraising justices, examining their performance and ensuring that they can deal with cases effectively when they are on the bench. We liaise with other criminal justice partners in our local areas to ensure that our training meets the needs of the cases that go before the court.

The bill proposes that the clerk should be taken out of that training role because we are seen to affect judicial independence. I do not accept that and I have made that clear to the summary justice review team. I think that the provisions represent a drop in standards; I have made that concern known on other occasions.

Mrs Mulligan: Listening to you, I would be reassured of the part that you are playing in that process. Having visited the West Lothian district court in Livingston, we have seen that it is also playing that part. However, there seems to be inconsistency around the country. How can we ensure that there is a baseline on which we can build and below which we do not let people fall?

Nicola Brown: That is a recruitment issue. To recruit the best clerks who can give the advice that the justices require, we need to recruit the best criminal lawyers. At the moment, the standard of pleadings in district courts is abominable. Defence agents and fiscals use district courts as a training ground but the standard of pleadings has dropped considerably. In Dundee, the standard has become so poor that the sheriffs have written to the defence agent and fiscals and offered them training. Increasingly, clerks have to rectify misleading submissions that are made by defence agents and new procurators fiscal. That is just a fact of life for us. If we do not have the right person as a clerk, or if we do not make the job attractive, the bench will not be supported and the district court will descend into the law of the jungle.

Graham Coe: I support what has been said about the importance of the clerk of court in the training of justices. The DCA represents a combination of the professional and the amateur—the clerk and the JP. We work together and form a team. The justices would be in great difficulty without the high level of training and support that they get in many places.

Coverage is, of course, patchy. Sometimes that is because of an individual clerk of court, or because a particular local authority has not given the district court the importance that others have given it. McInnes recognised that, and that is one of the reasons why he recommended taking district courts out of local authority control. He argued that they are a peripheral issue for local authorities.

McInnes raised the issue of lack of confidence of some procurators in the district court, but he did not produce any evidence, which was unfair. It is certainly not true at my district court, where communication between justices and the fiscal service is good enough to highlight any difficulties. Fiscals are willing to take part in the training of justices to ensure that standards are acceptable. I support much of what Nicola Brown said, but I do not agree that justices are completely useless on their own and that we would descend to the law of the jungle, whatever that is. We certainly need training and information from our legal advisers and I strongly support their having a continuing place in the training of justices.

10:30

Margaret Mitchell: If that experience could be replicated and confidence grew in district courts, could the power to impose community-based disposals be extended to those courts and to the new JP courts? Surely such a move would allow a better assessment to be made of disposals, lead to better outcomes and give the district and new JP courts more of a role. Your submission suggests that such cases could be dealt with appropriately by the JP court and that they would not have to go automatically to the fiscal for a work order to be imposed. Is there any appetite for giving those courts a greater role in that respect?

Would you welcome any move to extend to district courts and the new JP courts the power to impose drug treatment and testing orders to ensure that there was early intervention? Could the courts' involvement in such matters lead to swift and meaningful outcomes?

The Convener: I will throw open the question whether more sentencing powers should have been given to the district court.

Phyllis Hands: We have advocated for a long time that justices should be able to impose community-based orders because, in most cases, they are closer to the community. Of course, justices would have to be trained before any such measure was introduced, but I do not see any problem with JP courts handling those matters.

Johan Findlay: As far as drug treatment and testing orders are concerned, many courts already operate an informal system of deferring sentences to allow people to get locally available drug treatment. That said, the big problem is that such treatment is often not available immediately. However, justices can make those decisions because they are much closer to the community and have more local knowledge.

The Convener: So you are in favour of extending the power to impose DTTOs to district and JP courts.

Johan Findlay: Very much so.

The Convener: I wonder whether the bill team will comment on that.

Noel Rehfisch: There is already a power to attach drug treatment as a condition of probation, although I echo the points that have just been made on that matter.

I should also point out that different disposals, including supervised attendance orders and community reparation orders, are currently being piloted in district courts. In addition, the work order, which procurators fiscal will be able to impose, will be introduced as a pilot. The Executive wants to find out where best those community-based disposals can be used and whether they should be available at both sheriff and district court level to ensure that different levels of the system have a range of appropriate disposals.

The Convener: As a board member of the Glasgow routes out of prostitution project, I have for some time been asking ministers whether DTTO provision can be extended. By and large, fiscals in Glasgow refer prostitutes to the sheriff court, presumably because DTTOs are available in the sheriff court—I do not think that the situation in Glasgow is any different from that elsewhere in the country. Although 90 per cent of prostitutes in Glasgow have a drug problem, there is no option of referring them to the district court, but they are an obvious group of women offenders who might benefit from having the local court deal with their offences. After all, statistics show that more women than men who are dealt with in the sheriff court are remanded in custody. I assume that those women are referred to the sheriff court because a range of disposals is not available in the local court.

Richard Wilkins: We take the point. Part of the reason for that situation is that DTTOs have always been seen as quite a high-tariff disposal and are not normally used as an alternative to the maximum 60-day custodial sentence that district courts can impose.

We would have to extend the application of DTTOs quite generally before we transferred them down to the district courts. That is not undoable, but it is not quite what DTTOs are seen as being for at the moment. They are almost a last resort—they are an intensive option compared with all the other options that are available. They have not traditionally been seen as a district court disposal. The findings of the University of Stirling's evaluation of DTTOs suggested that DTTOs should remain quite a high-tariff disposal. Our thinking so far has been that they should probably remain a sheriff court disposal. Although, as has been mentioned, the district courts could have the power to impose probation orders or some sort of treatment as a condition, they will probably not have any disposal as intensive as DTTOs. Obviously, there is a discussion about whether we widen the reach of DTTOs and widen the extent to which they are used. That raises a number of issues, such as what DTTOs are for and what resource implications they have.

The Convener: Are there any further questions about extending sentencing powers to the district court?

Margaret Mitchell: I find it strange that DTTOs are considered a high-tariff disposal rather than an early intervention, in which context I would consider them to be of tremendous value in the court. Presumably, they are intended not as a penalty but to help the individual who is in court. We have heard that they are already happening informally. I realise that you do not set policy, but would an alternative point of view not be to consider DTTOs as early intervention and as a way of getting people when they are in front of the justices, before the problems escalate?

Richard Wilkins: That is certainly an alternative point of view.

The Convener: There is a debate about whether DTTOs should be an early intervention or a high-tariff disposal, but perhaps that is for another day. I presume that costs will come into it at some stage.

Phyllis Hands: Noel Rehfisch mentioned the pilot for the supervised attendance orders. It should be clarified that the pilot that is on-going is of the use of a supervised attendance order as a mandatory alternative for not paying a fine. It is not a pilot of the imposition of a supervised attendance order as a sentence, which we would welcome. We would already have had to go through the process of fining someone. I made the revolutionary suggestion during the McInnes review that having specialised courts—even JP courts—in which every offence of a certain nature, such as road traffic or common-law offences, would be dealt with in one court on a certain day, would help to channel business. JPs could handle that kind of business, which would not just be of a general criminal nature. Many road traffic offenders feel that they are not really criminals and that they should not be mixing with them; although I do not agree with that view, specialised courts would streamline business.

The Convener: Are you opposed to the use of supervised attendance orders when someone does not pay their fine?

Phyllis Hands: I am opposed to that being made compulsory. The choice about whether to give the person time to pay their fine should be left to the court, but the pilot is along the lines of, "If you don't pay your fine and you are brought to means court, you will get a supervised attendance order."

The Convener: I have concerns about this. I recently went to Glasgow district court and saw that the JP or magistrate was giving offenders the choice of a fine or 14 days in prison. The whole point of the pilot was to stop people going to prison for non-payment of fines. I have got a view about why the district courts are doing that—I have witnessed it. I support the Executive on this issue. We are trying to stop people from being jailed in the first instance for non-payment of fines. There is widespread support in the Parliament for that stance.

Phyllis Hands: I am not opposed to it.

The Convener: Given what I have witnessed, I am not convinced that if we leave district courts to their own devices, they will not jail people for non-payment of fines.

Phyllis Hands: I cannot comment on the example that you gave, because I have not seen Glasgow district court in operation. However, mandatory supervised attendance orders are being piloted in Glasgow, so the court is supposed to impose such orders. In Motherwell, we have received transfers of supervised attendance orders from Glasgow, so we know that people have been dealt with in that way.

The Convener: Would the District Courts Association prefer the imposition of a supervised attendance order to be a decision for the court rather than a statutory requirement?

Phyllis Hands: Yes. As I said, we want supervised attendance orders to be a sentencing option in the first instance. We would prefer not to have to wait for a fine to be imposed—I think that that is the association's position.

Margaret Mitchell: During the pilot in Hamilton, there was frustration about the fact that the court had to wait until someone defaulted on a fine before it could impose a supervised attendance order. The SAO often represents a more meaningful and effective approach to the problem. I wanted to clarify that the DCA would welcome the option to impose an SAO as a first disposal, as an alternative to a fine.

Cliff Binning: The discussion has moved on, but we should reflect on the important points that were made, by Nicola Brown in particular, about the role of the legal assessor in the court setting. The Scottish Court Service greatly appreciates the value of that role. We are determined to ensure that in the unification process we build on the best models that are in operation and make the best use of the valuable skill base of legal assessors. We have instituted a number of steps to realise that objective, following meetings with representatives of the DCA. A model job description was issued to all legal assessors for comment and the intention is to hold a seminar for legal assessors in June to discuss their role and responsibilities.

It is evident that the relationship between the assessor and the JP is important, which is reflected in the job description. At this stage, I am less certain about whether the role of legal assessors in the appraisal of lay justices can be pursued, given the necessary independence of the justice bench. However, the important point is that the arrangements for appraisal and training of justices will operate under the general framework of the Judicial Studies Committee and a supporting framework of training committees and appraisal committees. There will be an active role for the sheriff principal in that regard, so the judiciary and the JSC will have a high level of involvement in monitoring and the overall process.

Kay Polson: I want to comment on the issue that was raised earlier about how we might achieve consistent standards. The District Courts Association has put a lot of effort into designing and developing national competences for justices. The difficulty is that we cannot ensure that every area takes on board the standards in training justices. I hope that, rather than the present situation, which is patchy, we will have national standards and that the JSC will issue guidance to ensure that justices in all areas receive the sufficient and necessary training.

10:45

Rodger Neilson: I want to return to the availability of sentencing powers, although Cliff Binning has moved on the discussion. One frustration that we have long had on the bench is about our narrow range of powers, which leads us inevitably to use fines as the main disposal. Many people who appear before us are familiar faces. Many of them have drug problems and little income and often appear before us because they have tried to steal money to feed their drug habit. However, it is sometimes difficult to find an alternative disposal to a fine, which means that, further down the road, a means inquiry on the non-payment of the fine is inevitable. I have been told several times that we should always impose the fine, because most people will pay. However, if we do that, the few who are left might end up going to prison, which we want to avoid. By widening the range of powers, we would be able to help some offenders better and, if less fining took place, there

would be less chance of people finishing up at a means court and having the alternative placed on them because no other option is left.

The Convener: So far, we have heard that you are concerned about the increase in powers for procurators fiscal—specifically, the increase in the levels of fines and the powers that they will have for work orders and compensation offers—and that you believe that the district courts should have more sentencing powers and more options. You are concerned that there might be a dramatic drop in business. The key issue that the committee keeps coming back to is that the Executive says that the theme of the bill is speeding up the summary justice system to reduce delays and get speedier outcomes. If the committee agreed with you that some of the powers that the bill vests in procurators fiscal should rest with the district courts—which will certainly bring more offenders into the system—how would we make the system more efficient? We return continually to the issue of how to get speedier justice.

Johan Findlay: The fact that people come to court and are dealt with by justices who are local and who understand what they are doing—we get a lot of training on sentencing and understand a lot about it—has a much better effect on people than simply being given a £25 fiscal penalty would have, because in that situation there is no accountability and no responsibility is placed on people not to offend again.

The Convener: So you do not believe that it is better to have diversions for first offenders.

Johan Findlay: No, I agree with that. There is a place for fiscal fines, but at present they are overused and applied to the wrong people. People commit serious offences but get fiscal fines—we know that because they do not pay them. There is a place for fiscal fines for statutory offences such as having bald tyres. Many road traffic offences can comfortably and easily be dealt with through fiscal fines. However, I am concerned greatly about the use of fiscal fines for common-law offences.

Nicola Brown: I do not think that we should ignore the principle that justice should not only be done but be seen to be done. The victims of crime have not been mentioned but, in the past few years, our system has made great strides by investing resources in victim support throughout sheriff courts and by setting up the sister organisation of the Crown Office and Procurator Fiscal Service, the victim information and advice service. That has all been done to give victims greater access to the reasons why things are being done and why the prosecution has proceeded in the way that it has. There is concern that that transparency will be eroded by allowing the expanded use of fiscal fines. That clearly has implications for our system.

Phyllis Hands: The alternative to prosecution that the bill proposes whereby a person will have to take action on receipt of a compensation offer could lead to more delays in the justice system. If the person is deemed to have accepted the compensation offer and then, after means inquiry, the case goes out to warrant or to fine enforcement officers—if that is what is coming in—when the system catches up with the person, they will be able to ask for recall and get the case sent back to the fiscal and brought back to court. We could end up with more delays than there are now; at the moment, if someone is caught after 28 days and they have not paid, the case is automatically sent back to the fiscal, who then has to take further action. That is relatively quick but, if someone is deemed to have accepted an offer, the case could spin on for months if not years.

Andrew Lorrain-Smith: On speedier justice, the last time I sat on the bench, more cases were continued without plea on the request of the fiscal than I was given the chance to deal with. If someone is charged and they plead guilty to the charge, we deal with it. If they plead not guilty, there might be requests for adjournments and those can be decided. If a request for adjournment is unopposed, it will probably be allowed.

In my previous court, the biggest delay was caused by the fiscal asking for continuations without plea, probably because they did not know or could not prove whether the complaint had been served against the accused. If the fiscal had been sure of that by the time the case came to court, we could have dealt with it to some extent by issuing a warrant for a non-attender's apprehension. However, the district court can do nothing if the fiscal does not put the case in front of the bench.

The Convener: I want to put this point to the bill team. It struck me, on reading the main provisions in the bill, that we will not achieve greater efficiency until we also address the position of the Crown. At some point, we will hear from the Crown Office and Procurator Fiscal Service about its ability to deliver greater efficiency. In my opinion, it is fundamental to the efficacy of the bill that we consider whether the Crown is in a position to deliver speedier justice. A lot of responsibility will rest on the Crown. What discussion have you had on such points? Continuations, for whatever reason, must be coming up regularly.

Noel Rehfisch: That is certainly something that we discussed during the previous evidence session and we undertook to get back to the committee on it. Without going into detail about what is in the response that we sent to you, which is among your papers today, I point out that we

have tried to set out the programme of work that is under way to ensure that, alongside the legislative provisions that will play their individual parts in ensuring that cases go through certain aspects of the process and bits of the system as quickly as possible, there is an underpinning strategy to make sure that everyone is ready to deliver when the legislation comes into force. Much of that work will need to be done by all the stakeholders to ensure that everybody has a shared understanding of the trajectory of a case, for example, and is working together to get the cases through the system as quickly as possible.

Reference has been made, in that regard, to the work of the system model project under the auspices of the National Criminal Justice Board. I do not want to read out large bits of the Executive's letter, but I hope that it helps to paint some of the picture of the other side of the agenda that is going forward in parallel with the legislative changes that ministers feel are necessary.

The Convener: The next topic is the proposals for court unification.

Johan Findlay: We are a bit concerned about the length of time that it appears that unification will take. Everything will be difficult until everybody is part of the same system. We hope that the process will speed up once the problems with the first group of courts that are unified have been ironed out. It is the first time that I have seen the schedules, and 2014 seems a long time away.

Nicola Brown: There are practical issues and difficulties that will arise for district courts between now and unification. District courts have embraced the electronic exchange of information on cases. We update them electronically and give the results to the police and the Scottish Criminal Record Office through a software package that is used in every district court in Scotland except the district court in Glasgow, which has its own system. The software provider spoke to me last week and said that it was not going to continue to support district courts beyond 2008. That means that we will not be electronically compliant in accordance with the Executive's wishes. There must be some transitional arrangements to allow such practical issues to be addressed, instead of some areas waiting an inordinate amount of time for unification.

The delay in summary justice at district courts, which is one of the main subjects of criticism, is attributable to the fact that we cannot get Driver and Vehicle Licensing Agency printouts electronically although we deal with a large number of road traffic cases. That was pointed out to Sheriff McInnes. In February, the DVLA agreed for the first time to send that information to district courts, which is a huge stride forward, but we are not in a position to implement that because of the position with our software provider. That is a shame for justices and for accused persons whose cases are delayed for an inordinate amount of time in order that DVLA printouts can be produced. I would welcome any transitional arrangements that could be made to ensure that we are supported in those areas.

The Convener: Why can you not get printouts from the DVLA?

Nicola Brown: The DVLA refused to send the information over a certain type of link that we use because of doubts about the security of that link. The issue has been on-going for 10 years. Following meetings at the DVLA, it finally agreed in February to exchange information via the connection that we want. However, we cannot get the enhancement in place because local authorities will not finance extraordinary projects for district courts in view of the fact that they will no longer have responsibility for the courts. That is the difficulty that we face. If the situation drags on for any length of time, the district courts will be in difficulty.

The Convener: Perhaps the bill team can at some point—perhaps not today—get back to us on that. What is the intention here? Is the software that is used in the Scottish Court Service to be extended to the district courts?

Cliff Binning: I can clarify that. We have been in discussions with the information technology provider to the district courts. The matter is on our agenda and is in hand, and we will take it forward as a matter of urgency. It is intended that all courts will operate within the infrastructure that currently serves the sheriff courts. We are upgrading that system, which will be rolled out to all sheriff courts around the end of 2006. Nicola Brown's points are well made and we will continue to deal with such issues as a matter of urgency.

11:00

Stewart Stevenson: I raise a different and perhaps slightly contentious issue. The bill could lead to a situation in which there were no JP courts. Under section 46(5), the Scottish ministers would have regard to matters such as the capacity of sheriff courts when determining whether a JP court was necessary. Is the District Courts Association concerned that one outcome of the bill might be fewer lay courts in Scotland than we currently have or fewer such courts than it thinks are justified?

Rodger Neilson: We are concerned about that. The principle behind lay justice is that it is local justice that involves the community. The reasons for having the current number of lay courts will probably continue to apply. If the new JP courts are to be local, we cannot close many down

without losing that. For example, when cases in north-east Scotland were sent to one court, what could have been a 15-mile trip for the accused and witnesses became a 60-mile trip by public transport. Such factors must be considered if there are plans to close down courts.

There might be good reasons to consider the future of one or two courts, but by and large it is vital that we retain local courts. If we are to do that there should be at least one JP court per sheriff court area, if not more in areas where the geography is such that that is necessary.

Andrew Lorrain-Smith: I have a rural background and I feel strongly about the matter. It is often thought that cases of a similar nature can be adequately dealt with by a justice who has experience of such offences, which is true to an extent. However, it is important that a justice deals with cases in his area, because he knows what issues are important to the community—he knows what type of behaviour is getting up people's noses locally. He will return to the community and hold up his head, having dealt with the issues. He is known to be the local justice.

I have dealt with matters in my community and the issue of dealing with someone who you know arises infrequently; it is not really a problem. It is important to be responsible for justice in the area and to know what the community regards as important.

The Convener: I will play devil's advocate. In my experience, the public often seek a more extreme outcome, so I am a little concerned that you say that you respond to what the community wants. That is one of the concerns that McInnes had, particularly in relation to the consistency of decisions. Surely, the decision that is made must be made without regard to what the community thinks. The concern must be the fairness of the decision in relation to the nature of the crime that has been committed.

Andrew Lorrain-Smith: There is validity in what you say. I need to be more precise.

If your community is particularly worried about a certain issue, a local justice has a duty to reflect that. That is different from being told by your community that people want a certain outcome or that, because a certain family is involved, the outcome must be a tough one. I am not saying that at all. Obviously, a justice will have to make up their own mind about what decision to make but, if a community is worried sick about something, the local justice ought to know about that and ought to respond to it. Given the situation that I am in, the issue is a particularly poignant one. Midlothian is not a sheriff court district. Midlothian used to contain Edinburgh, but Edinburgh got a bit above itself and has become a district of its own. At some point, Midlothian might lose its court and be subsumed into Edinburgh. I am not advocating that; I see it as a danger.

I could write a thesis on how to deal with misdemeanours in Pilton, but I am not part of the Pilton community. That is important. I understand the issues that might be involved, but I am not going to be walking through Pilton after making decisions affecting the community. Similarly, the justices from Pilton are not going to be walking through Gorebridge, Pathhead or Dalkeith.

The Convener: I think that we should ask the member for Edinburgh South for his view.

Mike Pringle: There is concern that the bill gives ministers the powers effectively to abolish JP courts across Scotland. One of the issues that has been raised relates to areas such as Duns, which is a small community. If the justice deals firmly with certain people, there might be repercussions because everybody knows that he is the justice; in some parts of the country, justices might not want to sit in their local community. What do the witnesses think about that?

On the issue of the powers of JP courts, it was suggested that many cases that are currently handled by the sheriff court—particularly a huge range of car offences—could be dealt with in the district courts if the disposals that are available to them were increased and they were able to disqualify immediately. There is an argument for many cases being dealt with by the district courts.

We have discussed the lack of confidence in the ability of justices to deal adequately with disposals. I know that some justices fine people £150 for not having a television licence but, when I was a justice, I could never fine such people any more than £20. That demonstrates that there is a difference between how different justices deal with issues.

I understand that most places used to have a three-justice bench but that, now, most benches have only one justice on them. Perhaps having three on a bench would give the Scottish Court Service and the procurators fiscal more confidence in the justices' abilities to make adequate decisions. Perhaps someone would like to talk about that proposal and address the other issues that were raised.

Stewart Stevenson: I want to give Andrew Lorrain-Smith the opportunity to clarify the context in which he made some of his comments. I invite him to agree that one of the key skills that someone who sits on a bench of any character is likely to have to exercise is to remember which hat they are wearing. Unless the person who is sitting on the bench is capable of making their decisions wholly objectively and being able to account for those decisions wholly on objective criteria, the

decisions may well be open to challenge. Therefore, it is important that, when a justice comes into the court to sit on the bench, they leave behind at the court door their other authority and knowledge because that knowledge is not knowledge that, in a legal sense, they have when they sit on the bench. It would be useful if Andrew Lorrain-Smith were able to confirm that he agrees. In a sense, it is the same when we sit as members of the committee: we may know things as individuals that we cannot legally know as members of the committee. There is a distinction. One of the key skills that a magistrate of any kind needs is the ability, when sitting on the bench, to separate the different parts of their life. I hope that nothing that Andrew Lorrain-Smith has said suggests otherwise. It would be useful to have that clarification or, if I am wrong, for him to tell me that I am wrong.

Noel Rehfisch: I do not want to interrupt the flow, but I will quickly provide a couple of factual points that are useful to the discussion.

On the programme for the phased court unification, to date it has been decided to unify the Lothian and Borders courts in the financial year 2007-08, followed by the courts in Grampian and the Highlands and Islands. Ministers have taken no further decisions on that so far.

Mr Pringle mentioned the possibility of extending the power of JPs to disqualify somebody from driving in cases other than totting-up cases. That was mentioned in the policy memorandum to the bill and, in our follow-up letter to you, we have set out a little more clearly the fact that we are considering that. However, it requires amendment of reserved Westminster legislation, so we would need to negotiate with our Whitehall counterparts a section 104 order under the Scotland Act 1998 to achieve it.

The last time that we gave evidence, my colleagues from the Crown Office explained that, under the renewed marking policy, it was very much our intention not to deprive the district courts of business. In fact, the new way in which cases would be considered and marked, as well as other steps that we are taking—such as considering extending the disqualification powers—might lead to an invigoration of the business at that level. We hope that that provides the reassurance that the agenda to ensure that the district courts are properly used for the appropriate level of cases is genuine.

The Convener: Does that mean that it might be decided to move some business from the sheriff courts to the district courts?

Noel Rehfisch: I am not an expert on the marking exercises that the Crown Office has carried out or the review of its marking policy, but I understand that it will consider the outcome that is required in a particular case to determine at what level in the system the case should be tried or what sort of intervention should be applied. Therefore, it would be less a matter of asking which court a case should go to and more a matter of asking what outcome was being sought in the case. However, I do not want to say anything further on a matter on which I am not an expert.

The Convener: The Crown Office should be able to tell us what it is doing on that. The information was disclosed to us when we considered the Bonomy bill, when it moved 22 per cent of business down and then adjusted the marking policy so that, broadly, that percentage of cases moved from the High Court to the sheriff court. I would expect the Crown Office to be able to give us similar information and to tell us whether it has the same idea in mind.

11:15

Noel Rehfisch: I am not aware of exactly what the Crown Office's marking work to date has involved. It has certainly looked at cases being pushed out to alternatives to prosecution. We can look into that.

Graham Coe: Mike Pringle mentioned the idea of a three-justice bench. That was the opportunity that I was waiting for. It is perhaps not fully realised that about 25 per cent of district courts sit with a three-justice bench. It is one of the areas in which the District Courts Association has kept its options open, recognising that both the single-justice bench and the three-justice bench have advantages. Each has grown out of a set of situations in a local community, and the supporters of each back their system strongly. I come from a three-justice bench, and all my justices hope that the opportunity to have that will continue. There are, of course, implications for training and—as you perhaps suggested—for credibility and acceptability in the community.

Section 50(2) allows ministers to constitute a JP court with one justice only. In effect, that would remove the choice from a local area. I would encourage the continuation of choice. If justices in a local area feel that they can best serve the people of their area and deliver justice there effectively and efficiently, they should be allowed to continue to do so with a three-justice bench.

The Convener: How is it decided whether to run a three-justice bench?

Graham Coe: It is a matter of custom and use.

The Convener: So, there is no special category of cases.

Graham Coe: No. However, a three-justice bench is particularly useful in a trial. There are

other occasions when a single justice can—and, obviously, in many other parts of Scotland does—deal with the matter effectively.

The Convener: Do you support the idea that guidance should be issued on the use of a three-justice bench?

Graham Coe: All that I seek is a continuation of the opportunity to make a choice locally.

The Convener: One of the criticisms in the McInnes report concerns the consistency of decision making. I wonder whether it might be helpful to make it clear to everyone in which circumstances a three-justice bench would be used rather than a single-justice bench.

Mike Pringle: In my experience in Edinburgh, every case that comes in front of the district court is heard by one justice. In Duns, there is always a three-justice bench because that is what happens there. We are not talking about different types of cases; it is just that only one justice is used in Edinburgh. I do not know whether one justice is used in Dundee.

We will perhaps get on to training and all that stuff in more detail later but, as a justice in Edinburgh, I sat only eight or nine times a year. One of the criticisms that has been made is that justices do not sit often enough to get the experience. That is what we have heard in the evidence from West Lothian. If Edinburgh moved to a three-justice bench system, that would immediately mean that a justice in Edinburgh would sit not eight times, but 24 times a year. It is a question of getting consistency in decision making. When three judges are on the bench, one might want to impose a fine of £200, the second a fine of £50 and the third a fine of £150. After discussion, a compromise would be reached. I never sat on a bench of three, but I presume that that is how it would work.

Having three judges might well give more confidence to everybody concerned: the justices would sit more often and get more experience; people coming before a three-justice bench would realise that three people were deciding on the case; and so on. If the bill says that we could end up with one-justice benches across Scotland, I think that that would be a retrograde step in areas where there have been three-justice benches. I would be thinking about moving towards three-justice benches across Scotland.

Johan Findlay: There were a number of points in Mr Pringle's earlier comments.

Andrew Lorrain-Smith spoke about a local justice knowing the area. It is about understanding how serious an issue is locally; it is not about handing down a sentence because some people think a person should be hanged or whatever. Justices temper street justice to an acceptable disposal. That is very important and I do not think that there have been any cases in which justices have gone mad and done exactly what the local community wanted. We are accountable to ourselves as well as to the appeal court.

I think that across the DCA we would support other driving disqualifications. That would be a very sensible use of our time.

I sit on a treble bench and am a great supporter of the treble bench. Historically, the justice of the peace has always sat on the treble bench; it was the burgh magistrate who sat on a single bench. That was how things evolved in the reorganisation of 1975. I would like the flexibility of the treble bench to remain.

The Convener: In which area are you?

Johan Findlay: Dumfries. The whole of Dumfries and Galloway uses treble benches, which helps with consistency. I have no objections to sitting singly for means courts, pleading courts and lots of other things, but for a trial it is especially important that there is a treble bench.

The Scottish lay justice is the only lay judge in Britain who has power of verdict and sentence. That is a very onerous power. No lay judge in England can decide verdict and sentence.

Mrs Mulligan: We will discuss appointments later but I want to ask about the suggestion that there should be three people to a bench. Would you be able to fulfil your obligations? As Mike Pringle said, the amount of time that people are called to sit could be trebled. What effect would that have on JPs' time and on their willingness to give their time?

Johan Findlay: I have been a justice for 20 years. Before the most recent reorganisation, there were four areas in Dumfries and Galloway. Dumfries took particular care to have the right number of justices to give three at a time a sitting of once a month. That was how it worked but the system has since been dropped because we have amalgamated with a much bigger area where they have far too many justices. You have to be careful to have the right number of justices to match the sittings—whether you are sitting as a single bench or a treble bench.

Mrs Mulligan: Is recruitment a problem in some areas? If so, would requiring more justices cause problems?

Johan Findlay: I have no experience of an area with a recruitment problem, but Nicola Brown might know more.

Nicola Brown: There are vast recruitment problems in city courts.

Marlyn Glen: Has the system developed differently in city areas and rural areas?

Nicola Brown: For a number of reasons, the DCA supports the status quo—that is, the option of having either three judges on a bench or a single judge on a bench. However, recruitment is a problem. As I have said, I am the manager at Dundee. We have only 11 bench-serving justices and we sit every day. People therefore sit once a fortnight. Most city justices work full time and it is difficult for them to get time off work to attend court for such duties. We have been lucky with our justices because their employers have been very understanding. However, recruitment is difficult. If we moved to having treble benches, I do not think that we could continue to deal with business as we do at present. Different areas have different needs.

The Convener: The point is critical, so I will continue the discussion. Richard Wilkins has a comment from the Executive's point of view.

Richard Wilkins: I have a brief point of fact. When discussing one-person benches in comparison with three-person benches, we examined the figures as best we could. About a quarter of the courts have three-person benches but, as has been said, most of those courts are in rural areas, so they deal with a bit less than a quarter of the business.

We tried to assess how many JPs might be needed for all one-person benches or all three-person benches. The best estimate, which is not completely right, if that if JPs all sat for the same number of days as at the moment, the figures would change from about 610 JPs sitting on the bench to about 480 to 490 for all one-person benches or about 1,450 for all three-person benches. The establishment of three-person benches would have serious recruitment repercussions. That might not be unmanageable, but it would definitely be an issue, particularly in urban areas.

Mr McFee: I am more concerned now than I was when the matter was first raised. I am forming the clear impression from those who sit on three-person benches—and perhaps from those who do not—that a three-person bench is more desirable, particularly in a trial. However, some areas could not have three-person benches because we do not have the people. The inconsistency that was highlighted in the McInnes report may be a valid criticism, even if we adopt the system under the bill of predominantly or exclusively one-person benches. I need that to be thrashed out. Are the advocates of three-person benches saying that such benches reach better decisions—yes or no?

The Convener: We will get a snapshot of that.

Mike Pringle: I ask Richard Wilkins for information. I have experience of sitting as a justice in Edinburgh eight or nine times a year. Was the figure that you gave for three-person benches based on justices continuing to sit for the same number of times as they sit at present? Unlike Dundee, Edinburgh had no problem with recruitment when I was a justice. We always had a long waiting list of people who wanted to sit on the bench. It would be interesting to flesh out the figure of 1,400. Will everyone sit the same number of times? In some places, the number of JPs could increase.

Richard Wilkins: That would be the figure if every JP in each area sat for the same average number of sittings as at present. The average throughout the country is about 12 sittings a year, although it varies between local authority areas. If the average number of sittings per JP remained the same, that is how the stats would pan out. However, if the number of sittings per JP were increased, fewer JPs would be needed.

The Convener: We need to thrash that out. You say that the average number of sittings throughout Scotland is 12 per year. Notwithstanding the problems, about which I will return to Nicola Brown, that number is particularly low—it is one sitting a month. Is the Executive concerned about that? Do we not want people in any profession or job to make decisions more regularly, so that they gain the required level of expertise, or am I looking at the matter in the wrong way?

Richard Wilkins: That is an issue. A balance must be found between ensuring that we can recruit and retain enough people, so that the burden is not too significant, and ensuring that people sit often enough to be experienced. In England, the equivalent minimum requirement is 26 sittings a year, which is significantly higher than the current average in Scotland.

As you will know from examining the bill, it will allow the sheriff principal to determine from the amount of court business how many sittings JPs might need to do, in order to impose a minimum sitting requirement that will ensure that JPs who sit on the bench receive a minimum level of experience each year. In practice, we cannot expect a minimum amount to be set that is higher than the average that is decided by the amount of business—it depends on the level of court business.

Although in the long term we would like the overall amount of sitting to increase so that JPs can gain more experience, there are limitations. The first is to do with the amount of court business—that relates to our earlier discussion. Secondly, areas where the average is substantially more than 12 sittings a year and sitting levels are close to levels in England might

well hit problems to do with recruitment, particularly of people who are in employment—some areas have already hit such problems. That is a concern and we must strike a balance that takes account of issues to do with court workload and recruitment, particularly of people who have jobs.

11:30

The Convener: Is it better or more desirable to have a three-justice bench?

Johan Findlay: It is difficult to say whether that approach is better or more desirable. In Dumfries we think that the three-justice bench is the right approach, particularly in trials, because three people listen to the evidence—remember that we are lay people—and someone might pick up on something that the others did not notice. Obviously that cannot happen when there is a single-justice bench. I do not know whether single-justice bench decisions attract more appeals than do three-justice bench decisions—perhaps there is research on the matter. The three-justice bench offers a more consistent basis for sentencing, because we work with different justices every time we sit.

Andrew Lorrain-Smith: When I was appointed as a justice, I wanted to sit on a three-justice bench, but as I became more experienced I became happier with the single-justice bench, which is the status quo in Midlothian—we get used to the way in which we work.

May I make a different point?

The Convener: We can come back to you, but I want to pursue the desirability of having a three-justice bench. We have acknowledged that Graham Coe's position is that the three-justice bench should be an option, but it is important that we hear other views.

Rodger Neilson: I usually sit on a three-justice bench, but I have sat on my own and I feel quite comfortable doing so, so I have experienced both approaches. I do not think that a verdict that I reach when I sit on my own is any worse than a verdict that I reach as part of a three-justice bench. If the training is adequate, we should be able to take the decisions.

When some of us met the Judicial Studies Committee to discuss future training, it was interesting that two or three times during the course of a two-hour discussion I thought, "Yes, but that would be easier if there was a three-person bench." There can be instances in which knowing a colleague's thinking can temper one's verdict. For example, a colleague in Peterhead always wants to impose more fines than I do—and I suspect that other colleagues think that I fine more than they do. We can learn about our different approaches more easily if we sit on a three-person bench, which will lead to more consistent sentencing, albeit that consistency is regarded differently by people outside the system, because only the bench knows all the factors that it has taken into consideration in reaching a verdict.

The three-justice bench is the standard in England and Wales and has much going for it, but the best approach would be to keep some flexibility, so that a single-justice bench can operate when that is desirable.

Stewart Stevenson: Can the bill team explain the basis on which the number of JPs required was calculated? The figure that was given for a universal single-justice bench system seems to be simply a third of the figure for the triple-justice bench approach.

Richard Wilkins: Yes.

Stewart Stevenson: Right. I was particularly struck by Johan Findlay's point that, although she strongly advocates a triple-justice bench for trials, she nonetheless thinks that that is entirely unnecessary in many other instances. Therefore, I suspect that we should not be unduly influenced by the figure that 1,400-odd JPs would be required at the end of the day. Will you clarify the issue?

Richard Wilkins: If we had a system in which three justices were used for trials only and one justice was used for means inquiry courts and other business, the figure would certainly be significantly less than 1,400, although I have no idea how much less, because I did not do the calculations on that basis.

Mike Pringle: I agree with Stewart Stevenson. In my experience, a justice of the peace conducts a relatively small number of trials in relation to all the other business that they do. I, too, was struck by Johan Findlay's comment. We should consider seriously how we adjust when justices sit. I do not know what Nicola Brown would say about this, but perhaps the people in Dundee could sit as a triple-justice bench only when they did trials and singly the rest of the time. I do not know how more people can be recruited in Dundee—there is a clear difference between Edinburgh and Dundee in that respect. As Rodger Neilson said, there are never fewer than three magistrates sitting on a bench in England and most, if not all, of them are lay people. Perhaps we need to look at something in between. What are your comments on that?

Nicola Brown: Practical difficulties with recruitment arise in places other than Dundee. For example, information has been given to the Scottish Executive about difficulties in West Lothian. The issue is not only about recruiting; it is about retaining people throughout the training to

become a JP. When people realise the onerous number of sittings and other issues, they sometimes take the responsible view that they do not want to waste our time any further and so rightly drop out of the training.

We are getting a bit confused on the issue. A three-justice bench does not necessarily mean a better decision. The McInnes report raised concerns about consistency, but that was in respect of justices in rural areas in which large numbers of justices have been recruited but do not sit very often because of a lack of court business. That was libelled as the reason for inconsistency, which is a fair comment. The McInnes report did not suggest that a three-justice bench reaches a better decision than a single-justice bench; it suggested that the number of sittings that justices do is a material factor in consistency.

The Convener: We have almost moved on to the final part of the discussion, which is about recruitment, training and standards. It has been helpful to get a view on the issue of single-justice panels versus triple-justice panels, but we have heard enough about that issue and we need to think about what you have said.

I want to move to the final topic for discussion today, which is on training issues. Nicola Brown mentioned the number of sittings. What are the witnesses' views on having a minimum number of sittings, as an alternative way of maintaining standards?

Phyllis Hands: Justices should definitely have a minimum number of sittings. One sitting a month is probably not quite enough, but that is often all the time that people can get off work. For example, we have teachers who are allowed only one day a month away from school. If we do not ensure that people know what they are signing up to at the start, the drop-out rate will be high. If we are left with a core number of people who are available all the time, that will not be lay justice, because they will be like sheriffs who sit in court every day. When we recruit, we must ensure that people are aware of what they are signing up to and that they can fulfil the commitment.

Kay Polson: I whole-heartedly agree that there should be a minimum number of sittings. In my area, the justices like to sit more frequently. We consulted them all about how frequently they thought they needed to sit to feel confident on the bench and they agreed that they require a minimum of once a month. If a justice sits less frequently, training becomes even more important. If a justice sits more regularly, they are constantly facing the issues and getting experience.

Mike Pringle: I am certainly interested to hear what the justices think about the two points I am concerned about. The bill says that justices only need to have three days of training a year, which is totally inadequate.

I take Nicola Brown's point about someone who gives up halfway through their training. That is better than their worrying whether they can complete the training or ending up being a not very good justice.

However, the training provisions in the bill are just not good enough. I do not think that three days' training is all that justices get at present. Although I do not know about elsewhere, I know that in Edinburgh, when I first sat on the bench, I had to sit with another justice and observe him around eight or nine times before I was let loose on my own. During that period, I had several different types of training.

The other area that concerns me greatly is the idea that we will simply offer every existing justice of the peace a new five-year contract. West Lothian's view was that that would be a complete disaster because a substantial number of justices are signing justices. I do not know whether Bruce McFee ever wanted to sit on the bench, but in Edinburgh several justices who were appointed said, "No, I don't want to sit on the bench. That's not for me. I am happy to sign documents and be a justice of the peace but I do not want to sit on the bench." If we are to offer people a five-year contract just because they happen to be a justice, we have to consider who they are, and some sort of conditions will have to be set.

Mr McFee: I was an ex-officio justice, and such justices never sit on the bench. My understanding is that the bill does away with that position so the issue will not arise.

Richard Wilkins: It might be helpful to consider three different categories of justices, rather than two, if that would be any use. There are justices on the supplemental list who have very limited signing functions; those include the ex-officio justices. The bill will do away with that category of justice altogether.

There are also full justices who sit actively on the court rota. Then there are a reasonably large number of people—about 800 or 900—who are classed as full justices but who do not actively sit on the bench. The issue here is about finding safeguards for that category of justices. It is not about ex-officio justices and signing justices; it is about full justices.

The Convener: Do the witnesses believe that elected local councillors should be taken completely out of the picture? We have already removed them from the bench but some of them have signing duties. Do the witnesses agree with that?

Mike Pringle: Local councillors are not allowed to sit on the bench as a justice because of human rights legislation. A case was taken—I do not know whether it went through the High Court of Justiciary—and now local councillors are not allowed to sit on the bench, although they can still sign.

The Convener: That is right, but with court unification, those contradictions will not arise. I just wondered whether there was a view about it. Local council members are in tune with their communities; they sign divorce papers and that sort of thing. Should we get rid of that too?

Rodger Neilson: The system is a bit unwieldy, given the vast number of justices of the peace. It is difficult to keep track of them, particularly if they have passed on and are no longer available. Lists of justices appear and it is very difficult to keep those lists up to date. The system that is being proposed is far better because it does away with that vast number of signing justices. I am comfortable with the idea that councillors have signing duties, albeit that signing documents that have judicial significance would still be restricted to the bench-sitting justices.

11:45

The Convener: The DCA's submission makes it clear that the association is opposed to the idea of justices being reappointed every five years. I ask Phyllis Hands to put the association's concerns on the record.

Phyllis Hands: The bill introduces all kinds of ways to remove a justice. If a justice is not up to scratch we should not have to wait five years to remove them. If it is known that appointment is for only a limited period of time, such as five years, a justice might be allowed to sit until the end of the term, rather than action being taken immediately. If appointment is for life, action would have to be taken—it would be summary action, like the justice that we are meant to be dispensing.

Andrew Lorrain-Smith: I support that. The case for the five-year appointment has not really been made, unless it is the Executive's intention to appoint all members of the judiciary for five years. If that is the case, the proposal needs to be debated and the Executive should give its reasons for it. I do not see why justices should be placed in that position.

Johan Findlay: Stipendiary magistrates have grave concerns about the proposal—it would not be a good career move to become a stipendiary magistrate if the appointment was for only five years.

Mr McFee: The concept of introducing a five-year reappointment rule throughout the system is an interesting one, which I might come back to.

On a practical level—you do not need to name names or places—if it becomes clear over the course of a few years that a particular justice is not up to the job, is there not a way now in which you can shuffle them sideways into retirement so that they never sit on the bench again? Is that the practice?

Phyllis Hands: It is for the local committees to deal with their own justices. The committees are responsible for the rota, so the basic answer is that they would not put such a justice on the rota or, if the justice was on the rota, they would deal with means court work more than anything else.

Mr McFee: So the answer is yes.

Phyllis Hands: The answer is yes—sort of.

Mr McFee: That is fine. That is a practical solution.

The Convener: So you do not think that the case has been made for the five-year appointment. Is anyone opposed to the idea of the minimum number of sittings being 12 in a year?

Witnesses: No.

The Convener: Mike Pringle has expressed the view that three days' training is not enough. Do you have a view on that?

Phyllis Hands: We definitely agree. We made the point in earlier discussions that it might be advisable to have three days' training followed by a period when the justice would go out and do their own investigation in a sitting court and gather their own information about the role that they are expected to play. They would then come back for a further two days' training before they were—

Mike Pringle: Let loose.

Richard Wilkins: I broadly agree with Phyllis Hands. I do not think that the figure of three days appears anywhere in the bill, although you may have heard it being mentioned. There is a power for the Lord President to prescribe whatever training they consider to be necessary, which is one of the reasons why the Judicial Studies Committee is currently discussing with the District Courts Association various issues to do with training. I expect that the views of JPs will figure strongly in whatever guidance comes out on the issue. The figure of three days does not appear in the bill, but there is a power for the Lord President to set a minimum requirement and a scheme of training for induction.

The Convener: What expenses do JPs get for doing their duties? How does the system work?

Phyllis Hands: They get mileage for their cars and they get something like £6.35 for more than four hours and £13 for more than seven hours. They do not get paid very much.

The Convener: If they are employed, does the employer in most cases pay their salary per day they get off?

Phyllis Hands: I think that the figure is up to £72 per day to replace any salary that they lose.

Johan Findlay: In the 20 years during which I have sat as a justice, I have never been paid anything for my time. I get petrol money, but I have never been offered any other remuneration. I think that a lot of justices do it only for the mileage, and I know that if people have to take a day off work their expenses will be reimbursed in some way or other.

Andrew Lorrain-Smith: Likewise, I have never been paid anything. On the minimum number of sitting days a year, I should point out that, in the time that I have been a justice, I have sat as infrequently as once every six months, which was a nightmare, and as frequently as fortnightly. When I had sat fortnightly a few times, I really felt that I was in gear with the thing. It makes a huge difference, and there is no getting away from the fact that the best training is sitting.

There are some rural courts where it would be difficult to achieve 12 sittings, but that could be dealt with adequately if there were more training for people who were sitting less frequently, which is what I would prefer. We must consider the effect on witnesses and victims of having to move considerably out of their protection zone to another court area. It should also be said that quite a lot of people who go to court are innocent, and it is a bad thing for them if they have to go a long distance, so I urge members not to be too prescriptive about the proposed minimum of 12 days, because there will be situations where it is difficult to achieve.

The Convener: I note what you say about things not being the same in every case. If we are about raising standards and challenging the perception of inconsistency, we would have to have some training related to a minimum number of sittings. I agree with Andrew Lorrain-Smith that the best training is probably sitting, but whether that can be aggregated over a long period or whether slightly more training should be factored in if it cannot be achieved is a matter that the committee must consider.

Mr McFee: Would that, in essence, be one of the arguments for a three-person bench in certain circumstances, so that justices can keep up their level of involvement?

Andrew Lorrain-Smith: Yes, in the short term. In Midlothian, we had to ask some justices to stand down because they were not sitting often enough.

Mr McFee: Do they want to come to Dundee? [*Laughter.*]

Andrew Lorrain-Smith: There were some who were happy to stand down. If we changed to a three-person bench, that would multiply our sederunts by three in the short term.

Mr McFee: In certain circumstances.

Andrew Lorrain-Smith: The arithmetic gives you the answer. In the long term, it is a matter of matching the court rota to the number of justices or the number of justices to the court business.

Johan Findlay: I know that you were kind enough to accept my suggestion of having a treble bench for trials, but in some areas, including mine, that would be difficult to achieve.

The Convener: We have not accepted anything.

Johan Findlay: I meant that you seemed supportive of my suggestion.

We sit once a week, as is common in many district courts, and we deal with every kind of case on that day, including pleading diets and trials. I have sat when we have had five trials down for that day, all of which have gone off. If we had a three-person bench for trials, we would have done no business at all that day, so it might not prove possible, from a practical point of view, to have three justices for trials.

Graham Coe: I would like to link the three-justice bench to training and to what happens in England. In England, the basic training is to be a winger, and there is separate training for the person who is to chair the bench. There has been something similar in my area in relation to a three-justice bench. For the first year after induction training is complete, justices sit only as supporting justices. I feel that linking the three-justice bench with the training is a useful way of ensuring that experience on the bench can be built up. It does not involve simply sitting at the back and watching; those trainees are part of the system itself.

The Convener: We have talked about the appointment and training of JPs, but we have not covered the appraisal of JPs, although one view on it was expressed. Do you have any comments to make on appraisal?

Graham Coe: We note that the appraisal of JPs will be undertaken by JPs, to ensure judicial independence. I certainly see a role for the legal adviser in the appraisal of JPs, and the people who train the justices must have something to say about their readiness for appraisal. I always think of appraisal as being derived from and linked with

the training cycle, rather than a tool that the organisation can use to get rid of someone.

Mrs Mulligan: I have a quick question about the appointment of JPs and the fact that there is no provision for appeals. Would anyone like to comment on that?

Phyllis Hands: Appeals against what?

Mrs Mulligan: I understand that there is no right of appeal for justices who have not been included on the list of JPs that will be appointed. Is that right?

Richard Wilkins: Are you talking about those who are not re-appointed at the end of five years?

Mrs Mulligan: No. I am talking about those who will be appointed the first time. There is no right of appeal for those who are already JPs, but who are not appointed.

Richard Wilkins: That could become more of an issue. As the bill is framed, supplemental list JPs will not be offered reappointment, but full JPs will be offered reappointment; it is up to them whether to accept that appointment. We would not expect there to be any appeals unless a factual error had been made. If we were to increase the level of safeguard, so that a larger number of full justices of the peace were not appointed under the new system, we would have to consider how the legislation was phrased and whether the test was still a specific point of fact. At that point, we might need to start thinking about appeals. However, if the test remains a point of fact, we would not expect there to be a need for an appeals procedure. That is how the bill is framed currently.

Mrs Mulligan: Mike Pringle said that there might be concerns that some justices would be appointed inappropriately. If we went down the road that he suggested and did not appoint them, would there have to be an appeals process?

Richard Wilkins: That would depend on the exact mechanism used. If an objective, factual test were applied to ensure that a large number of JPs who do not have experience of sitting on the bench were not appointed to do so, an appeals process would not be necessary; however, if a broader measure to determine which JPs were appointed were used, we might need to consider the need for an appeals process. We are not at the stage of working out the exact phrasing of legislation and considering what tests and mechanisms might stem from it, but there is a potential issue there.

Mrs Mulligan: Will there be an appeals process for reappointment after five years?

Richard Wilkins: No. A decision on that will be made by the sheriff principal. Several of the grounds for reappointment are issues of fact, but one is to do with the inadequate performance of the function of a JP, which might involve the consideration of appraisal issues. The sheriff principal can also consider other grounds that they think are relevant. We do not envisage an appeals process in the reappointment of JPs. We envisage reappointments being made after the sheriff principal has made a decision on the basis of the facts presented.

There are also five-year appointments for part-time sheriffs, whereby the sheriff principal can decide against reappointment on any grounds that they consider relevant, among other criteria. There is no appeals process there. We do not envisage an appeals process in the reappointment of JPs at the end of five years.

12:00

The Convener: Phyllis, can you give the committee any figures for the number of JPs, by court and number of sittings?

Phyllis Hands: The number of JPs in each area?

The Convener: Per district court, and an idea of how often they sit.

Phyllis Hands: I think that that information is in the statistics that are produced by the Executive. I do not know how reliable they are.

Richard Wilkins: I have probably got some of the figures here, but I might e-mail them to Phyllis first, to check whether they are all right. Between us, we can certainly provide you with quite a lot of that information.

The Convener: We would like to see the finished version. The committee will look into the treble bench and the minimum number of sittings. We will want to see how the situation is looking across Scotland before we take a view on those issues.

Phyllis Hands: I know that the statistics show a three-man bench in North Lanarkshire, although what we actually have is three courts with one man on each bench.

The Convener: That is why we would like to see the number of court sittings and the number of justices.

Phyllis Hands: We would welcome an input by the legal adviser for the sheriffdom when the appraisal committee considers appraisal. We would also welcome a training and appraisal scheme for the legal advisers. We think that it is important that, if the justices are being subjected to that scheme as volunteers, it is only fair that professionally employed people are subjected to the same system.

The Convener: I propose that we finish there, unless there are any issues that you feel have not been covered. You make some points in your written submission that we will not have time to go through today, but I assure you that we have noted them and will discuss them with other witnesses in regard to other important aspects of the bill.

I hope that you have found this session useful. We have found it useful to have this discussion with you, and it will be in the *Official Report* so that we can look back at what was said—not to incriminate anyone. The discussion has taken longer than two hours, and it will be important for us to remind ourselves of what has been said. I thank you for participating and assisting the committee greatly in its work.

Rodger Neilson: Thank you for inviting the DCA to give evidence.

The Convener: I also thank the bill team. It has been really helpful to have you here to clarify points as we have gone along. Thank you for your full and extensive letter in reply to many of our points. I am sure that we will have others to raise, but you would expect that.

As the discussion has lasted two hours or so, the committee will welcome a short break.

12:02

Meeting suspended.

12:19

On resuming—

Annual Report

The Convener: Item 2 is consideration of our draft annual report, which has been prepared by the clerks. I invite members to comment on what, if anything, they would add to it.

Marlyn Glen: We should add to the list of visits our visit to London to discuss the Scottish Commissioner for Human Rights Bill.

The Convener: Yes, we should mention that we had that visit to London to meet the Department for Constitutional Affairs and the Joint Committee on Human Rights. I suggest that we also mention that we visited the offices of the Scottish Criminal Record Office.

I wonder whether we should mention subordinate legislation. The two items that stick in my mind as quite notable are the instrument relating to disclosure and the order relating to legal fees. Perhaps we should mention them specifically.

Stewart Stevenson: It would certainly be worth mentioning in general terms how much of our time secondary legislation has taken up. As well as the headline stuff that comes to the notice of people outside the committee, we deal with subordinate legislation, which takes up a bit of preparation time prior to committee meetings and during our meetings.

Mr McFee: Was the convener thinking of commenting on situations in which we have been faced with decisions that have, in effect, been taken and simply notified to us so that we can ratify them after the event?

The Convener: Those are two separate points. I agree with Stewart Stevenson's point in that 33 negative instruments is a lot. Officials have quite frequently had to assist us with them because of their complexity. I suggest that it would be worth mentioning the kind of instruments that we have dealt with. The two that I mentioned dealt with the most notable issues, both of which we might need to reconsider in future. We do not have much more space in the report, but I think we can squeeze that in.

If members have no other comments, are they happy to agree to the annual report of the Justice 1 Committee?

Members *indicated agreement*.

The Convener: The size of our annual report looks like virtually nothing compared with our workload over the year, but I am sure that it will be

duly noted that we have met for more hours than any other committee—

Stewart Stevenson: Once again.

The Convener: I am glad that the deputy convener has backed me up by pointing out that that has happened once again.

As the committee agreed previously, we will now deal in private with item 3, which is a discussion of our general approach to writing our report on the Criminal Proceedings etc (Reform) (Scotland) Bill.

12:22

Meeting continued in private until 13:26.

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