JUSTICE 1 COMMITTEE

Wednesday 17 May 2006

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

Wednesday 17 May 2006

JUSTICE 1 COMMITTEE
16th Meeting 2006, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

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

COMMITTEE SUBSTITUTES

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

*attended

THE FOLLOWING ALSO ATTENDED:

Desmond McCaffrey (Adviser)

THE FOLLOWING GAVE EVIDENCE:

James Chalmers (University of Aberdeen)
Rachel Gwyon (Scottish Prison Service)
David McKenna (Victim Support Scotland)
Eric Murch (Scottish Prison Service)
Neil Paterson (Victim Support Scotland)
Tim Richley (Sacro)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald
Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 6

Scottish Parliament

Justice 1 Committee

Wednesday 17 May 2006

[THE CONVENER *opened the meeting at 10:02*]

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

The Convener (Pauline McNeill): Good morning and welcome to the 16th meeting in 2006 of the Justice 1 Committee. I ask members to switch off their mobile phones. All members of the committee are in attendance, so I have no apologies to report.

Agenda item 1 is stage 1 of the Criminal Proceedings etc (Reform) (Scotland) Bill. I welcome James Chalmers of the University of Aberdeen, who has previously appeared before the committee. I thank him for coming back to the Parliament and for his written submission, which has been helpful. We have a number of questions to ask him.

Margaret Mitchell (Central Scotland) (Con): Good morning. How radical a reform of the summary justice system does the bill represent?

James Chalmers (University of Aberdeen): I think that the McInnes committee—whether deliberately or not—took a managerial or bureaucratic approach to the system and tried to consider the efficiency with which cases could be processed through it. Therefore, there is a lot of emphasis on managing cases efficiently and getting them through the system and perhaps less emphasis on the consequences for those involved and the procedural rights of persons in the system. Such an approach may be appropriate in considering what is supposed to be a summary system that is without all the protections that are afforded to people in jury trials.

Margaret Mitchell: You mentioned efficiency. Were you thinking specifically about administrative efficiency or about what would speed up the system?

James Chalmers: Both.

Margaret Mitchell: Intermediate diets seem to be a key component of the bill. How are intermediate diets currently working?

James Chalmers: I am not familiar with the current practice, but from my knowledge of previous research—and of similar devices in the High Court of Justiciary that are not called intermediate diets—a lot depends on the judge or sheriff who is involved and how proactive they are prepared to be in questioning parties about their state of preparation for a trial. If measures such as intermediate diets are to work properly, they should ensure that trials take place when they are required and are not aborted at the last minute because parties are not prepared for them.

Margaret Mitchell: Do you think that the judge should make it clear that he expects the defence and the fiscal to be fully prepared when they come to an intermediate diet or to have an exceptional reason why they are not?

James Chalmers: It is not simply a case of expecting them to be fully prepared. That is largely right, but it is a question of making sure that, if a trial date is set, the parties are at least reasonably confident that the trial will go ahead. If that is not possible, a trial date will not be set. Cases will not be put down for trial if they are unlikely to go ahead and witnesses are likely to be cited and countermanded at the last minute.

Margaret Mitchell: So a key point is that the fiscal and the defence should be fully signed up to establishing intermediate diets as the point at which they should be ready to go.

James Chalmers: Yes.

Margaret Mitchell: That is handy. Can you suggest anything else that would speed up the system, either on intermediate diets or generally?

James Chalmers: No, I do not think so.

Mr Bruce McFee (West of Scotland) (SNP): On page 1 of your submission you express concern that raising the maximum sentence available to the sheriff summary courts from three months to 12 months

"would significantly erode the safeguard of trial by jury."

You go on to say that the approach taken both by McInnes and by the bill is to treat such an increase as

"a mere matter of administrative convenience".

What percentage of summary proceedings are held before a jury at present?

James Chalmers: Summary proceedings are never held before a jury. They are always held before the judge alone.

Mr McFee: Exactly. So, no summary proceedings are currently heard before a jury. Are you concerned that some cases that would have been heard before a jury in solemn proceedings will now be heard in the summary court? How fundamental an erosion of right is that, given that there is no right to trial by jury at the moment?

James Chalmers: It is correct to say that there is no right to trial by jury. One of the interesting

contrasts between the Scottish system and the English system is that if a measure to restrict jury trial was proposed in England there would be an enormous outcry because it is seen as much more significant there. However, that is because, in England, the choice of trial can sometimes be a matter for the accused—or the defendant, in English terminology. Somebody who is charged with certain offences can elect to be tried either before magistrates or before a jury. In Scotland, that is always the prosecutor's decision, but if the prosecutor decides to try the case by way of summary proceedings the possible sentence is lower.

My concern about the bill—it is not something that I would necessarily object to, but it is a concern—is that the safeguard of trial by jury ensures that people are not sentenced to more than three months or sometimes six months without at least being able to put their case before a jury if they want to plead not guilty to the charge. The proposed change is quite a radical step, which significantly increases the powers of the judge sitting alone. If we in Scotland do not believe that trial by jury is a particularly important symbol or safeguard, there is probably no problem.

My concern is purely that the McInnes committee justified the change simply on the basis that the system will be quicker and more efficient if the sheriff's sentencing powers are increased. That is true, but equally it would be more efficient to abolish juries entirely. We are not proposing that, so there is a question about where we draw the line and why we think that that is important.

Mr McFee: Where do you draw the line? In your submission, you state:

"I would personally be relaxed about such a change".

James Chalmers: I am not particularly wedded to jury trial as a safeguard in the way that a lot of English lawyers are. I am confident that professional judges in the sheriff courts will try people fairly, but the change is quite radical because, assuming that the powers are used fully, a number of fairly significant sentences will be handed down without the possibility of a jury trial beforehand. That is a significant change.

Mr McFee: Can you tell the committee what percentage of cases go before a jury at present?

James Chalmers: Not off the top of my head, but I can provide that information in a letter. At the moment, very few cases go before a jury because most cases—well over 90 per cent—are disposed of by guilty pleas. Most cases are summary cases, so they would never go before a jury. The figure is probably well under 1 per cent. I would have to check, but I can provide the figure.

Mr McFee: That would be useful. Is there any need for safeguards when it comes to the seriousness of cases that can go to summary trial in the sheriff courts? We do not currently have an indication of what kind of cases might be involved, which is of concern. Is there a need for additional safeguards to ensure that the new powers are used fairly? In particular, should there be sentencing guidelines? Do you think that there is a danger of sentencing drift?

James Chalmers: The High Court has had the power to issue sentencing guidelines for more than 10 years now, although it has never used it. It appears that sentencing powers are not exercised with huge consistency between different sheriffdoms. It is difficult to tell whether that is a function of different sheriffs taking different approaches or of their being responsive to the kinds of crimes that come before their courts. Consistency in sentencing is important, but I do not think that it is a particular problem of summary procedure. If there is a problem that needs to be addressed in sheriff court procedure generally, it needs to be addressed regardless of the changes to summary procedure. Sheriffs in solemn cases now have the power to sentence up to five years.

Mr McFee: On the change from a three-month to a 12-month sentencing limit—apart from the specific cases that we will come on to later—do you think that the potential for sentencing drift will increase, given your concern that there is some inconsistency in sentencing with the current three-month limit?

James Chalmers: I do not think that there is great potential for sentencing drift. Although such cases will now be sentenced as summary cases, the sentences will be handed down by the sheriffs who would previously have heard the cases as solemn cases. The sheriffs concerned will have experience of the appropriate level of sentence for the crimes. I doubt that they will treat them any differently just because they will now be summary rather than solemn cases.

Mr McFee: You raise a point about the specific statutory offences related to assaults on emergency workers. There are also the older provisions relating to assaults on the police. Given that a higher maximum sentencing power is to become available for summary sheriff court cases involving common-law offences, could such offences be adequately dealt with under common law in the future? Could offences such as interfering with or hindering emergency workers under the Emergency Workers (Scotland) Act 2005 be better handled under common law?

James Chalmers: The offence of assaulting a police officer—although that is not a very accurate description of it—would probably have to remain separate. That goes beyond assault, and covers

obstructing, hindering and so on, which are very important. The same language was used in the 2005 act, but I am not convinced that there was a particular problem of hindering or obstructing; the problem was largely that of assault. The creation of the summary offence, with the enhanced sentencing powers, meant that such cases could be dealt with more seriously at the lower level.

Even if there was not a substantial problem—I am not terribly clear on this when it comes to obstructing or hindering emergency workers—there was probably a very good reason for having such an offence in place. Regardless of the sentencing issue, the offence should probably be retained. The main inconsistency relates to the sentencing powers under the Police (Scotland) Act 1967. It would be more consistent to increase the sentence to 12 months across the board. In practice, a serious assault on a police officer will simply be prosecuted at common law anyway to avoid the statutory maximum sentence. That is not an enormous practical problem.

Mr McFee: My understanding is that the bill does precisely that—it increases the maximum sentence in such instances to 12 months. That means that there is not a tariff.

James Chalmers: It increases the maximum sentence to 12 months in respect of the emergency workers offences, and I think that it does so in cases of assaulting a police officer if there has been a prior conviction. There was always the option of an enhanced sentence for situations where the person had previously been convicted of a similar offence. I suspect that such an enhancement provision is now simply unnecessary, and that there could simply be a maximum sentence of 12 months across the board.

Mr McFee: We will need to raise that matter with the bill team anyway.

The Convener: Is it important for the committee's report to establish which offences the Crown intends to move from the solemn to the summary procedure?

10:15

James Chalmers: That would be useful. It should be fairly easy to get a guide, simply from considering present sentencing profiles. I imagine that the assumption is that cases that at present attract sentences of up to a year will be prosecuted under summary rather than solemn procedure. The Crown may have more detailed proposals about how the decision will be made, but I imagine that the length of the sentence will be the decisive factor. I can try to obtain information on that for the committee.

The Convener: We will take up the matter with the Crown, because that information is absent from the bill. The general public or anyone who looks at the bill cannot tell how the powers will be used in practice.

James Chalmers: The McInnes committee report did not consider what type of cases should be transferred down to the summary procedure; it said simply that the many cases that attract sentences of up to one year could be more efficiently processed and dealt with more quickly under the summary procedure. However, the report did not consider what type of case would be involved.

The Convener: Are there any rules about who can represent people under the two procedures? We found considerable resistance to moving business from the High Court to the sheriff courts among those who had been through the criminal justice system, because going to the High Court automatically attracts representation by junior counsel as a minimum, which is not the case in the sheriff court. Will the move from solemn to summary procedure have a similar impact?

James Chalmers: I do not think so. I do not know for certain, but I think that, in the past, a trainee solicitor in their second year who had a restricted practising certificate could not conduct a jury trial. I would have to check whether that was and still is the case. However, that would be a fairly minor issue. Beyond that, I am not aware of any other issue.

The Convener: I do not think that is minor. People who are at present entitled to be represented by a solicitor advocate or counsel because they face a jury would not be so entitled under the bill, even though they face a sentence of up to 12 months—the figure will go up from three months. That is important. If you are right that trainee solicitors can deal with summary cases—I do not know whether they can—they would be able to represent people in cases in which the sentence could be up to 12 months.

James Chalmers: That would be the case, but I will have to check what the current situation is.

The Convener: That would be useful.

I have one more question, which is about the statutory offences that relate to emergency workers. If the offences attract penalties that are greater than those in the current statute, will they be dealt with under the solemn procedure? For instance, will offences against a police officer be dealt with by a jury trial?

James Chalmers: An assault against a police officer that is considered to be particularly serious is prosecuted at common law, not under the statute. The statutory offence is a summary one

and the sentencing powers are not enhanced if it is prosecuted under the solemn procedure. In practice, serious assault on a police officer would always be prosecuted as a common law assault, not as a statutory offence.

The Convener: Why do we need to amend the current statute to increase sentencing powers for offences against police officers and emergency workers?

James Chalmers: The only reason for that is consistency among the provisions. The maximum sentencing level for assaulting or hindering police officers will be equalised with the sentencing level for assaulting or hindering other emergency workers. The issue is more about consistency than anything else.

The Convener: Would you be concerned if the implication was that such offences should attract a higher sentence, which will be allowed for?

James Chalmers: I am not concerned about that because, as I said, serious cases are prosecuted at common law anyway. It is difficult to envisage sentencing drift as a result of the changes.

Mrs Mary Mulligan (Linlithgow) (Lab): The bill allows procurators fiscal to impose fiscal fines. Do you think that the guidance that informs procurators fiscal in that regard should be public?

James Chalmers: If the fiscal is, effectively, going to act as a sentencer—at present, they do that but with an extremely limited range of discretion—it would be useful to know the basis on which their decisions are being made. Given that an offer of a fiscal fine can be rejected—although I understand that there are concerns about the difference between an opt-in and an opt-out procedure—I am not sure that there would be any way in which the exercise of discretion by the fiscal could be challenged. Therefore, I think that this would be a matter of policy rather than being to do with the legal rights of the accused. In principle, it would be useful to have greater transparency about how these powers are exercised.

Mrs Mulligan: Are there any reasons why the guidance should not be made available?

James Chalmers: I suspect that procurators fiscal are wary of releasing guidance on fiscal fines or any other prosecution matter because they fear that, if people knew that certain types of behaviour were unlikely to result in conviction or the offer of a fiscal fine, they might tailor their behaviour accordingly, which would not be desirable. For example, if the guidance says that thefts under a certain value should normally not be prosecuted, publicising that might be seen as licence for people to go out and steal items of a small value. That would be undesirable. There are good reasons for keeping some prosecution guidelines confidential.

Mrs Mulligan: On the possibility of fixed fines being offered by the procurator fiscal, and the accused then having the choice of opting out of that rather than opting into it, which is the situation at the moment, could you outline the difficulties that that might lead to?

James Chalmers: There are two difficulties. The first is a potential human rights difficulty. Anyone charged with a criminal offence has the right to a fair trial and, clearly, in the situation that you outline, a trial has not taken place. That problem can be addressed by saying that a person who is offered a fiscal fine has not really been charged with a criminal offence, because it does not result in a conviction. However, given that it results in an enforceable penalty that can be laid before the court, I think that that argument would be unsustainable in terms of the European convention on human rights.

The second argument would be that the accused in that case has done what most people who are charged with criminal offences do and has waived their right to a fair trial. People do that all the time by pleading guilty or by accepting an offer of a fiscal fine, which has been acknowledged by the courts as being an example of a waiver of the article 6 right to a fair trial. However, the courts have said that a waiver has to be—to quote from the decision of the Privy Council in the case of Millar v Dickson—"voluntary, informed and unequivocal". Failing to reply to a letter cannot be described as voluntary, informed or unequivocal. Secondly, there is a practical problem. It is unrealistic to assume that somebody who is unwilling to reply to a letter or who does not bother to reply to a letter will pay the fine. Given the difficulties involved in the enforcement of fiscal fines and the fact that, if someone does not reply, they are deemed to have accepted the offer and, therefore, cannot be prosecuted, that strikes me as an undesirable route to go down.

Mrs Mulligan: You mentioned the fact that, as a fiscal fine can be revealed at a later stage, payment of the fine could be taken as an acceptance that the accused was guilty. Are there problems with that?

James Chalmers: There is probably no problem with the ECHR in that respect because it would be absolutely clear to the court that paying the fine was not an admission of guilt and was not equivalent to a conviction. However, I am not entirely clear what on earth the court is supposed to do with the information that someone had previously either accepted or failed to reply to an offer of a fiscal fine. All that the McInnes

committee said was that it would be useful for such information to be put before the court. Given that the sentencing judge will know that it is not an admission of guilt and that it is not the result of a trial, I think that it would be utterly irrelevant to a sentencing decision.

Mrs Mulligan: Might there be the risk of an injustice here? After all, someone who can pay the fine might simply accept the offer because it will save them hassle and so on. However, those who cannot or find it difficult to pay might accept the fine and then avoid paying it, which would become more of an issue.

James Chalmers: That becomes more of a concern the more the procurator fiscal's powers are ramped up. We need guidance on the information that fiscals will use to pitch the appropriate level of fines. If, as I suspect, fiscals do not usually receive detailed information about the alleged offender's means, that decision will become very difficult indeed. Given that fines go up to £100, the potential already exists for what you suggest to happen; however, the fact that fines might go up to £500 means that there is a much greater possibility that people will be given fines that they cannot pay.

Margaret Mitchell: A section of the bill states that, in sentencing, the judge should have a record of the number of fiscal fines that an alleged offender has. Given your view that such information is irrelevant, there should be no presumption that the imposition of a fiscal fine was the result either of someone happily admitting their guilt or of someone simply failing to reply in the relevant time. If, when sentencing, judges are to have regard to the record of previous accepted fixed penalties, such information will obviously count. How does that play out with ECHR considerations?

James Chalmers: Although, at the moment, the accused—if that is the right term in this context—has to positively accept a fiscal fine, doing so does not amount to an admission of guilt, unlike the situation with fixed-penalty notices for traffic offences. If that can be considered a problem, it can be dealt with by the sentencing court saying later on, "We can't treat this as an admission of guilt of the offence". Indeed, the court would be bound to say that. However, if the information cannot be treated as an admission of guilt or as evidence of conviction after a trial, it does not carry any weight.

Margaret Mitchell: So you would recommend that that information should not be put before a judge.

James Chalmers: That is right. After all, the McInnes committee did not put forward any rationale for its assertion that it could see no reason why such information should not be put before a judge. I think that there are very good reasons why it should not be. As I have said, it is not an admission or a finding of guilt.

Margaret Mitchell: Turning it the other way around, the fact that someone has been breaking the law frequently might not be taken into account because the judge would not see the record of the alleged offender's 20 or so previous fiscal fines.

James Chalmers: That could be dealt with if procurators fiscal had adequate information about the use of fiscal fines. I think that that has been more of a concern because, since such fines were introduced, records have been held locally, not centrally. As a result, someone who offended regularly in a particular fiscal area would have a clear record of fiscal fines; however, they might not have such a record if they moved around.

As I understand it, information technology developments at the Crown Office and Procurator Fiscal Service mean that—if not now, then fairly soon—the information will be held centrally and procurators fiscal should be aware of all previous offers of fiscal fines. In that situation, it would be inappropriate for someone with a long record of fiscal fines to be made another offer instead of being prosecuted. However, the decision whether to prosecute is one for the prosecutor; it is not a matter for the judge in deciding what sentence to impose.

The Convener: Would it have helped if McInnes had clarified this matter? After all, we are simply not clear whether the information can be used by the sheriff for sentencing.

10:30

James Chalmers: If it is being treated as equivalent to a previous conviction and has been laid before the court at the stage of sentencing, it must be for the purpose of being taken into account in sentencing. I just do not see how the report could take it into account. A judge who specifically said that he or she was increasing or enhancing a sentence because of the long record of fiscal fines—or because of a single fiscal fine—that had been paid by an accused would find the decision open to challenge on appeal, on the basis that there was no admission or finding of guilt to take into account.

The Convener: I would like to explore further the issue that you raised in response to Mary Mulligan's question about prosecution policy. In the bill, the fiscal fine is referred to as an "alternative to prosecution". I would have thought it quite important to establish whether it is a sentence or an alternative to prosecution. If it is an alternative to prosecution, surely it cannot be treated as if it were a prosecution, which is what

the bill seeks to do by providing that information before the court. Is it your view that the fiscal fine and the process around that is an alternative to prosecution?

James Chalmers: That will depend on how the term is used. The fiscal fine is an alternative to putting the case before a court. In one sense, it is a procedure that would be used by the procurator fiscal that could, especially in cases involving a fine of about £500, become very close to a prosecution. However, we could redefine prosecution in all sorts of ways in order either to take that within the definition or to keep it outside the definition. The question is simply one of principle: should a fiscal fine be taken into account at the sentencing stage? I think that the answer to that question is that it should not.

The Convener: For the moment, there is no intention that that information should be used for the disclosure procedure, but I can see nothing that would prevent that. My experience from examining the disclosure process is that, as we move along, the whole process is expanding the amount of information that can be used. One of my worries is that, although people are saying now that that information would not be used for disclosure purposes, they could change their minds two years down the road, so acceptance of a fiscal fine could then be used for the disclosure process.

James Chalmers: The information is, or will be, held centrally; there would be no practical difficulties in doing that, so there would be nothing to stop that change being made.

Margaret Mitchell: I wonder whether there is another downside. Suppose that a fiscal were to hand out a fiscal fine for petty theft or breach of the peace, for example, but the perpetrator had an underlying drug or alcohol problem. If that case went to court, the defence would give the full circumstances; the judge would be fully aware of them and might consider that a drug treatment and testing order was appropriate because the accused needed help. However, such intervention might not be made at the earliest possible moment if a fiscal fine was issued. Could that be a problem?

James Chalmers: It could be a problem. Although they do not have formal powers to do so—as with the power to impose a drug treatment and testing order—procurators fiscal can make informal diversions from the criminal process, such as an agreement not to prosecute if the perpetrator receives drug treatment or takes part in a programme for reparation or mediation, for example. However, such action depends on the availability of facilities and on whether a local informal scheme has been set up, which varies among procurator fiscals' offices. I am not sure what the current state of play is. If a case is being dealt with at an early stage by issuing a fiscal fine, the prosecutor is unlikely to know of the circumstances that would justify such intervention.

Margaret Mitchell: That is the problem. If such a case were aired in court, that information would come out, whereas if it were dealt with by a fiscal fine, the full facts would not be made known.

James Chalmers: It is always open to the accused's agent to make the procurator fiscal aware of such information, but if the case was hived off at an early stage and a fiscal fine issued, the opportunity to discuss that with the client might never arise.

The Convener: Is Bruce McFee's question about fiscal fines?

Mr McFee: It is related. I want to put the matter in context, because I am aware that there are concerns.

The Convener: Please be brief.

Mr McFee: In what percentage of cases before the sheriff summary court are guilty pleas entered?

James Chalmers: The most recent figures that I have seen, which are out of date, suggest that the percentage is well above 90 percent and probably above 95 per cent.

Mr McFee: I thought that it was important to establish that context.

Mike Pringle (Edinburgh South) (LD): James Chalmers's submission does not mention justice of the peace courts. The committee has had many discussions with other witnesses about the retention of lay justice courts and the link between the justice system and communities. That link might be broken, given how the bill is drafted. Do you have a view on that?

James Chalmers: What do you mean when you say that "That link might be broken"?

Mike Pringle: The bill provides that JP courts will be based on sheriffdoms, which cover large areas. JP courts might therefore be moved from their current locations, which would break their links with communities. Is that important?

James Chalmers: I do not think that it is important, but that is because I am not convinced by the notion that there is a link between JP courts and communities, particularly given that some district courts currently cover quite large cities, so the justice who hears a case might have no knowledge of, or link with, the community from which the case arises. It could be argued that it would be improper for the JP to have a great deal of such knowledge, because that might compromise the independence and impartiality of

the court. I am not convinced that there are merits in such links, so I see no problem with their being broken. There is an issue about familiarity with the kind of cases that arise locally, but such experience can be built up over time.

Mike Pringle: JPs were afraid that lay justices would disappear altogether, which was the view of the majority of the McInnes committee, but the bill does not take that approach. Will there be a drift in sentencing from the High Court to the sheriff court as a result of the increase in sentencing powers?

The bill will confer on the Scottish ministers the power to amend the maximum term of imprisonment, level of fine and amount of caution that JP courts may impose—the term of imprisonment may not exceed six months and fines and cautions may not exceed level 5. Will that lead to a drift?

Currently a JP can disqualify a driver only on a totting-up basis, but some witnesses suggest that JP courts should be able to consider more serious motoring offences and to impose immediate disqualification. Would that be a good move?

James Chalmers: The McInnes committee was probably right to recommend a two-tier system of courts in Scotland. It is odd that a country that has a population of five million should have a three-tier system—or a four-tier system, if we take account of the distinction between sheriff summary and sheriff solemn proceedings. In England, a two-tier system seems to work reasonably well. However, the decision has been taken to retain lay justice courts. It is difficult to express a view on that without knowing the Executive's intentions.

I mentioned problems to do with the transfer of cases from solemn to summary proceedings. That approach has been taken largely in the interests of efficiency. It is not clear that significant efficiency gains would be made by moving cases from sheriff summary procedure to JP courts, and the McInnes committee was not convinced that district courts are cheaper to run than are sheriff courts. Given that JP courts are to be brought into the administration of the Scottish Court Service, I doubt that there would be much incentive for the Executive to enhance sentencing powers. I am not clear why those provisions are in the bill, or when it is envisaged they might be used.

Mike Pringle: I do not know whether you have read in detail the sections of the bill that relate to JP courts. There is a view that there is an anomaly in section 50. Did you have a chance to consider that?

James Chalmers: Yes. I have read the submission from the City of Edinburgh justice of the peace advisory committee about the effects of that section. When the district courts were created under the Criminal Procedure (Scotland) Act 1975, it was specifically provided that the district courts would have transferred to them all the jurisdiction of the long list of inferior courts that existed prior to that date. It is curious that there is in the bill no equivalent provision for the transfer of jurisdiction from the district courts to the JP courts. At first glance, it looks as though the proposed revised section 7 of the Criminal Procedure (Scotland) Act 1995 would give the JP courts jurisdiction only over summary statutory offences and certain offences of dishonesty, which I am sure is not the intention: I have tried hard to read the statute differently. Other provisions in the bill seem to be inconsistent with that, which suggests that it is not the intention.

Without the provision that JP courts will have the jurisdiction that the district courts had, which refers back to the provision that district courts had the jurisdiction of all the old inferior courts, the link in the chain would be broken. It would be helpful, for the avoidance of doubt, for the jurisdiction to be specified.

Stewart Stevenson (Banff and Buchan) (SNP): I want to pick up on the costs of JP courts that the McInnes report sets out. It is generally accepted that, given the accounting basis on which the costings were derived, the costs were due mainly to the distribution of overheads and that the savings that would be achieved by the abolition of JPs would therefore be small. The marginal costs of having JP courts were therefore a small fraction of the costs that the McInnes report set out. That is one of the reasons why there was a minority report. I think also that Sheriff Principal McInnes would accept that he is a lawyer and not an accountant.

The Convener: I knew that Stewart Stevenson would want to make that point.

I want to be clear about your answer to Mike Pringle, for the purposes of the *Official Report* and our scrutiny. Is it your view that the Executive should consider drafting a section specifically to clarify the jurisdiction of the JP courts?

James Chalmers: Yes—that would certainly not do any harm. It would be undesirable if, once JP courts were created, the business was clogged up for some time because of disputes over the exact jurisdiction of the courts.

The Convener: That makes sense.

Desmond McCaffrey (Adviser): The other issue that was raised relates to section 39 and the right of a person to seek a recall of the fixed penalty, whereby they would make an approach to the clerk of court, who would decide whether to revoke or uphold the decision. Thereafter, there is a further right of appeal, as it were, to the court. In JP courts, that would mean that the JP clerk would make a decision and, in the court set-up, the same

clerk would be advising the court. Is that a problem?

10:45

James Chalmers: That is a potential problem. The determination of whether the offer should be recalled is something on which the alleged offender is, under the European convention on human rights, entitled to a fair hearing before an independent and impartial tribunal. A clerk does not have the security of tenure of a judge, and so is probably not an independent and impartial tribunal. That is not in itself a problem if the clerk's decision is appealable to a body that is independent and impartial and which has the power fully to review the decision.

The problem is that it has been settled that the clerk is regarded, under the ECHR, as a member of the district court. In effect, one would be appealing the decision of one person to a body of which that person is a member, which would create difficulties in respect of the perceived independence and impartiality of the court.

I understand that the McInnes committee's proposal was initially that an application might in the first instance be made to the procurator fiscal. Odd as it may sound, if that were the procedure and the decision was appealable to the district court, it would not raise the same problems because the court would be independent and impartial.

The Convener: That was very helpful.

We have no more questions for you. You have focused our minds on some key issues about jury trials and about making the bill clearer. Your contribution has been exceptionally helpful. Thank you.

I welcome our second set of witnesses. They are Rachel Gwyon, who is the director of corporate services in the Scottish Prison Service, and Eric Murch, who is the director of partnerships and commissioning in the SPS. Thank you for your written evidence, which has been very helpful.

We will go straight to questions.

Stewart Stevenson: The financial memorandum suggests that the SPS has done modelling on the impact of the changes to bail that will be made by the bill. It states that you have concluded that the

"maximum impact of the overall package .... can be met from within existing capacity."

Your submission suggests that changes to bail and remand might result in an increase of about 25 to 35 prisoners. Can you break that down into the effect of the changes to bail and the effect of changes to remand?

Rachel Gwyon (Scottish Prison Service): We compared the number of people who might have been bailed previously with the number that might be bailed under the pattern of offending that is set out in the bill. We made certain assumptions; for example, that sentences were probably already taking the matter into account.

We have considered people on a second charge for a crime of violence who have a previous conviction, a second indecency charge with a previous conviction and vice versa. We have examined the figures over a year. Remand lasts up to three months, so it does not have the same effect as what is reflected in the annual figures. The sum, taking 2003 as the base year, produces a range of outcomes in the range of 25 to 35 prisoners that we mention in our submission.

Stewart Stevenson: Is part of the calculation that, in essence, if people are locked up before conviction, that will be discounted from the resulting sentence?

Rachel Gwyon: Yes.

Stewart Stevenson: So the figure will be about what you suggest.

Rachel Gwyon: Yes.

Stewart Stevenson: The bill will also change the way in which enforcement of fines works. It is suggested that the figures will balance out. Is that correct? What is your view on the range of likely figures?

Rachel Gwyon: When the proposals were made, there was no precedent that would help us to establish their impact. About 60 people are with us every day for fine defaulting, so improved enforcement of fines would improve such people's ability to make payments before they had to come to us. That is a downward pressure, but we did not know how far that might offset the estimated 25 to 35 people who would be with us as a result of the remand provisions.

Since then, West Lothian police, for example, has had a spring-clean campaign, which encouraged people to settle their outstanding fines before warrants that were ready to be served were actioned. We have now been able to take into account the news releases and so on that came out in March. That information suggests that the decrease in the number of people who would come to us as a result of fine defaulting would almost net off the increase under the remand provisions.

Stewart Stevenson: How many receptions a year do you have for fine defaulting?

Rachel Gwyon: I think we have that information in our written evidence—there are several thousand.

Stewart Stevenson: From memory, I think the figure is about 6,000.

Rachel Gwyon: That sounds about right.

Stewart Stevenson: I was informally given a figure of 135 fine defaults each day, rather than 60. Does the larger figure include recalls?

Rachel Gwyon: The only figures that I have seen are the ones that our statisticians prepare, which are done from the numbers that are with us each night on a range of sentences for fine defaulting, and on sentences of up to three months, six months and so on. The statisticians have done the figures for both 2004 and 2005; the figure of 135 does not ring a bell. We have been working on a figure of 61.

Stewart Stevenson: I ask about this merely because 6,000 receptions mapping into 60 people would suggest three days per person. Is that fair? Does that make sense?

Rachel Gwyon: Yes.

Stewart Stevenson: So, basically, you are adhering to the view that the effects of the bill will net out at zero.

Rachel Gwyon: It is hard to predict exactly, but we expect the overall effect to be slight once the two sets of provisions have netted to some extent.

Stewart Stevenson: When you say "slight", what is the upper bound of your expectation? Is it 25, 50 or 100?

Eric Murch (Scottish Prison Service): We will be reasonably comfortable if there are under 30 extra prisoners.

Stewart Stevenson: It is projected that the prison population will continue to rise, although there is a range of projections and the lowest has the figure remaining stable, so how much earlier in the calendar will you need to provide extra prison places?

Eric Murch: We currently do projections twice a year; the next will be issued shortly and we will try to marry projected numbers with the number of places that are available in the business plan, which will also be issued shortly. In general terms, our designed capacity is around 6,373 and we are sitting at around 10 per cent above that figure. That is not ideal, but it is not hugely difficult to deal with. A figure of around 30 places would not cause us a great deal of difficulty.

Stewart Stevenson: I presume that there is a point at which an increase in the prison population will lead you to propose additional capacity.

Eric Murch: Yes. We currently have in place a process by which we increase capacity, but it entails doubling up. Because of the nature of the accommodation in which we house people, that increases the risk to the Scottish Prison Service.

Stewart Stevenson: What would be the cost of 30 extra people in prison? Currently, the cost per prisoner is something of the order of £36,000 a year.

Rachel Gwyon: Our audited figure in the annual accounts is that the amount is around £40,000.

Stewart Stevenson: That is £1.2 million a year for 30 extra people.

Rachel Gwyon: Yes—although we must remember that we are already overcrowded and that we manage that, as Eric Murch said, through doubling up. Extra provision is due to come on-stream. There is a planning appeal on Low Moss prison that would help to slot people into places in which the capacity matched the design capacity rather than the overcrowded capacity.

Stewart Stevenson: I will move on and ask whether there will be any effect, in terms of an increased demand for your services, from the extra sentencing powers at summary level that the bill will provide in the sheriff courts.

Eric Murch: We assumed that there would be a level transaction, which would involve a shift of location rather than anything else.

Stewart Stevenson: Your planning assumption is that the bill will have a sentencing-neutral effect. That is it from me, convener.

The Convener: I want to be clear—I have less technical knowledge than Stewart Stevenson on such things—about what the figure of 30 prisoners refers to. Thirty prisoners per what?

Rachel Gwyon: Per night.

The Convener: The bill's provisions on additional sentencing powers for breach of bail will result in longer sentences being imposed in some cases. Is that incorporated into the SPS figures?

Eric Murch: Yes, the bail aggravation issue is included.

The Convener: Is there a gender distinction in your figures? Would the longer sentences apply differently in relation to women?

Rachel Gwyon: I think that we looked at global figures for the type of offence and the previous track record for that offence. As far as I recall, the figures were not broken down by gender.

The Convener: It is possible that more women than men are currently in custody for fines. Women tend to be given custodial sentences for lower-tariff offences. I wonder whether the impact on sentencing of women has been considered.

Eric Murch: The potential for a differential impact might exist.

The Convener: We would be interested to hear about that. Will you get back to us on it?

Eric Murch: Yes.

Mr McFee: To sum up—notwithstanding the further information that you will provide for us on the gender impact, which is clearly an issue given the high proportion of female prisoners who are in jail for fine defaulting—your evidence is essentially that you estimate that the bill's impact on the service will be almost neutral. If the bill results in an increase in the number of prisoners, which it is suspected would be about 25 to 30 prisoners per night, you would be able to squeeze them in. Is that right?

Eric Murch: Yes, we would be able to accommodate such a number in the medium term.

The Convener: My next question is similar to my question on gender. In concluding that the bill will result in a level playing field, did you consider whether the pattern for under-21-year-olds is likely to be different? Is that age group less likely or more likely to breach bail? I suspect that the trend is that under-21-year-olds are more likely to breach bail.

Eric Murch: Yes, they are more likely to breach bail.

The Convener: Therefore, slightly longer sentences might be given to that group as a result of the bill.

Eric Murch: We would need to do the same exercise for that group. We will do that.

The Convener: We will be grateful for any detail that you can give us. Although we are not considering the impact of the bill on the SPS specifically, we would like to know what impact it will have on the service. Any further detail would be quite useful.

Rachel Gwyon: Okay.

The Convener: We have no further questions. We will be interested to receive a breakdown of how you arrived at your figures and how those relate to different trends in different offending groups, such as women and young people. Any sort of breakdown would be extremely helpful.

I presume that if we think of any other issues when we are writing our report, we can contact you for additional information.

Rachel Gwyon: Sure.

The Convener: Thank you very much.

I suspend the meeting for 10 minutes before we take evidence from our final set of witnesses.

10:58

Meeting suspended.

11:10

On resuming—

The Convener: I welcome our final panel: Tim Richley is from Sacro; and David McKenna and Neil Paterson are from Victim Support Scotland. Thank you for your written submissions. We move straight to questions from the committee.

Marlyn Glen (North East Scotland) (Lab): The written evidence that you submitted is generally welcoming of the provisions in the bill that deal with bail and remand. Will you expand on that?

David McKenna (Victim Support Scotland): For many victims of and witnesses to crime, the impact of the present bail arrangements is significant. Indeed, it is one of the most significant issues that is raised with us as a support organisation. Many victims tell us of their distress at experiencing threats and intimidation. They can even be the subject of a subsequent offence, but that does not always result in further charges if there is no witness. The whole way in which people are bailed and the information that victims are given about the bail process have not been working for some time in our communities.

The provisions on bail and remand begin to address that, in as much as they develop the process and make clear the opportunity to attach specific bail conditions. The key feature is that causing fear and alarm can be seen as a ground for finding that someone has breached their bail conditions. The provisions have the potential to transform victims' and witnesses' experience of the bail process. At the end of the day, their security, their sense of security and their peace of mind will be substantially improved.

Tim Richley (Sacro): We concur with what David McKenna said about the importance of keeping victims more in the picture during the process and of the bill making bail conditions more robust.

Marlyn Glen: The bill requires the court to explain to an accused the terms on which bail is to be granted. Is that sufficient to ensure that people who are granted bail understand and agree to comply with bail conditions?

Tim Richley: It is a good idea but, as we said in our submission, we would add to it in one important respect. The process that is put in place should be similar to that which is used when probation is granted. Someone not only runs through the conditions with the person who is being considered for probation but asks them whether they accept those conditions. The present bail process is passive; people are simply told that

they are on bail. Often, very little is done to check that they are aware of the conditions or whether they accept and are prepared to abide by them.

David McKenna: I have watched hundreds of bail decisions being made in the sheriff court. In my experience, sheriffs take the opportunity to read out the standard bail conditions to the accused and to draw their attention to the fact that certain actions such as interfering with witnesses could result in a breach of bail. They also ask the accused whether they accept the conditions.

Our main concern stems from our experience of watching 100 people pass through a bail or remand court in the space of 90 minutes. On average, bail or remand cases each take a minute—99 per cent of them are bail cases. There is little opportunity in that setting to ensure that the accused person—or the offender, depending on the circumstances—understands what the conditions mean. Although we welcome the provision, something more is needed to ensure that information is communicated more effectively to the person who is given bail so that they understand the conditions better than happens in those few seconds of a court hearing when people are often confused.

11:15

Marlyn Glen: That concerns me too. We want to make sure that the conditions are understood and accepted. Do you have any practical suggestions on how that can be done?

David McKenna: Our views are slightly more wide ranging than the proposals in the bill. Before an individual is released on bail, a formal opportunity should be taken in the court setting for someone to take the time to go through the special conditions with them and to answer their questions. The fact that that had taken place could be recorded.

At present, victims of crime are not aware that an accused person has been released on bail. They do not understand what the standard conditions are and they do not know about any special conditions that might be attached, including the condition that the accused should go nowhere near the witnesses, their shop or their home, for example. In addition, victims do not necessarily understand what action they can take if the accused breaches his bail conditions.

The process does not start and finish in court. It might start when bail is granted, but it is inevitable that it finishes in our communities. It is important to ensure that people who are affected by the crime and who could be affected by the actions that the accused might take have the information that they need to protect their community.

Marlyn Glen: It is very important that the accused person leaves the court having understood the bail conditions. I like your idea of a written record that they could take away.

You spoke about victims' concerns. I would like to discuss that with Tim Richley. Do you have information about how effective the current system is in providing courts with information on victims' concerns when a court considers whether to grant bail?

Tim Richley: I am not aware of how that information is fed back or whether it is effective.

David McKenna: Victim Support Scotland has substantial concerns about existing processes. There is absolutely no doubt that the process I described of bail hearings that last a minute or a minute and a half does not necessarily allow for substantial explanation even of the standard conditions.

In cases that involve serious crime or prosecution under the solemn procedure, it should be incumbent on the prosecution to undertake appropriate investigations to ensure that any issues to do with the security or safety of the victims are taken into account and made known to the court when it decides on bail and bail conditions. It is often difficult to do that because of the turnaround time. If someone is lifted on Monday afternoon, they appear in court on Tuesday morning, and the information is not available. However, in more serious cases when the accused person is remanded for seven days so that reports can be made and other investigations can take place, there is an opportunity to undertake an assessment of the security implications from the victim's perspective. That opportunity could be made available to the court and taken into account when it decides on bail.

Margaret Mitchell: The bill proposes to increase the maximum sentence for breach of bail—specifically for non-appearance in court—from three to 12 months. What are your views on that?

Tim Richley: We did not deal with that issue specifically in our written submission, so I have no comment to make at this stage.

David McKenna: I will make a brief general point. There is a perception in our communities and among people who experience crime that accused persons and people who are on bail just ignore the system with impunity—in other words, nothing happens to them as a result. Although I am not sufficiently knowledgeable to say whether the sentence should be three months or 12 months, we need to get across the message that breaching bail and not turning up for court cases will not be tolerated in our society. I do not know

whether increasing the sentence for that from three months to 12 months will be the answer, but I can understand why the proposal has been made.

Margaret Mitchell: That is interesting. You feel that when people breach bail, that is more or less accepted on the nod and the three-month sentence that is available is rarely used.

David McKenna: It is difficult for us to understand from our work with victims what happens in such cases. We cannot tell whether an additional sentence has been imposed for breach of bail, whether it has been rolled together with the sentence for the original offence or whether the two sentences will run together. The situation is unclear to us and I am sure that it must be unclear to offenders, too.

Margaret Mitchell: Do you feel that the bill makes it clear that breach of bail will be treated as a separate offence?

David McKenna: It is important that the penalty for breach of bail is not seen to be something that will be wrapped up with, and disappear in, the main sentence. We want it to be stated that the community takes seriously the committing of offences by people who are on bail.

Mr McFee: I felt that Tim Richley skirted over the issue by saying that because Sacro had not dealt with it in its submission, the organisation did not have a view on it.

On section 2 of the bill, which is about bail and bail conditions, your submission states:

"Sacro has operated Bail Supervision schemes in Scotland for a number of years and therefore has direct experience of bail."

Even if your organisation has not come to a view on the proposed new power, what is your own view on it?

The Convener: Mr Richley is entitled to give the view of his organisation if he wants to; he is not here to give his personal view.

Mr McFee: Fine. It would be useful to hear either view.

Tim Richley: Before we increase the sentence for breach of bail to 12 months, we need to think carefully about putting more people in custody just for that offence. As we say in our submission, we advocate the development of a more robust bail system. From our operational experience of supervising people on bail, we know that up to 50 per cent of remand cases do not lead anywhere—people simply walk out of the court. I advise that we should be cautious about extending the sentence to 12 months.

Mr McFee: Are you cautious because at the moment many of the individuals who breach bail and who end up being sentenced serve their sentences concurrently, which means that, in effect, there is no sentence for breaching bail?

Tim Richley: You are right—the two sentences tend to run concurrently. In my experience, offenders seem to know that there is a good chance that the sentences will run concurrently rather than consecutively.

Mr McFee: Given that the chances are that nothing will happen to someone who breaches bail at the moment, surely the penalty for doing so must be increased so that people take the offence more seriously. Surely that measure would have an effect.

Tim Richley: In an ideal world, it might do. If everything worked out well and increasing the sentence to 12 months meant that people took their bail conditions more seriously, that would be good. However, we would be concerned about people spending more time in custody. We would argue that better work could be done with them in the community. For example, they could be supervised more effectively.

Mr McFee: What would that entail? Can you tell me about the nuts and bolts of that?

Tim Richley: People who are on bail supervision tend to be higher tariff offenders than offenders who are on ordinary bail. Our staff—or the staff of another organisation—could supervise, assess and monitor them in the community. Through signposting, various other agencies could be linked in, if that was appropriate. Also, if they agreed to it, we could start looking at their commencing addressing their offending behaviour—if there was offending behaviour to be addressed—much earlier. Remand could be avoided, there would be much less cost, and we would have the benefit of not having 1,200 remand prisoners a day.

The Convener: Following on from what Bruce McFee has asked, do you have any figures that you could give us for breach of bail by those whom you supervise?

Tim Richley: Yes, although our figures are about 18 months to two years old. Success in terms of a bail order is that the person does not reoffend but complies with the conditions of their bail and turns up at their next court date. Seventy-nine per cent of people on Sacro's supervised scheme in Edinburgh achieve that.

The Convener: Is it possible for us to get a written submission from Sacro on the schemes that you run, giving some figures to show the success of the schemes?

Tim Richley: We would be happy to supply that information. According to the statistics that are available to us, 70 per cent of the general bail population who are not supervised complete their bail successfully, which means that 30 per cent do not. There is a greater chance of people who are on a supervised bail scheme—who, by definition, are at a higher risk of breaching the conditions of their bail—making it through to their next appearance in court. Given the fact that a remand prisoner costs £91 or so a day—if not more than that, judging by the SPS figures that we heard earlier—and the fact that the average period spent on remand is between 23 and 25 days, depending on which statistics are used, the cost of remand soon adds up.

The Convener: Are facilities for things such as drug rehabilitation available to the individuals on the supervised schemes that you operate? If someone is waiting to be tried for a drug offence, for example, is there any drug rehabilitation facility available to Sacro?

Tim Richley: We could not access rehab from Sacro; we would have to go through channels such as local authority criminal justice services. Currently, we do not have any advantage in that respect. We could not fast-track access to such services.

The Convener: So there is no systematic access to those services.

Tim Richley: No. There are no special conditions.

Margaret Mitchell: In its written submission, the Association of Chief Police Officers in Scotland suggests that, in addition to the grounds that are listed for refusal of bail, there should be a ground of "public safety". What is your view on that?

Neil Paterson (Victim Support Scotland): The bill sets out a substantial test in the criteria that must be satisfied before a court can refuse bail. It states specifically that there must be a substantial risk of an adverse reaction and that evidence must be provided to the court that justifies that assessment of risk. Although we welcome the additional provisions that have been included in the bill, we think that that bar is still set fairly high.

Earlier, David McKenna made the point about the fear and distress that can be caused. It is fair to say that that relates specifically to people who are likely to be cited as witnesses in the case in question. However, some people who are released on bail cause wider public safety concerns. If I am correct, that is what ACPOS was driving at. We broadly concur with what was said, with the proviso that other substantial tests and assessments should continue to apply. We need an appropriate balance.

11:30

Tim Richley: We at Sacro would agree. The last thing that we want is community safety to be compromised by people being released on bail who should not be.

Mr McFee: Do the witnesses from Victim Support Scotland feel that too many people are released on bail at the moment?

David McKenna: If we can keep people out of prison, that is a good start. It is not that we want more people to be locked up. However, the statistics tell us that a large minority of people who are held on remand do not go on to get custodial sentences. A small but substantial minority of those who get bail go on to commit serious offences while on bail. We have to ensure that the people who need to be on remand are on remand, and that the people who do not need to be on remand are allowed to go back to their community, with the appropriate bail conditions. We do not want people to go to jail for no reason at all. People should be held on remand only if it is absolutely necessary and not simply because it is an easy option.

Mr McFee: I would not suggest that anybody would want people to go to jail if that was not the appropriate place for them.

If you all support a public safety provision, that suggests that you feel that the public safety element has not been taken into account. If such a provision is to be effective, it must surely increase the number of people who are remanded. If it did not, it would clearly be ineffective.

Neil Paterson: That is arguably the case, but it would be contingent on two things. The assessment of people who are being considered for bail must be based on appropriate information. As David McKenna said, the present conveyor-belt system works against the possibility of any kind of appropriate assessment being made—whether of public safety, the safety of victims or witnesses, or the needs of the accused person. The system has to be changed so that assessments can be based on appropriate information. That is what we want to be in the bill.

Mr McFee: The implication of your answer is that you do not think that appropriate assessments are made just now. You imply that, at present, either people who should be remanded are not remanded, or people who should get bail are remanded.

Neil Paterson: The honest answer is that we probably do not know. However, we have developed a sense that the system is not working appropriately. I do not have information to say that more people would be remanded in custody as a result of our suggestions. However, the courts do

not always get the information that they require to allow them to make an informed decision on whether bail should be granted.

Margaret Mitchell: In your written submission, you welcome the fact that the grounds for refusal of bail—and public safety is being considered as one such ground—will be listed in the bill as a way of increasing transparency and consistency. I think that the grounds have to be stated openly in court, which might address your concern that things can be over and done with in a minute, with nobody being quite sure what has happened.

Neil Paterson: The bill explicitly says that the court must make a statement on either granting or refusing bail, and we welcome that on two counts. We hope that, over time, it will increase the general public's understanding of the system and their confidence in it. Such a statement will also send a clear message to the other stakeholders—the accused person and the victim—about the process to be gone through and about the conditions that apply. If things do not work, people will know what to do.

Mr McFee: I want to ask about undertakings, and my question might reflect some of the concerns that you have raised.

You will be aware of the proposal that the police should be allowed to impose special conditions when releasing someone on an undertaking, which some suggest should be subject to approval by a senior police officer, although we do not know how practical that would be. Do you agree with the principle that the police should be able to impose conditions when liberating an accused person on an undertaking? If that provision comes into force, would you like other measures to ensure that the conditions were appropriate? If so, what would they be?

David McKenna: It is always hard to tell from the numbers what shifts around in the justice system. In some senses, the police are the gatekeepers of what moves into the formal criminal justice system. I imagine that, every day of every year, the police decide whether to take people to court to be remanded. They say to such people, "You'll need to watch your behaviour; you're not going to get away with this next time—blah, blah, blah." The provision offers the potential for a more formal opportunity in the community to say, "Your behaviour's not acceptable, but we will release you on your own recognisance, as long as you undertake to behave yourself." The information that conditions have been applied should be shared in the community and certainly with victims.

It is hard to tell from the bill whether the provision means that fewer people will go through the remand court process. I presume that that is the intention, but I cannot tell whether that will happen in practice.

Mr McFee: The police would release somebody on an undertaking to appear at X sheriff court on such-and-such a day at 10 o'clock. In general, you are in favour of that now. Are you in favour of the police being able to impose special conditions, such as not approaching Jeannie Smith or not going near the High Street?

David McKenna: Absolutely.

Mr McFee: Are any other measures required to ensure that conditions are appropriate?

David McKenna: Whether using undertakings is appropriate will always be a judgment call for the police service. The issue is that the victim of the crime—the shopkeeper or whoever—needs to know that the special conditions are in place as part of an undertaking. Otherwise, the process will be invisible to the community—it will seem as if nothing has happened.

Mr McFee: You would be concerned if the victim did not know about the conditions.

David McKenna: That is correct.

Mr McFee: Does Tim Richley have comments to add?

Tim Richley: If the police had extra powers to impose special conditions, we would need to ensure that they were closely monitored. Bruce McFee mentioned that conditions could be signed off by a senior police officer. It is important that the police officers who make the decisions and their senior officers are aware of the bigger picture. We gave the example in our submission that if the police imposed the condition that an alleged offender, Mr X, was not to go near shopping centre Y, which happened to be where he obtained his methadone prescription, the risk of further offending could be increased. If he could not obtain his methadone prescription, he might go elsewhere to shoplift, which would cause more problems than were solved. The complete picture must be considered and I am not sure whether police constables on the ground can always do that.

Mr McFee: So you would have concerns about the operation of the power.

Tim Richley: Yes.

Mr McFee: Does the bill strike the right balance in dealing with deliberately obstructive witnesses without punishing the people whom Victim Support called vulnerable witnesses, who are reluctant to give evidence because of intimidation, for example?

Neil Paterson: The relevant section in the bill probably has its origins in legislation on High Court

reform; a similar provision was slightly controversial in that context, too. I understand why it may be necessary to have such legislation on the statute book, but since the provision was introduced for use in the High Court, I am not aware that it has been used. We argued, in respect of that legislation, that the provision must be used as a measure of last resort because there are far better ways of getting vulnerable and intimidated witnesses to give evidence than by compelling them to do so by means of legislation. We would make that point again in the context of the bill that we are discussing today. It is better to provide the appropriate support and, if necessary—if there is a great degree of intimidation—the person should be referred to the witness protection programme, which is available across Scotland.

Mr McFee: Could you talk further about support? Where and why is it not being provided?

Neil Paterson: There is no witness support facility available within any of the district courts in Scotland. Our witness service, in conjunction with the Crown Office and Procurator Fiscal Service's victim information and advice service, provides two ranges of support to almost every witness in the High Court system and in one level of the sheriff court system. However, the service does not exist in the district courts, so there is a glaring gap in relation to particular support needs in the district courts. The part of the bill that we are discussing highlights that gap rather sharply.

David McKenna: There is also the experience of the witness in the community, as they can suffer intimidation, threats and harassment. Many victims will tell you that their experiences following the reporting of the crime and giving a statement in evidence were worse than the crime itself. People are often fearful of the consequences of being seen to give evidence in court.

Neil Paterson talked about the witness protection scheme, which is operated by Strathclyde police on behalf of the Scottish forces, under which a person's identity can be changed and they can move many hundreds of miles away. However, the scheme deals only with what we might call high-tariff cases, such as drug cases in which it is important to get evidence into the court. Many witnesses are not involved in such cases and get little support in terms of their safety, security and emotional needs. They might go to a police station and say that a man who is accused of breaking into a garage has threatened to kill them because they are a witness against him. The witness might feel strongly that their life is in danger but the police officer, who has heard it all a thousand times, will ask, "What do you want me to do about it?" That is the experience of witnesses. Often, there are no witnesses to the threat that has been made, so nothing can be done.

There is a need to develop witness protection to ensure that police forces and other agencies are able to provide for the safety and security of witnesses in the low-level cases as well as witnesses in the high-tariff ones.

Tim Richley: I agree with everything that David McKenna has said.

Mrs Mulligan: On penalties, do you agree that increasing the sentencing powers of the sheriff summary courts will mean that those courts will be better able to deal with a wider range of cases?

David McKenna: I am not sure that we are in a position to give you a professional or expert response to that question. The ability to deal with a wider range of cases in the summary system could benefit the victim, the accused and the criminal justice system as a whole. If the change were made, you would have to review the situation after two years or so to see what difference had been made.

Mrs Mulligan: Would the proposal lead to higher sentences, which would put greater pressure on the prison service?

David McKenna: Again, I stress that this is not quite our area. All we can do is give you our experience of how the system works.

The point is not that judges, sheriffs or justices will give increased sentences or that there will be an upwards drift in sentencing. I agree with the earlier witness about that. The only issue might be if more people were convicted than under solemn procedure, but it is difficult to determine whether that will be the case. The issue is not sentencing drift but whether there is potential for more people to be convicted under the summary process, or even the opposite. It is not obvious what will happen.

11:45

Neil Paterson: In many ways, it will depend on the type of cases that are placed in each level of the court system. To refer back to the evidence that Mr Chalmers gave, it is not clear from the legislation—nor would we expect it to be—how the Crown will decide on the locus for prosecuting different offences in the system. We—and, I am sure, the committee—would be interested to see more information on that, because it will be a key determinant of our response to the question that you posed. Without that information, it is not easy to develop a sense of what will happen.

Mrs Mulligan: The committee will be interested to pursue the matter because it is not clear. I suppose that I am trying to get your impression of

it at this stage, but I suspect that your impression is much like ours and that you cannot be clear without a few more indications of where we are going.

Mr Richley, do you want to add anything?

Tim Richley: Yes. Sentencing has been mentioned several times this morning. We are concerned that, if the powers are increased, sentences will drift upwards. If custodial sentences drift upwards, it follows logically that alternatives to custody will be used less widely because of the stiffer penalties that the bench can impose. We have to counter that with the targets to reduce prison populations.

Mrs Mulligan: You mentioned the alternatives to prosecution that are proposed in the bill. We will come back to those, but do you think that they will allow more opportunities to reduce reoffending?

Tim Richley: I am unsure about how the alternatives will operate in reality, including fiscal fines and unpaid work.

Mrs Mulligan: Do you not support those alternatives to custodial sentences?

Tim Richley: We support almost any alternative to a custodial sentence in appropriate cases. Broadly, we endorse community alternatives to custodial sentences, but I am not sure whether 10 to 50 days of unpaid work, as requested or directed by the fiscal, will work in practice. I am slightly concerned about that.

David McKenna: Obviously, we have an interest in the matter from the perspective of reducing victimisation, which in turn means reducing reoffending. The alternatives to prosecution have the potential to reduce offending and reoffending and so to reduce the number of victims. They mean first that people are not taken immediately into the formal criminal justice system, where they end up with a criminal conviction and, secondly, that people do not find themselves involved in a disposal that they will fail at, which might result in them going to prison. The pattern of what happens to people who go through that process shows that they are more likely to reoffend. We have the opportunity to take them out of the system.

We all know about people who go on offending time and time again, but many people come into the formal criminal justice system only once or twice in their lives and then never come back before a court. Do we really want to stigmatise them unnecessarily with a criminal record that could affect their employment opportunities and other aspects of their lives? It is particularly unnecessary when the outcome in the court will be a fine of around £190. I do not think that victims of crime would want people to go through an expensive court process for the sake of a £190 fine. I think that the alternatives can work for both victims and offenders and can reduce offending.

Mr McFee: I agree with you. However, if repeat offences are dealt with by fiscal fine, that could ignore an underlying problem of drug or alcohol abuse. How do the witnesses think we could square that particular circle?

David McKenna: This might not be a popular thing to say, but it would be a sad world if the only way that somebody could get access to help and support was by getting a criminal conviction. When people come through the criminal justice system and are found to have unmet needs, it is right that the system should consider how it can help to address them, but I would not like to think that people's attitude was, "Well, I'll just go and kick that door down because I'll get to court and I'll get ahead of the list or I might get some help," although I am sure that that is not what happens in practice.

On the second part of the question, the formal criminal justice system does not often detect that people have support needs in relation to drug abuse and so on. It will be important that the rules that govern the use of alternatives, which the Procurator Fiscal Service will design, do two things: first, they should look to pick up on needs; and secondly, they should not allow a situation to roll on indefinitely so that, for example, someone gets five or six fiscal fines and three work orders. At some point, someone must say, "Enough is enough. You have had that opportunity, but you will have to go into the formal court process now."

Tim Richley: On addressing needs, a couple of services are available. Members might be aware that two pilot arrest referral services are running: one in Motherwell and one here in Edinburgh. When somebody is charged with a drug-related offence or an offence that might be related to drugs, such as shoplifting, the alleged offender is given the opportunity to become involved with support services before they go anywhere near a court. For example, they can be referred to such services while they are in the cells. If that kind of system was linked with the system of fiscal fines or with the alternatives that we have been talking about, it would avoid people being missed. They would be asked, "Do you have issues in relation to your drug use? Would you like some assistance with that?" That could progress along very well.

Mr McFee: That is a pilot scheme.

Tim Richley: Yes, there are two pilots.

Margaret Mitchell: I just wonder how that would work in practice. I imagine that fiscal fines will be a high-volume business and we have heard how in such business the time is often not taken to look into things properly. What Tim Richley suggested

about doing referrals from the cells is fine, but many people will just get a fiscal fine offer through their letterbox and it will be a case of, "Right, I'll get that out the way." My concern is not that we must prosecute people to get something done; it is that there is the time in the prosecution process for the defence to put the case properly, for the fiscal to be aware of all the circumstances and for the judge to make a proportionate decision on sentencing. Can the witnesses suggest anything for the fiscal fine procedure that might help to highlight that somebody has a drug or alcohol problem or an underlying problem that has led to the offence for which they have been charged?

Tim Richley: Off the top of my head, I do not have any suggestions on that, although I am sure that our organisation would want to consider the matter.

Margaret Mitchell: Mr McKenna, you said that the rush to prosecution is not the right approach. How would you deal with the problem?

David McKenna: Again, the issue is the process. The case papers that go to the fiscal should draw attention to the fact that the person has an issue. I agree with Tim Richley that the time for intervention is when someone with such issues enters the criminal justice system for the first time and not six, nine or 12 months down the road. If there are services to which people can be referred by the police, Sacro or the social work department, those should be taken advantage of at an early stage—they should also be available as court disposals, but often no such disposal is possible.

Margaret Mitchell: Is there an issue about resourcing such services, given that the Crown Office and Procurator Fiscal Service is under such pressure?

David McKenna: I cannot comment on that.

The Convener: We will return to the matter when we take evidence from representatives of the COPFS.

Mike Pringle: I do not think that Sacro mentioned JP courts in its submission, but Victim Support Scotland mentioned them. Most district courts are closely involved with the community, which provides the justices, so there is a direct link between the district court and what happens in the community. However, the location of JP courts will be based on sheriffdoms, so it is possible that there will be a move away from a community-based approach. Victim Support Scotland expressed concerns about the matter; will you expand on those?

We have heard a lot about whether lay justice courts should continue. Will you talk about the lack of facilities to which you refer in your submission?

David McKenna: Neil Paterson is probably the best person to answer some of your questions. However, I am delighted that lay justices will be retained and developed, because they are an important link between communities and the formal criminal justice system. I am pleased that the bill does not reflect the advice of McInnes.

Neil Paterson: The comments in our written submission relate less to the retention of lay justices than to current facilities in the district court and the new paradigm of basing the location of JP courts on sheriffdoms. Two, potentially competing issues are at play. First, as the committee knows, facilities for victims and witnesses in district courts are often poor. There has been considerable modernisation of the court estate at sheriff court and High Court level—although perhaps not as much as we would have liked—but that has not happened to anything like the same degree in the district court estate. That means that the issues about intimidation and fear that David McKenna highlighted in his response to a question from Bruce McFee can be much more apparent in the district court estate than they are in the more modern court estate, where there are separate waiting facilities and other arrangements can be made to manage the problem. Work is required through the modernisation programme to improve the situation in district courts.

A competing concern, particularly in rural areas, is that if a large number of courts are closed, people might be forced to travel considerable distances to go to court, which also creates problems. When the rationalisation programme is taken forward, the two concerns that I identified will need to be considered. Facilities need to be upgraded, but if we do not retain a degree of local access and placement, there will be an adverse effect on victims and witnesses.

Mike Pringle: Sheriffs' powers will be increased and it is suggested that JPs will have more powers. Currently I think that JPs can imprison people for up to 60 days, but there is a proposal to extend the maximum sentence to six months and to increase the maximum fine level to level 5. Another issue is whether justices should be able to caution people.

I think that you heard the earlier question about traffic offences. If cases are shifted down to justices, should they be able to disqualify drivers immediately, as well as by totting up? Would that exacerbate the situation that you described?

12:00

Neil Paterson: In truth, it is difficult to say at this juncture. The key issue is that the retention of justices should not be progressed without the ancillary measures that are in the bill. JPs must be

given greater support and much more intensive training; without that, concerns may be more apparent.

We have made comments about the locus for trying cases and about particulars. How that will pan out is unclear; we need to see more information before we can offer a more informed view.

The Convener: I return to witnesses. The key issue in the Bonomy reforms and in relation to the bill is that although a victim is a witness, trials will not proceed without other witnesses. We have all had experience of that as witnesses ourselves or from listening to witnesses' experiences.

You have talked about more serious cases in which intimidation takes place, but I am thinking of ordinary cases in which no allegation of intimidation has been made. People's everyday experiences are of nobody greeting them at the court—I do not know even whether they are entitled to a cup of tea—and of the court not necessarily having facilities for witnesses to sit separately from everybody else. There is a case for having a witness service or a charter for witnesses that is similar to our thinking about victims. Do you agree that it is about time that we started to improve our treatment of witnesses in the system? Without witnesses, victims will not get justice. I should use the term "alleged crime", but you know what I mean.

David McKenna: I am sure that Neil Paterson will fill you in on the detail. We should recognise that substantial work has been undertaken in the past five years to improve witnesses' position—we have the witness service in the High Court and all sheriff courts. However, there is a big gap in the district courts and in addressing the low-level intimidation that you are talking about. We also have the Vulnerable Witnesses (Scotland) Act 2004.

The Convener: You referred to a witness service. Is that for witnesses only?

David McKenna: Yes.

The Convener: Does it operate separately from the victim service?

David McKenna: Yes. It is part of Victim Support Scotland's overall structure, but it operates in sheriff courts and in the High Court. Volunteers co-ordinate support with key staff. However, there is nothing in the district courts. As you said, the issue is not just high-profile cases but the terrible experience of walking into a building where there are hundreds of people, including the accused and his or her friends—the accused is usually a man. Witnesses sit in the same room as those people, who are 2ft away from them and who talk about them in front of them. Witnesses do not want to repeat that experience. A big gap in the district courts needs to be addressed.

Key issues in relation to witness protection also need to be addressed. More needs to be done to ensure the safety and security of a person who has witnessed a crime, whether as a victim, a bystander or whatever. That person needs to feel that their position is being taken seriously. Some proposals for bail will take important steps towards that, but quite a lot still needs to be done.

The Convener: In the High Court and in sheriff court solemn cases, do witnesses now have better treatment? Are they separated from the accused?

Neil Paterson: That is the case in some places. Where the court estate permits it, separate waiting areas are possible, but not all sheriff court buildings allow for that, because some are too old and making the conversions is physically impossible.

The Convener: Do you know what happens to witnesses when those facilities are not available?

Neil Paterson: If we were working with people whom we knew would go to court, we would liaise with the Crown—if they were Crown witnesses—and the Scottish Court Service to make arrangements so that witnesses did not come into contact with people about whom they might be concerned. That happens in many cases. However, some folk do not take up the offer of support and just turn up on the day. Unfortunately, it is less easy to do something in that situation.

Before I came to today's meeting, I asked our witness service manager to give me an indication, from our statistical records of cases that have been reported to us, of the level of intimidation that still takes place. In the past 12 months, people have complained about intimidation in or around the High Court or sheriff courts—at a level serious enough for us to record—in more than 3,000 cases. Although advances have been made, the issue has not gone away.

The Convener: What is being done about that?

Neil Paterson: Several measures are being taken. We have worked closely with the Court Service to help it to redesign some of its buildings. In some instances, situations arise before we come into contact with a person. Sometimes when we go into the witness waiting room and say, "Hello. Are you Mr So-and-so?" and take them out, they tell us that they have been sitting alongside the accused or their associates. If we do not know about the person in advance, it is not possible to deal with the situation.

The Convener: Do the police get involved?

Neil Paterson: They are involved in some instances. With crimes that are at the higher end of the tariff, the police work with us and the Crown Office to ensure that such situations do not arise.

The Convener: That is what I am driving at. You say that not too many problems arise with cases that are at the more serious end of the scale. However, it seems to me that no matter what type of crime is involved, witnesses should get the same treatment as they would get in the High Court.

Neil Paterson: We agree.

The Convener: There is a weakness in the whole system. The defence and the prosecution often rely on witnesses appearing—they are crucial to the system. By introducing measures on reluctant and obstructive witnesses, we are only touching the surface. I am interested in further information about the 3,000 cases of intimidation that you mentioned. Do you agree that it is about time that we improved the treatment of all witnesses, regardless of which part of the system they are in? Would it be unreasonable to say that the Executive should have some kind of charter? You probably think that that is naff, because we have charters for this and that, but we could substitute another term. Should we have a set of rights that witnesses can expect, regardless of whether they are in the lay justice courts or the higher courts?

David McKenna: That is an eminently sensible suggestion. We have a victims charter that sets out national standards and what victims of crime can expect from the agencies. As I said, we have made rapid and substantial progress in the past 50 to 60 months, but there is a long way to go. My aspiration is that witnesses who are not associated with the accused should be able to go into any court building and find separate entrances, facilities for tea and coffee, seating areas and toilets. There is no point in a toilet being at the bottom end of the witness room or at the end of a corridor if all the people sitting there are the accused's friends and witnesses.

The Convener: That is helpful. If the committee decides to develop that theme for our report, which I am keen to do given your support in principle for the suggestion, you might want to think further about it and give us some ideas.

David McKenna: As well as the issues for victims of and witnesses to crime, serious issues often arise for people who are involved in the family courts, although that is a civil matter. Witnesses in such cases often suffer intimidation and need support and help. The same is true of fatal accident inquiries and antisocial behaviour cases. They do not fall on the criminal side, but people in such cases can experience victimisation and have the same support needs. That remains uncharted territory.

Mike Pringle: Under the bill, the JP courts will be the responsibility of the Scottish Court Service, whereas at present the district courts are local authorities' responsibility. In general, local authorities have not spent money on facilities. How difficult will it be to upgrade the facilities? The City of Edinburgh Council has spent a lot of money on upgrading the district courts, so many of the facilities that you request are available, but that is not the case generally. As the new JP courts will be the responsibility of the Court Service, is that an opportunity for improvements to be made?

David McKenna: We will have to wait and see what the Scottish Court Service's proposals are for the rationalisation of its estate. We have made the point that we do not want courts to disappear, so that people have to travel 40 or 50 miles to get to court when they can travel a mile at present. In our experience of victim support, there are opportunities to use the existing resources better. For example, spare capacity in one court could be used to reduce the number of physical courts from three to two in an area. There is potential to improve existing buildings and to make better use of buildings that are already up to the mark. Perhaps—dare I say it?—sheriffs could sit at 6 o'clock in the evening, justices could sit at 7 o'clock in the evening or we could have Saturday courts. Many measures could be considered to improve victims' and witnesses' experience of the court system.

The Convener: You can dare.

David McKenna: I had better finish there.

The Convener: That completes our questions. We are grateful for your oral and written evidence. We would benefit from information on the statistics that you mentioned—we would like to scrutinise that issue further.

Witness Expenses

12:12

The Convener: Agenda item 2 concerns witness expenses in relation to consideration of the Criminal Proceedings etc (Reform) (Scotland) Bill. Do members agree to delegate to me as convener responsibility for arranging for the Scottish Parliamentary Corporate Body to pay any expenses to witnesses who apply for them?

Members *indicated agreement*.

The Convener: We agreed previously to take in private agenda item 3, which is a round-up of the evidence that we have just heard in preparation for our report.

12:12

Meeting continued in private until 12:45.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Monday 29 May 2006

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron