JUSTICE 1 COMMITTEE

Wednesday 24 May 2006

Session 2

£5.00

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

CONTENTS

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JUSTICE 1 COMMITTEE
18th 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:

Val Bremner (Procurators Fiscal Society)
Gerard Brown (Law Society of Scotland)
William McVicar (Law Society of Scotland)
Gerard Sinclair (Law Society of Scotland)
Rachael Weir (Procurators Fiscal Society)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald
Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Wednesday 24 May 2006

[THE CONVENER *opened the meeting at 10:04*]

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

The Convener (Pauline McNeill): Good morning and welcome to the 18th meeting in 2006 of the Justice 1 Committee. I have received apologies from Margaret Mitchell, who is unable to join us this morning as she is unwell.

Item 1 is stage 1 consideration of the Criminal Proceedings etc (Reform) (Scotland) Bill. I welcome Val Bremner, the secretary of the Procurators Fiscal Society, and Rachael Weir, a member of the society. Thank you for coming along and for your written submission. We will move straight to questions.

Stewart Stevenson (Banff and Buchan) (SNP): Good morning. The Scottish Executive states that the sections in the bill on bail put the common-law position into statute law. How do you respond to that? What might be the practical effects of the proposals?

Val Bremner (Procurators Fiscal Society): I agree with that. The framework that is set out in the bill, particularly in relation to the factors that will apply when bail is considered, is in essence what happens now. Our members' concern, which we included in our submission, is that it is dangerous to attempt to codify criteria that are understood in common law by those in practice. If the Executive codifies the criteria and uses only illustrative examples, people might look at the list and think, "If it's not there, it's not important, and it will not be used." Our concern is that, by including an illustrative list, the Executive will create a system in which only the criteria on the list are considered. In fact, there are other considerations that may be used but, in time, there may be an erosion of the procurator fiscal's discretion.

We appreciate that it is a difficult matter, because if the Executive included an exhaustive list, it might be accused of being rigid and it would inevitably miss something out. Plenty of people would devote themselves to trying to find out what had been missed and cases could arise from that. We are not here to say that the Executive either should or should not codify. Our position is that we will work with whatever system is provided in the bill. To answer your question, we would say that the bill puts existing good practice on a statutory footing but that we have concerns.

Stewart Stevenson: Are you saying that the list is inadequate or are you simply saying that the existence of the list is a potential difficulty?

Rachael Weir (Procurators Fiscal Society): It is the existence of the list that concerns us. There is a danger that, in time, the courts will regard the list as exhaustive, even though the explanatory notes state that it is "non-exhaustive". Even if the courts do not regard the list as truly exhaustive, it might be more difficult to argue factors that are not on the list, and that might present difficulties further down the line.

Stewart Stevenson: Can you point to other legislative changes of a similar character where something has been codified by introducing a list, whether in a bill or in secondary legislation, and a practical difficulty has been caused, or is the concern merely a theoretical dancing on the head of a pin?

Val Bremner: I do not think that we can readily give you an example from Scots law. I suppose that what we are saying is theoretical. We are surmising about the practical difficulties that could result. We are not saying that codification will not work, as it could well work. However, we seek clarity on the aim of the framework. We would commend the aim of ensuring that the public are better informed about bail and understand its workings, but for the reasons that my colleague mentioned, we wonder whether having a non-exhaustive list will create clarity for the public or whether the framework will cause more discussion, debate and concern among the public.

Stewart Stevenson: Can you suggest a sustainable, alternative construction that would address your concerns?

Val Bremner: I do not wish to sound difficult, but I do not think that we could take a position on that or offer an alternative. It is not within our remit to do that. As civil servants, we can bring you our concerns, but clearly we have to work with whatever Parliament decides should be in the legislation. We are flagging up our concern that difficulties might arise in the long term.

Stewart Stevenson: Do the provisions in the bill adequately address the concerns of victims and witnesses about bail?

Rachael Weir: Could you explain further what you have in mind?

Stewart Stevenson: Witnesses have told the committee that the physical arrangements outside certain courts are not thought to be adequate. People have asked whether the rights of the victims are properly reflected in the process of the consideration of bail. Do you think that the

provisions in the bill go any way towards addressing such concerns?

Rachael Weir: The concerns that victims and witnesses have are best addressed through what might be described as the art of communication. We need to communicate to them the decisions that are being taken and take time to consider their views. That is the case regardless of the provisions in the bill. Whether the common man understands the common law any better than his own reading of statute, I cannot comment on as a lawyer. However, the real issue is not what is written in the statute but how it is implemented and the dedication of those who will implement it.

Stewart Stevenson: The University of Edinburgh uses a quote from me, addressing a committee, to show how ignorant MSPs are of the common law. I disagree with that, but that is another story.

The Association of Chief Police Officers in Scotland has suggested that public safety might be another ground for refusing bail. If that were a ground, what factors do you think should be taken into account? What would it mean if that were part of the bill?

Val Bremner: One has to consider the criteria that are set out. At the moment, when opposing bail, we might say that someone might constitute a danger to the public. There is a question of how that is interpreted. The danger might be to the wider public or to one individual.

There is nothing in the bill that would prevent a procurator fiscal from continuing to address a court in order to oppose bail because of public safety issues. Such issues, in general, might apply to an offender who is involved with serious public disorder, such as terrorism—to use an obvious, but rare, example. In any case, the procurator fiscal has discretion with regard to opposition to bail. Our main concern is that the bill should not work against that. We feel that the bill offers us sufficient flexibility to enable us to continue to oppose bail in the way that we have done in situations in which public safety is at risk.

Stewart Stevenson: The issue of public safety, as you would raise it in the court, concerns a risk to an individual, who could be identified if necessary, or to the public in general. Is that correct?

Val Bremner: Yes. The definition of public safety depends on each case and each individual. For example, in the case of a serial sex offender, it is clear that that person could be a danger to a section of the public—which is to say, women—and it would be a matter of concern for public safety if that person were to be at liberty. The decision would depend on the particular circumstances of the case and the number of offences involved.

The Convener: What is the Procurators Fiscal Society's view with regard to the change of emphasis in relation to allowing the court independently to make its own decisions about bail?

Rachael Weir: I do not think that we would take any particular view on that. If Parliament decides that that is appropriate, that is what will take place in practice. Under the bill, the Crown and the defence will still have their say, so, in terms of practice, the proposal would simply leave the decision entirely in the hands of the court.

The Convener: We need to take a view on this issue. Are you not particularly concerned about the proposal? It would mean that, where the Crown did not oppose bail, the court could consider granting it. Do you have no concerns about the court doing that?

10:15

Val Bremner: Such situations are unusual. I know that there have been instances that have resulted in appeals, and, if nothing else, the bill will clarify the position. However, if the Crown has something to say in the public interest about why someone should be granted bail, the Crown will say it, and it would be exceptional for a sheriff to refuse bail where the Crown had not advanced any comment.

Mr Bruce McFee (West of Scotland) (SNP): Is the reason perhaps that, at present, a sheriff is almost incapable of expressing an alternative view as to whether an individual should receive bail because the Crown has not informed the court about any concerns that there may be? If an individual has what could in some circumstances be considered to be a track record, that might suggest that he or she would reoffend, but if that view is not made known to the court, it will be difficult for the sheriff to come to any conclusion other than to grant bail.

Val Bremner: I agree with what you say, but it would be extremely unusual in the situation that you have outlined, where a repeat offender was at risk of reoffending, for the Crown not to be heard. However, you have touched on something that is of concern to us. The bill mentions parties having the opportunity to comment on risk, and although one might say that the Crown already does that without using the word "risk", we have to be careful. There may be circumstances in which the Crown does not wish to address the court, and we would be concerned about what might be taken from the Crown's silence. We can give information about risk where we have it, but we do not have such full information as we would like to have, nor

are we always best qualified to give information about a particular offender. For example, in the case of someone with a serious mental illness, we are not necessarily qualified to indicate with certainty whether that person is likely to reoffend. If we are suitably informed, we will comment on risk, but we are concerned about our ability to do so: we might not have the information, or be qualified, to comment, and we are concerned about what might be taken from a situation in which we did not comment.

Mr McFee: Do you think that that is a dead stopper, so to speak, or is there some way around it?

Val Bremner: It is proper for the bill to give parties an opportunity to comment on risk. That is entirely fair and appropriate. However, we have concerns about the clarity of the provision and about how it would work in practice. If, using discretion, the Crown representative does not comment on risk, and something untoward later happens with the offender, they might be criticised for failing to comment on risk, although they might not have known about any risk or might not have been suitably informed. That is obviously a concern, but we do not suggest that the provision should be removed from the bill.

The Convener: We had noted that concern in your written evidence.

I should have introduced our adviser, Des McCaffrey, who has been advising us on the bill. He might want to say something just to clarify that point.

Desmond McCaffrey (Adviser): In your written submission, you say that proposed new section 23B(5) of the Criminal Procedure (Scotland) Act 1995 was troublesome. I think that that subsection (5) has to be read along with subsection (4). Committee members are a bit concerned about what the provision really means as drafted. Subsections (4) and (5) are no different from the existing situation, in that the court can ask the prosecutor or the accused person's solicitor to provide it with information, but subsection (5) appears to indicate that there is no obligation for them to provide information, even if asked. Is that your interpretation of subsections (4) and (5)?

Val Bremner: It is.

Desmond McCaffrey: The committee wants to know whether that is what happens just now. If the court were to ask the procurator fiscal or the solicitor acting for the accused to provide it with some information, there would be no obligation on either to answer that request. The solicitor might cite the ground of confidentiality, or the Crown might cite reasons of risk and security, if the fiscal did not want to say why they were taking a certain position.

Rachael Weir: That is correct to the extent that, when the court makes such a request, it can take into account a whole variety of factors, which will not necessarily focus on risk. The language in that area of the bill focuses entirely on risk. It gives parties the opportunity to comment on risk, rather than the whole variety of factors that might be taken into account in relation to bail.

The Convener: We need to clarify the likely interpretation of section 1, given the language that it inserts into the 1995 act. Proposed new section 23B(5) indicates that there is a choice, where it says:

"However, whether that party gives the court opinion".

It is perhaps implied that the opinion is to be an expert opinion, which is suggested by the reference to

"any likelihood of something not occurring".

The example that you have given is a good one. We need to clarify with the bill team what the intention is.

Marlyn Glen (North East Scotland) (Lab): Several witnesses think that the bail system would be strengthened if the accused had to agree to the bail conditions formally, perhaps by signing a printed list of bail conditions. Do you think that there would be material advantage to the criminal justice system in taking that extra step?

Rachael Weir: Having somebody sign something is useful to an extent. What I said earlier about witnesses and the art of communication also applies to the accused. In many courts, the most effective approach is when the sheriff takes the opportunity to explain to the accused what the conditions are and what they mean, rather than simply referring to what is on the statute book. To an extent, it might be helpful for something to be signed, but it is more helpful if what the conditions mean for people is fully explained to them, if necessary in a public forum.

Marlyn Glen: I agree with you about that, especially when one bears in mind the potentially lower levels of literacy among those involved. Do you think that giving the explanation aloud is enough? I agree that the accused person might just sign what they are given, but it could be just the same if the sheriff explains something. The accused could just as easily say, "Yes, I understand." Would the proposal really make any difference? It is about ensuring that the accused person comprehends everything. Do you have any suggestions?

Rachael Weir: It is fair to say that most accused persons in that position have legal representation. To an extent, it is for the legal representative to explain to the accused what the conditions mean. From my experience in court and from the

experience of our members, it does no harm for the presiding judge to take the opportunity to give an explanation. Some of them do so in very plain language. They do not just stick to the wording that is provided.

Marlyn Glen: When we went on our visits, we noticed that different practices apply in different courts, including some good practice. However, we expected bail slips, which people could take away with them, to show the date of the accused's next court appearance, and we were concerned that that does not happen.

Val Bremner: As far as we are aware, bail slips do not show court dates. Many accused persons rely on their solicitor to remind them by letter of fixed dates when they are required to turn up. We are certainly aware of mix-ups occurring in that respect.

Marlyn Glen: There seems to be a big problem with breach of bail conditions, perhaps because the person did not understand them, and with non-appearance, perhaps because the person did not hear the instructions properly.

What resource implications would you expect the provisions on bail to have for the Procurator Fiscal Service? What work is under way to ensure that the service can meet any additional demands?

Val Bremner: As a society acting on behalf of our members, we have considered the issue, and I cannot say that we consider that the particular provisions on bail have resource implications.

Widening the scope of my answer a little, we have concerns about the increased use of the option to release someone on a written undertaking to appear in court on a future date. Logic tells us that, if more people come in quickly on undertakings, there should be a consequent drop in the number who come in later as ordinary reported cases. There is no doubt that, when people on undertakings come in, usually on a busy morning—perhaps to be put before a custody court, in addition to all the other custody cases—time is at a premium for our members. They will be marking custody cases, and many of them have court commitments and have to leave the office.

We are concerned that we will not have the resources to deal with the extra people who have been released on an undertaking. It is not just a question of the decisions that have to be made; the fact that the extra people will be obliged to appear in person in custody courts means that business in the courts will inevitably take longer, given that such cases might previously have been dealt with by the accused entering a plea by letter, which is quite a speedy process. We cannot comment on the work that has been done to address that issue, because we are not party to it.

Our membership has gone through a period of relentless change in the Crown Office and Procurator Fiscal Service. None of us would seek to return to the circumstances of six years ago, when accusations were levelled at us that we did not work smartly or provide the service that people had come to expect. There is no doubt that the service that the COPFS provides has improved greatly. It is generally agreed that the Bonomy reforms have been a success, which we would say is due in no small part to the hard work of our members. Our members would say that they were pleased to be part of a system that has stopped witnesses having to come to court needlessly time after time. However, they would also say that the reforms have had no effect on reducing their day-to-day workload—in fact, some might tell you that they have increased it.

We are not here to tell you that the COPFS cannot cope with the bill. We will work with the bill and we want to be part of a system that delivers speedy and effective justice in summary cases as well as solemn cases. However, we have to say that there are resource implications for us. We do not know whether they have been addressed and we are concerned about that, because our members are already working at optimum capacity.

The Convener: I have a few more questions on the resource implications. I want to be clear about the point that you made about undertakings. You said that some people whose cases would previously have been dealt with by their entering a plea by letter might be released on an undertaking. Will you explain that?

Val Bremner: Currently, some accused persons are reported to us by the police within three to four weeks of the crime taking place and are released on bail without an undertaking. In such cases, which come to us in a more relaxed timescale, the accused is cited to attend court. In a large majority of cases, a plea of not guilty is entered by letter by either the accused person or a solicitor acting on their behalf. When such cases are first called, the plea of not guilty is entered by letter and diets are fixed, which is a speedy process.

A different section of the bill will strengthen our ability to deal with such cases in an administrative way. However, if people who are released by the police have to sign an undertaking to appear within 10 days, the case will come to us to deal with more urgently; we will have to deal with it in advance of, or on the morning of, the day when the person is to appear. We will need extra resources to cope with such cases coming in at the same time as custody cases. We will have to direct resources to meet that challenge. It is our experience that when people turn up at court in person, it takes longer to call each case, because

things have to be explained and dates have to be fixed.

Mr McFee: You think that work might be created for you in cases where an individual who would previously have been released by the police is released on an undertaking to appear at a specific place and time, which would cause a time constraint. Would it be more rational for the police not to release on an undertaking someone they would have previously released anyway, or do you feel that, if the police can release people on an undertaking, it would happen more and more?

10:30

Val Bremner: Releasing people on an undertaking ensures speedier delivery of justice. At the moment, road traffic offenders such as drunk-drivers appear at courts across the country on undertakings and are dealt with relatively quickly. Everyone accepts that that is the way forward.

However, the measure might raise questions about the use of resources. If more and more people are reported on undertakings, the COPFS will have to deal with those cases, if you like, at the front end. We are concerned about how we will manage and cope with those cases on top of an already heavy workload.

The Convener: I thought that the purpose of introducing undertakings was to allow the police to release more people from custody—even though they will have to come back within 10 days.

Val Bremner: That is the usual period at the moment.

Desmond McCaffrey: I wonder whether Ms Bremner could explain what happens at the moment. As I understand it, undertakings are given principally in road traffic cases.

Val Bremner: That is correct.

Desmond McCaffrey: All other cases are supposed to be reported within 28 days and, after they are filtered through your offices, citations for arranged dates are sent out.

The evidence that the committee has received suggests that, under the new system, there will be fewer custody cases because more people will be released on undertakings. Is that correct?

Rachael Weir: I am not sure what impression other witnesses have given, but that was certainly not our understanding of the bill.

The Convener: We thought that the point of the provision was to ensure that not so many people would be held in custody awaiting trial.

Val Bremner: There might well be fewer people in custody. In fairness, if the overall number of cases remains the same, but some of them come to the COPFS as a result of undertakings, the resource implications might not be so great for us. However, as my colleague has pointed out, we interpreted the liberation on undertaking provision more widely and felt that it would lead not just to fewer people being in custody but to the COPFS having to deal with additional cases. The issue needs to be clarified.

The Convener: You might be right.

Desmond McCaffrey: You feel that undertakings will be used to deal with cited cases rather than to deal with the custody issue.

Rachael Weir: Yes.

Mike Pringle (Edinburgh South) (LD): The Executive officials told us that the COPFS was involved in working out the optimum way of using undertakings. However, your comments suggest that there has not been much discussion with the Procurator Fiscal Service. Perhaps the Executive thinks that the Crown Office is dealing with the matter. Has a joined-up approach been taken?

Val Bremner: In fairness, a good number of groups in the Crown Office and Procurator Fiscal Service, the Scottish Executive and the Scottish Court Service are considering all aspects of the bill. The Procurator Fiscal Society is not involved in that work, so I cannot tell you anything about it. However, I am sure that it is on-going.

Mike Pringle: I am sure that you agree that speeding up the justice process under the Bonomy reforms and keeping people out of prison unless they have to be there are positive measures. It must therefore be a good thing to release people from custody on an undertaking and stipulate that they have to appear within 10 days. Are you afraid that the police might use undertakings not only for people who might otherwise have been put into custody, but for everyone else?

Val Bremner: It is accurate to say that that is our fear. We fully support the suggestion that the provisions will speed things up and assist with the delivery of quick and efficient justice. We all seek that end. It is not within our remit to seek to hold people in custody, other than if the public interest dictates.

The Convener: You have drawn an important point to our attention. We need to ask the bill team to clarify the purpose of undertakings. We assumed that they were primarily for custody cases, but I think that your assumption is right. There is nothing to say that they are only for custody cases.

Mr McFee: I think that I understand the concern. I am sure that the Executive wants to have fewer people in custody and more released on undertakings, but you are concerned that the

intention and the practice might be two different things. Undertakings will be delivered to an individual by the police, but we are not sure how. Are you concerned that, in addition to people who would have been held in custody being released on an undertaking, the proposed system might suck up from the bottom those who would have been released and ensure that they are now released on an undertaking?

Rachael Weir: That is a concern. I am aware, however, that the Crown Office and Procurator Fiscal Service, the Scottish Executive and criminal justice partners are working closely to try to work out how the provisions will operate in practice. A lot of work is still being done on that, so a lot of what we are saying about the matter is speculative. However, we are highlighting to the committee the concern that, if the provisions on undertakings are interpreted as widely as we suggest, the resource implications will have to be factored in, whether that involves the reallocation of existing resources or consideration of what additional resources, if any, will be required. Because that is speculative, it is difficult for us to comment.

The Convener: That is helpful.

On the question of resources, one of Sheriff Principal McInnes's suggestions on how to speed up the system was that a summary of evidence against the accused should be available at summary complaint. It seems to me that that is undeliverable. Are you concerned about the front loading of the system and the impact that that will have on the service? The thing that concerns me most about achieving efficiency and speed in summary justice is the impact that it will have on the Crown. That is my starting point. If you want to comment generally, I would welcome that.

Val Bremner: We share your concern, convener. The term "front loading" suggests that by doing some of the work at the beginning we will save some work later, but that is not our members' experience of the Bonomy reforms. Under the reforms, considerable resources have been put into front loading, but it seems to our members that the amount of work has increased rather than decreased. That is a concern to us. Of course, the reforms have been a success in terms of the number of witnesses who have to come to court and our members are happy to have played their part in that. They will also play their part in the legislation to speed up effective delivery of summary justice, but I would not like to say how much more work they can do. Many of them are working flat out to do their bit to assist.

The Convener: You mentioned the success of the Bonomy reforms, but in that case it was clearer where the bottlenecks were in the system. They were obviously at the top end of the system, but we are now discussing a high-volume system. Is it fair to say that, although the changes to summary justice are at a lower level than the Bonomy reforms of the High Court, they represent a bigger challenge because of the high volume of cases?

Rachael Weir: The moment that the volume is increased, there is, inevitably, an enormous challenge for everyone who is involved in the criminal justice process. The effort that our members and others have put into making the Bonomy reforms a success shows that that level of professionalism and commitment is essential. There must be a robustness of approach on the part of all parties who are involved in the criminal justice process. That has been the key to the success of the Bonomy reforms.

Mike Pringle: We have talked about trying to speed up the system. Part 2 of the bill contains a number of proposals that are designed to do that. You have commented on undertakings, but do you have any comments on any of the other ways of speeding up the system that might affect the Procurator Fiscal Service?

Val Bremner: Part of the bill deals with the increased use of fiscal fines. That is more to do with taking business out of the courts than it is to do with speeding up the system, so I might be digressing slightly, but it might have the knock-on effect of making the rest of the business go more smoothly.

There is no doubt that the issue of fiscal fines represents a culture change for our members. Currently, we operate with a tiered fiscal fine system, up to £100. The bill will take that substantially further. With the enhanced power in respect of compensation offers, we are in a whole new territory.

In our written submission, we have expressed our concerns about compensation offers. If our members are expected to make decisions about compensation not only for damage but for distress, they will have to be well informed about the detail of every case. However, provided that the COPFS is given rules, procedures and guidance, we have no difficulty in principle in fiscal fines being used in an enhanced way to take business out of the courts. The fact that we will not have unpaid fiscal fines referred back to us for prosecution will be of some assistance, because such cases would proceed as registered fines and would not involve any work by the procurator fiscal. That would have to be described as a potential benefit to us.

Mike Pringle: With regard to compensation offers, are you in a position to know various people's means? For example, if I came before you, you might say, "Well, he is on an MSP's substantial salary, so he is quite well off". In other

cases, however, you might not know someone's salary. Will you be able to decide on appropriate levels for compensation offers in such cases? How much information do you have?

Val Bremner: There are two aspects to that. In every police report, we are given some information about the accused person. However, that information is often only as good as the information that the accused person wants to give. There is no compulsion on an accused person to tell the police what they earn and, quite often, they do not. We might have information only to the effect that an accused person is unemployed and is in receipt of state benefits.

The second aspect, which might cause more difficulty, concerns the information that we get about the compensation aspects of the crime. We are used to receiving reports about vandalism, but it is not always possible for us to go to court and ask for compensation if all that we have is the information that the damage was estimated at £60. Many courts take the view that that is not sufficient information on which to make a compensation order. If we are to deal with compensation offers at the front end, without going to court, there is no doubt that we will have to have comprehensive information from the police. We understand that ACPOS and the COPFS are doing work in that area.

Mr McFee: It is possible to put an estimate on the cost of replacing a plate-glass window or a car windscreen, but how do you put an estimate on a punch in the face?

Rachael Weir: That would be a difficult assessment to make, and it would have to be done on a case-by-case basis. What one person might find extremely distressing might be capable of being brushed off by another person. Again, as my colleague said, it would be important for us to get comprehensive information about the effect that the incident has had and to have adequate guidance that will allow us to act objectively and with some consistency.

10:45

Mr McFee: The fact that you will have to assess every case individually suggests that you will not have that consistency.

Rachael Weir: There is a danger in viewing compensation as providing the victim with recompense for the actual loss that they incurred. In many cases that is not possible, because it is not easy to establish the exact value of a loss. If the sum of money that is provided is too low, that might be insulting to the victim; if it is set too high, it might overcompensate them for their loss. All that can ever be done is to set a nominal amount. We are concerned about how the balancing exercise will be carried out. We are concerned to ensure that our members will have adequate information and guidance available to them to help them make a difficult assessment.

Mike Pringle: The McInnes report noted that intermediate diets are very successful in some areas, but not in others. What is your impression of that? What do you think needs to be done to ensure that the system is even across the spectrum?

Val Bremner: That observation is correct, in our experience. There is variation between areas. When a robust approach is taken from the bench in an intermediate diet court and the parties are forced to focus their minds on the issues and on agreeing evidence, there is no doubt that trials can be avoided or that the issues can be more focused so that the trials take less time. That all helps with the speedy and efficient delivery of justice.

Ensuring that the system is even might be a matter of training or of focusing minds. The approach that was taken in the Bonomy legislation has focused minds in the High Court, and issues now appear to be explored at an early stage. When a case gets past a preliminary hearing, it is pretty certain to go to trial.

Our experience is that, unfortunately, there are still cases that go through intermediate diet but do not go to trial. There is something not quite right with that. In theory, if a case goes past the intermediate diet that happens because the parties are going to trial, but that is not always the case. As we know, some cases are adjourned.

Mike Pringle: You mentioned training. Who needs to be better trained? My impression is that, if a case goes past the intermediate diet, there should inevitably be a trial. How can the problems with that be prevented?

Rachael Weir: The way to prevent them is to take a robust approach, as I said in relation to the Bonomy reforms. As far as those reforms are concerned, the indicator of success is that everybody involved has taken a robust approach. It does not fall to just one party in the criminal justice process to do that. Everybody has to play their part in taking that approach and in being properly prepared at the intermediate diet stage.

Mike Pringle: Who needs better training?

Val Bremner: I do not think that it is for me to say that anyone needs training. In our organisation, a good deal of time and resource is allocated to preparing the Crown for intermediate diets. In doing that, we are often in a position to provide information that will help the defence to resolve the matter. Perhaps training is the wrong word; we would like a more robust and consistent approach to be taken by the bench throughout the

country, and indeed by all parties. As my colleague said, it is not just a matter for the bench. Everyone has to co-operate in the process.

Mike Pringle: Section 14 deals with trial proceedings in the absence of the accused. Do you have any views on that?

Rachael Weir: It is not for us to offer a view on the provision's legitimacy, but I can comment on practical matters. It is unlikely that the provision would be used regularly. There would be practical difficulties in trials in which we had to corroborate the identity of the accused. Apart from cases in which evidence on the identity of the accused had already been led, or in which there was no dispute between the Crown and the defence about the identity of the accused, it is difficult to envisage circumstances in which we could proceed with a trial in absence of the accused.

Mike Pringle: Would the provision seldom be used?

Val Bremner: It is fair to say that it would be used infrequently, for the reasons that Rachael Weir gave.

Mrs Mary Mulligan (Linlithgow) (Lab): What impact will the proposed changes have on resources? I am thinking about the changes to the sentencing powers of sheriff summary courts and about alternatives to prosecution.

Val Bremner: We might give different answers for the two examples that you gave. There is no doubt that the enhancement of the penalties that are available to sheriffs on summary procedure will mean that business comes down to those courts from solemn procedure, so there will be a small increase in business in that regard. However, we expect the enhanced use of fiscal fines to mean that some of the lower-end business will come out of the summary system. Of course, there will still be business in the justice of the peace courts, because lay justice courts are to be retained. I am giving our initial thoughts about the impact of the bill, but we are not privy to figures or guidance about the cases that will move down from solemn to summary procedure. That is a matter of detail that will be worked out later, about which we will be advised by the COPFS.

Mrs Mulligan: Do you expect the shifting of business that you described to make the courts more efficient and effective?

Val Bremner: If lower-end solemn business, which is fairly serious crime, becomes higher-end summary business, the sheriff summary courts will be no less busy. However, the drop-off of business to JP courts or out of the system altogether, through the use of enhanced fiscal fines, will make the courts less busy. The proof of the pudding will be in how we are guided to deal with such cases, so it is difficult to give members more than our initial impression of what will happen. The net effect might be that there is not much difference. If some business comes down to the summary court and some is lost from the bottom end of that court's activity, things might feel the same as they did before. However, I am speculating.

Mrs Mulligan: You said that some business might come down to JP courts. Do you have a view on what the JP courts might deal with?

Rachael Weir: No. Ultimately it will be for the law officers to decide on appropriate prosecution policy.

Mrs Mulligan: What training and guidance on the changes will your members need?

Val Bremner: We receive policy guidance, so we expect that new policy guidance will be provided to tell us what we must look for in relation to enhanced fiscal fines and whether business will come down from the solemn courts. We believe that a good deal of work is being done on that already, and that we will receive the guidance when the bill has been passed. We are not concerned about the matter, because we know that the COPFS has been working hard on the guidance.

Mrs Mulligan: You touched on the appropriate use of alternatives to prosecution. The bill proposes increased use of alternatives to prosecution, which will put a great deal of power into the hands of the fiscals who will take decisions on such matters. How do you respond to concerns that fiscals might not have sufficient information about people's resources—you mentioned that in response to another question—or about the problems that were causing an individual to offend, such as drug or mental health problems, about which you might not feel equipped to make a judgment? How will you deal with such situations?

Rachael Weir: There are a number of aspects to that. As you have correctly identified, the key is the information with which procurators fiscal are provided. However, procurators fiscal are well used to reading between the lines in reports and even where information is not apparent on the face of it, they may have an inkling—for want of a better expression—that somebody might have mental health difficulties. In such cases, procurators fiscal are used to making the necessary inquiries of the police or of colleagues working in the community with people with mental health difficulties, so I do not think that the situation will be unfamiliar to them. The key is that our members must have the information in order to make such judgments.

Val Bremner: You mentioned a concern about the power that procurators fiscal are being given.

We would not take that lightly, and we would give careful and clear guidance about how the enhanced power should be applied. We certainly do not have any concern about the way in which that power would be used.

Mrs Mulligan: You said that you would be reliant on the information that was provided to you about the offence and the individual in question. Would providing such information for you increase the pressures on the police?

Val Bremner: There is no doubt that, with the enhanced fiscal fines and the additional power in relation to compensation offers, there will be a greater need than ever for full, comprehensive and accurate information. Generally, we get that but there are always cases in which we have to ask for more information. I am sure that the minds of the police are focusing on that, and I believe that work is being done by our organisation in conjunction with ACPOS to do what can be done to improve the quality of information. However, the process will be only as good as the information, and there is no doubt that that will affect the result.

Mrs Mulligan: Is there anything that you would like to suggest that could help with that, based on your experience of receiving the information at the moment?

Val Bremner: I suppose that a practising fiscal might say that the more information we get—about victims, about accused persons and about the crime itself—the better. We could all wax lyrical with examples of excellent reports that gave us full information and which allowed us to make an informed and clear decision on how to proceed.

The Convener: I have a question about the types of offence that might now incur a fiscal fine. You referred to guidance. In your view, should that guidance be clear cut to members of the public? I am referring to the general policy guidelines on the application of the new powers.

Rachael Weir: Ultimately, disclosure of any prosecution guidelines would be a matter for the law officers; we would not have any direct involvement in that. Guidelines on the application of alternatives to prosecution already exist and the public have come to expect procurators fiscal to apply themselves properly in the public interest to the circumstances of any case in which they use those existing alternatives. As I said, it would be for the law officers to decide what needs to be disclosed.

The Convener: Would you expect there to be guidance to procurators fiscal on the use of those extended powers?

Rachael Weir: Yes.

Mr McFee: You believe that there must be guidance on what alternatives to prosecution can be applied to, but would you expect cases such as those that involve domestic abuse to be dealt with by the courts rather than by fiscals using alternatives?

Rachael Weir: At this early stage, we can have no expectations regarding what crimes may or may not be considered suitable for those enhanced alternatives. As we have said, that will ultimately be a matter for the law officers to decide upon.

Mr McFee: Do you regard that as building on the guidance that already exists for alternatives to prosecution?

Rachael Weir: Yes.

11:00

Mrs Mulligan: Your submission states that the recall provisions that relate to fixed penalties and compensation offers may prove difficult to operate in practice. Will you enlarge on that?

Val Bremner: Our concern is based on the fact that we do not really know how the provisions will work in practice. It is reasonable to assume that, when the provisions are first enacted, a substantial body of accused persons will not understand or will not grasp the full import of the opt-out system, which I expect will lead to a fairly sizeable number of attempts at recall. If recalls are allowed, that will be the net effect. We are not clear whether we are expected to be party to that process or to comment on requests for recall. Our inclination is that we will not be, but we lack clarity on that. If a person wishes to challenge the facts, what will happen? We are unclear about the matter, but we expect a difficulty at the front end—people will not understand that they must opt out or the fine will be registered, so they will resort to the recall provisions.

Mrs Mulligan: Might the problems at the beginning—with people asking for a recall because they did not understand the undertaking—die down when people become more aware of the system?

Val Bremner: That is a fair assumption. In any culture change or sea change, teething problems are inevitable. One hopes that, when the system is clearly understood, the number of requests for recall will drop.

Mrs Mulligan: Do resources need to be identified to deal with those implications?

Val Bremner: If we understand the bill correctly, a request for recall will, in the first instance, be a matter for the clerk of court. Unless that matter were to be convened in open court, with the fiscal present—which I do not expect to be the case—that will not have an implication for us. Parties will

be entitled to a hearing from the justice if they are unsuccessful with the clerk. Again, we will probably not have a part in that at all. The measure may have resource implications, but not for us.

The Convener: Our adviser has a point of information on the issue, which we have been pursuing.

Desmond McCaffrey: Last week, Mr Chalmers from the University of Aberdeen raised the issue of the recall provisions in proposed new section 302C of the 1995 act. A request for recall will be made to the clerk of court, but a problem will arise for JP courts, because the clerk of court will make the decision and any appeal will be made to the court to which he is the adviser. That is clearly a problem. Mr Chalmers's suggested solution, which is to be taken up with the bill team, is that the request for recall should go to the procurator fiscal, as they made the original decision, and the outcome could then be reviewed by the court. That idea has been advanced as a possible solution to the problem with proposed new section 302C, which is that, because the clerk in a JP court will make the decision, they clearly cannot act in the appeal—the situation is different in sheriff courts. If the bill is changed so that the procurator fiscal had to make the decision on the request for recall, which could then be reviewed, what resource implications would that have for the society?

Val Bremner: I appreciate the difficulty with the clerk of court's involvement in the appeal process. If the suggestion were taken up and our members were to be, in the first instance, inundated with a large number of applications for recall, that would have resource implications that have not been factored in or planned for. It is a novel concept and not one on which we would comment other than to say that it would certainly have resource implications for us. If that proposal is put together with the rest of the package that the bill represents, additional resource might be required.

Mrs Mulligan: The committee has received evidence that people might not understand the provisions for opting out of a fixed penalty and might feel that they have not had sufficient notification—there are general difficulties with the provisions. It has been suggested that the provisions go against natural justice. Do you have a view on that?

Rachael Weir: It is not for us as civil servants to express any view on the underlying policy. As we have underlined at various times today, the issue is the art of communication and how the choice is communicated to members of the public who receive fixed penalties or procurator fiscal fines.

Mrs Mulligan: You do not want to comment on the principle, but are you concerned that people might feel that they have been unfairly treated because they did not understand the policy? I accept that you are saying that communication will need to be good, but can sufficient safeguards be put in to ensure that people understand that they have to opt out or it will be assumed that they have accepted the offer?

Val Bremner: The bill makes sufficient provision for a safeguard in the recall provisions, subject to the difficulty with the clerk of court. The criminal justice system will always have to deal with vulnerable people who might not always have access to legal advice, particularly at the lower end of the scale. As the system currently operates, I am sure that those people have some difficulty. We could tell you of our experiences of inquiries in procurator fiscal offices about fixed penalties, and the police and clerk of court have similar experiences.

As any new system beds in, I hope that those who are going to be in regular receipt of such fiscal fines will come to understand the process. However, I accept what you are saying. There is a vulnerable section of the community that can sometimes need additional help to understand the process.

Stewart Stevenson: Is it an appropriate process if there are people who are "in regular receipt" of fiscal fines, given that the policy intention of fiscal fines appears to be to deal with people who will come into contact with the criminal justice system only relatively infrequently?

Val Bremner: You are quite right. There should not be people who are in receipt of fiscal fines on a regular basis. I apologise if I used the wrong words.

I am sure that there will continue to be people who receive one level of fine and then perhaps a more enhanced level if the public interest dictates that, but there has to come a point at which prosecution becomes the imperative in the public interest. You are absolutely correct that fiscal fines should not be seen as a way of keeping people out of court. That would not be compatible with the public interest and we would not use fiscal fines in that way. Only if the circumstances were appropriate would someone receive an enhanced fiscal fine.

Stewart Stevenson: The point is that the fiscal fine does not count as a conviction so if someone were to receive regular fiscal fines, on eventually appearing in court they would appear to have a relatively clean sheet, which might thwart the ends of justice.

Val Bremner: That happens in practice, but I emphasise that there is not a body of people who are regularly in receipt of fiscal fines. It was a bad choice of words, and I apologise.

Mr McFee: Let us move on. You have said that you believe that the introduction of alternatives—in particular, fiscal fines—will result in an amount of business being taken out of the courts system, potentially relieving the pressure. My colleague alluded to the fact that we are told by the bill team that a fiscal fine does not represent a criminal conviction, as it is not an admission of guilt. However, it can still be revealed in court for up to two years should the person subsequently appear in court and be found guilty. That would happen when sentence was about to be passed. Is the fact that such fines can be disclosed in court likely to impact on the number of people who are prepared to accept them?

Rachael Weir: I do not think that it is possible to make a speculative judgment about that at this time. To be fair, some people will be affected by that decision and others will not appreciate the new distinction that will be in place. The fact that courts will take fiscal fines into consideration may have some effect, but at this stage it is difficult to determine what it may be.

Mr McFee: So you think that that will impact on the number of people who accept the fines but that it is difficult to quantify the impact.

Rachael Weir: There is potential for such an impact. That is the most that anyone can say at this time.

Mike Pringle: You might not want to express an opinion, but do you think that it is right that fiscal fines are put in front of a court? At the moment, the sheriff, the JP or whoever it happens to be gets a list of previous convictions. Do you think that it is right to attach fiscal fines to that list of convictions? Those convictions are either an admission of guilt or the conviction of guilt, whereas fiscal fines are neither.

Val Bremner: You are right to make the distinction between a conviction and a fiscal fine. However, a policy decision has been made to proceed with the bill in this way and it is not for us to comment on that matter of policy.

Mike Pringle: I have a couple of questions about JP courts and JPs. Several witnesses have raised concerns that the provisions in the bill may lead to a reduction in the business of district and JP courts, which might lead to the disappearance of such courts altogether in some places. Do you have a view on that? Is it important that we keep such courts wherever they exist at the moment?

Val Bremner: At the stage that we have reached, the provisions of the bill clearly set out the fact that JP courts are to be maintained. We accept that and we do not express an opinion on the concept. Just as for fiscal fines and fiscal compensation orders, we expect to be in receipt of revised guidance about the type of case that might go to a district or JP court. Beyond that, we cannot say anything at the moment. I am sure that there will be business that will find its proper place in a JP court.

Mike Pringle: Do fiscals have confidence in the district courts? Does the fiscal service lack confidence in the ability of JPs in some places, with the result that some minor offences are being prosecuted in the sheriff court that should, rightly, be prosecuted in the district courts? If that is a concern at the moment, how will we address it? The JPs will now be part of the Crown Office. Does the role require better or longer training?

Val Bremner: We are aware of the intention to bring justices of the peace under the umbrella of sheriffs principal to enhance their training. We welcome that. However, we are not aware of any evidence to the effect that any procurator fiscal is directed to avoid referring anything to a district court for the reasons that you have outlined. We have clear policy guidelines, and we recognise the value of the district courts in dealing with minor offences.

11:15

Mr McFee: The McInnes committee made the clear suggestion that some fiscals simply lack confidence in the way in which cases are handled in the district courts. In fact, McInnes went so far as to recommend that district courts be abandoned altogether, such was his concern about them. Do you accept that that is a problem? Are you aware that some fiscals tread warily in determining to refer a case to a district court rather than a sheriff court because, frankly, they have concerns about the training of JPs or the consistency of the decisions that are made in the district courts?

Val Bremner: I accept that that comment was made in the context of the McInnes report. It certainly was not made by us, and I cannot comment on its validity or otherwise. I do not accept that fiscals take that into account when they make a decision about marking a case. We have clear guidelines that we are required to follow and, if we do not follow them, there are consequences for us. I do not accept that what you describe is common practice.

Mr McFee: We heard clear evidence from JPs and those who are responsible for the district courts that that is a concern. In areas such as Dundee, the PF sends a large number of cases to the district courts but, in other areas, the district courts have not seen such cases for a considerable time. What you are saying directly contradicts the evidence that we have received.

Val Bremner: I hear what you are saying, but you must appreciate that there is scope within our

guidelines for flexibility and local variation—and rightly so. One minor offence might be a problem in one area and not in another. I cannot comment further. We are not aware of what you describe being a difficulty. We are required to act within our guidelines.

The Convener: So, at the moment, when a fiscal marks a case, there is some flexibility to mark it either for the district court or for the summary sheriff court.

Rachael Weir: The flexibility is not so much in those aspects as in the guidelines under which fiscals operate. Ultimately, the procurator fiscal will have regard to what action is in the public interest. As my colleague has said, certain crimes will be of more significance than others in certain areas, or they may be of particular local significance. There may be particular problems—

The Convener: So that means yes. You can—for the reasons that you have given—choose to mark a case either for the district court or the sheriff court. You can do that if you can justify it.

Rachael Weir: At the moment, there is scope for local variation but not variation from depute to depute. Individual procurators fiscal have some limited flexibility.

The Convener: In your view, if the Executive used statutory instruments to increase sentencing powers for JP courts to a maximum sentence of six months' imprisonment, would you have to mark cases in which the offence would generally attract up to six months' imprisonment for the JP courts, although you would currently mark such cases for the sheriff courts?

Val Bremner: We may not be required to do so in absolute terms, but that would certainly widen our discretion. We would expect any revised guidance to take account of that. We could expect to refer some of the cases that currently go to the sheriff courts to district courts with enhanced powers, were that option to be made available.

The Convener: You say that that would widen your discretion, but you might have to refer more cases to the JP courts.

Val Bremner: When I used the term "discretion", I was trying to say that there is still discretion about prosecution per se in some cases, depending on the public interest. We hope that that discretion will be maintained. If the powers of the district courts were enhanced, we would expect that certain business that currently goes to the sheriff courts could go to the district courts. We would have no difficulty with that.

The Convener: I, too, hope that that discretion remains. However, my worry about that scenario is that members of the public may see it as a downgrading of certain categories of crime if some cases that would have gone to the sheriff courts go to the local courts.

Val Bremner: One might think that, on the face of it. However, I am sure that, if justices of the peace are given substantially enhanced powers and use them, any such perception will be quashed quite quickly.

The Convener: Finally, I want to press you a wee bit more on what you said about the lessons of the Bonomy reforms. What you said about ensuring that the system is robust was helpful. We are finding it difficult to pin down provisions in the bill that would make intermediate diets in the sheriff courts robust. Can you give us any advice on that? For example, is the Crown in a position to deliver statements or summaries of evidence more quickly than it currently does, or are we looking in the wrong direction? I assume that some intermediate diets are not operating effectively in sheriff courts because parties are not prepared to go to trial, preparation work is not being done and statements are not being made available.

Val Bremner: Those are difficult questions for us to answer. Our members work hard to prepare cases with a view to resolving them without a trial, if that can be done. That approach includes disclosing statements at a certain point where doing so is appropriate. It is hard to see what more we could do to make the process work. Quite a lot of resources are focused on trying to make intermediate diets work, and the statistics on plea rates in some areas are startling. However, we have heard anecdotally about areas in which things are not as good. A case will go through an intermediate diet, there is a continued intermediate diet and matters are resolved later with a corresponding waste of court time and perhaps the needless citation of witnesses. I can only reiterate what my colleague said earlier. Every party that is involved in a case—the bench, the defence and the procurator fiscal—must play its part.

The Convener: I hear what you say and know that your members are working hard, but I am worried that the whole system will break down if we push matters any further. Who is not coming to the table as prepared as they should be? Why are intermediate diets not working in some cases? You have said that lots of resources are being made available to make intermediate diets work, but they are not working in some cases. Therefore, why should we continue to make such resources available, unless we know how to fix the problems?

Val Bremner: I cannot identify one single problem and would not cast blame in any one direction. The defence, for example, will often have legitimate reasons for requiring to continue a case. It might be genuinely unprepared through no

fault of its own or of the Crown and might require to be fully prepared before a trial can take place.

The Convener: With the Bonomy reforms, we forced the parties to come to the table at an intermediate diet. People needed to communicate beforehand and have their case prepared before the judge. I wonder how the summary justice system could be made more robust in the same way.

Val Bremner: There is no doubt that that provision has been successful in stopping the churn in the High Court. However, I echo what my colleague said earlier. We must be wary of applying to the bread-and-butter work of the courts—more than 90 per cent of the work of the courts—a solution that has been successfully applied to less than 10 per cent of the criminal case load in this country. It may not be possible to make such an approach work. I cannot provide a solution to members because a number of factors are involved, most of which are outwith the control of procurator fiscals. However, there is no doubt that if all parties at the table always take a clear and robust approach, the delivery of justice will inevitably be swifter and more effective.

The Convener: That is helpful.

That ends the session. We have been given a number of important points to think about, and there was a useful and helpful exchange on the interpretation of aspects of the bill. I thank Rachael Weir and Val Bremner from the Procurators Fiscal Society.

The meeting will be suspended for five minutes for a comfort break after which we shall reconvene with our second panel.

11:24

Meeting suspended.

11:35

On resuming—

The Convener: I welcome our second and final panel, which comprises witnesses from the Law Society of Scotland. Thank you for coming. I introduce Gerry Brown, who has been a witness many times before and is known to members; Gerard Sinclair; and William McVicar. Thank you for your helpful submission. As usual, we go straight to questions.

Stewart Stevenson: It is always a pleasure to have serial offenders before the bench. I open with questions on bail. In essence, I will repeat a question that I asked the fiscals. The Executive maintains that the bill simply puts into statute the common-law practice and provisions. Is that your view?

William McVicar (Law Society of Scotland): The criminal law committee of the Law Society, on which we all serve, prepared in addition to the submission that we have made to this committee a paper for the Sentencing Commission for Scotland in October 2004, a copy of which we will make available to the committee. That paper sets out our position on bail clearly and in detail. Much of that is incorporated in the bill.

The starting point is that the bail system cannot be considered in isolation. Everything in the justice system is connected and comments about bail have an impact on whether trials in absence are needed and relate to liberation on bail or undertakings to the police.

You asked earlier whether anything in the provisions would allow public safety to be a determining factor. Proposed new section 23B(2) of the Criminal Procedure (Scotland) Act 1995 says:

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

That highlights the fact that the public interest is of paramount concern. The subsequent provisions set out more specific matters that the giver of bail will require to take into account when considering whether bail should be granted. It is clear from the bill that public safety is a paramount consideration that must be in the judge's mind before the decision whether bail should be granted is made. I have no quarrel with the various categories that are listed in proposed new section 23C as a matter of practice—they basically reflect how the system operates.

The only difference is in proposed new section 23B(3), which says:

> "The attitude of the prosecutor towards a question of bail does not restrict the court's exercise of its discretion in determining the question."

That means that the court does not require to give or to refuse bail according to the stance that the prosecutor takes. As the law is applied at the moment, I understand that if the prosecutor does not oppose bail, the court is bound to grant it. There are all sorts of good reasons why that should be so in some cases. For example, the prosecutor might not want the court to know, or might not want to disclose publicly, the reasons why bail should be granted.

However, the view that we took in the memorandum that was submitted to the Sentencing Commission was that the present system was probably not compliant with article 5 of the European convention on human rights, because the procurator fiscal is not acting as a competent authority—as a judicial authority—for

that purpose. To that extent, the provision in proposed new section 23B is correct.

Our view on the question whether the provision fetters the prosecutor's discretion in appropriate cases to liberate the accused person, notwithstanding the decision of the court, is that it does not. The prosecutor will still be able to disregard the court's judgment. Although they cannot give bail in those circumstances, it remains within their discretion to liberate in appropriate cases. That happens at common law and we see nothing in the bill that would prevent that from continuing to be the case.

Stewart Stevenson: In order to be absolutely clear on the matter, am I correct in saying that the prosecutor can disregard the court's decision to grant bail? Is that what you said?

William McVicar: The court could refuse bail and the prosecutor could disregard that, in the appropriate circumstances.

Stewart Stevenson: What would the appropriate circumstances be and how might the prosecutor be held to account for their judgment in that regard?

William McVicar: The question is one that the prosecution would have to answer. My understanding is that that is what could happen in—

Stewart Stevenson: But does it happen?

William McVicar: It happens occasionally. Let us say that somebody has been held in custody in relation to a murder case. If the prosecutor decides for some reason that is peculiar to the case that the person should not be in custody any longer, they will be let out of custody. That is the historical position, although I am not suggesting by any stretch of the imagination that it happens routinely. The prosecutor will continue to have that residual power.

Stewart Stevenson: Without going back to the court?

William McVicar: Yes.

Stewart Stevenson: That comes as a surprise to me and, I suspect, others around the table. In looking at the bail system in the context of the bill, is it appropriate for the prosecutor to retain that right? Has the Law Society taken a view on the matter?

Gerard Brown (Law Society of Scotland): The Lord Advocate's prerogative, as the author of proceedings, should not be interfered with. I have personal experience of someone in the reverse situation to that which Bill McVicar described. My client, who had been remanded in custody on a murder charge, suddenly appeared in my office one day to discuss the case. I thought that the police would be chasing him down the road, but they were not, as he had been liberated. In that case, the man in question was quite properly liberated. The Crown investigations had reached the stage where it could take the view that he should not be detained any longer. The only surprise was that nobody had told me.

Stewart Stevenson: I perfectly understand that the prosecution may properly come to a view that it is no longer appropriate for someone to be held in custody. However, the decision to put the person into custody was made not by the Lord Advocate but by the court, so is it appropriate that the independent decision of the court is overridden by the prosecutor's view of life? Am I failing to grasp the complexities of the relationship?

Gerard Brown: No, you are not. However, the important point in all of this is the context of the structure of the proceedings, which is that they are raised at the instance of the prosecutor. In the example of the court having refused bail, the person will be kept in custody, but it is up to the prosecutor to take a view on the case at any time.

Stewart Stevenson: If I may, I will explore a parallel example. Let us say that evidence is being taken in a case when something occurs that causes the prosecution to desert the case. Am I correct in saying that the consent of the judge is required before the accused can be discharged?

William McVicar: No. That does not require the judge's consent. In certain circumstances after the commencement of a trial, the judge has to become in involved in making decisions. However, the Crown has the right to withdraw the proceedings at any stage. That is its prerogative.

Stewart Stevenson: Let me close this off, although I suspect that other committee members might want to come in on the back of this question. Would the prosecution service have someone liberated from court-imposed incarceration pending trial only if the prosecutor deserts the case, or could that also happen in the circumstances in which the case will proceed but the prosecutor's view of its nature and the requirement to hold the accused on remand has changed?

11:45

William McVicar: The second position is the correct one.

Stewart Stevenson: Therefore, the prosecutor is taking a decision that the bill appears to suggest that the sheriff ought to take, because it is not analogous to deserting a case during a trial.

I see that other members are signalling to the convener.

The Convener: We need to be clear about the matter before we move on. Proposed new section 23B(3) of the 1995 act is primarily intended to address cases in which the Crown does not oppose bail because, at the moment, if the Crown does not oppose bail, the court must grant it. The bill changes that so that, whether or not the Crown opposes bail, the court can consider bail at its own hand. That is what that provision is essentially about.

Desmond McCaffrey: The committee wishes clarification of whether the witnesses are saying that, notwithstanding proposed new section 23B(3), the power to release somebody on bail still rests with the Lord Advocate.

William McVicar: We are not suggesting that a person could be released on bail, but that they could be released from custody.

The Convener: The fiscal has always had that power; it is not affected by the bill. Is that correct?

William McVicar: It is.

Desmond McCaffrey: However, the bill makes a change, which the committee understands to be that the decision on bail will be for the court and the court alone.

William McVicar: That is correct, and we do not quarrel with that as a principle.

The Convener: Are you suggesting that there should be an additional provision to deal with the fiscal's power to release someone from custody?

William McVicar: No, we are simply highlighting that that happens at present, as you may not have been aware of it simply from reading the bill.

The Convener: The bill does not affect that power, does it?

William McVicar: No, it does not.

Mr McFee: Can you put this into simple terms for me? At the moment, if the Crown does not oppose bail, it is granted. The proposed new system would allow the court, even if the Crown does not oppose bail, to then—good grief, I have managed to get this totally—

The Convener: I have already covered that. We have agreed that that is what proposed new section 23B(3) does. Whether or not the Crown opposes bail, the court can consider at its own hand whether to grant it.

Mr McFee: I understand that.

I assume that the Lord Advocate intervened in the case that Gerard Brown described, in which, when a client appeared at his office, Mr Brown was looking for the blue lights chasing the man.

William McVicar: Yes.

Mr McFee: Is it your understanding that, under the bill, the Lord Advocate could still intervene in that way?

William McVicar: Yes.

Mr McFee: So the bill would alter that power in no way at all.

William McVicar: As I read it, the bill does not interfere with the Lord Advocate's discretion and prerogative to exercise that power—nor are we arguing that it should.

The Convener: We are already clear about that.

Mr McFee: However, the person would be in custody because of a decision of the court.

William McVicar: Yes.

Mr McFee: The Lord Advocate can, in effect, overrule that.

William McVicar: No. The Lord Advocate is the author of the proceedings and the master of the instance. Therefore, just as he can pursue proceedings at any time, he can withdraw them at any time. That is the statutory position.

Mrs Mulligan: So, in giving the court the power under the bill to take a decision on a matter that the procurator fiscal has not raised, we are not saying that the accused would always be held in custody because the sheriff or whoever had decided that, as the Lord Advocate would still have the opportunity to release them.

William McVicar: That is correct—but such things would happen only very rarely. We are not suggesting that they would happen every week.

Stewart Stevenson: The court may now grant bail without considering any material from the prosecution service. Is it not anomalous that the prosecution service can override the court's considerations, to which the service was not party? The rule change allows the sheriff, even if bail is not opposed by the prosecutor, to apply criteria that were not brought forward by the prosecution service when determining whether bail should or should not be granted. I accept that the criteria for granting or refusing bail have to be documented. Given that we are now giving the court more of a role, and not simply confining the decision to the prosecutor, is it not anomalous that the prosecutor should retain powers to override a court decision that is based on information that the court has but which the prosecutor does not necessarily have? Have I explained myself?

William McVicar: I understand what you are asking, but I do not agree that it is anomalous. It is for the prosecution to decide how, where and in what circumstances a prosecution is to carry on.

I suppose that the problem might be, in due course, the court refusing to allow the prosecution to discontinue proceedings. You might regard the position on the question of liberation as anomalous, but the court has never been able to compel the prosecution to bring a particular case.

Stewart Stevenson: Is it a gap, under those circumstances, that an undertaking is not required from the person concerned, or that bail conditions are not imposed on them? People move straight from being in custody to being at liberty.

William McVicar: I do not consider there to be a particular problem. As I have said, the cases in which this might happen are very rare.

The Convener: It is important to emphasise that point. We were becoming concerned that courts were making decisions and the Procurator Fiscal Service was regularly using its power to release people, but, as you say, the power is rarely used.

Gerard Brown: It is rarely used. If there is a concern that someone might be liberated who should not be liberated, the court can be brought back into the process by the prosecution to have the status of the accused reviewed or changed.

As Bill McVicar says, such circumstances are exceptionally rare, but we felt that the committee should be aware of the power.

The Convener: It is not in the bill but it is helpful for us to understand the issue. We are now clear about it.

Marlyn Glen: Several witnesses think that the bail system would be strengthened if the accused had to agree formally to the bail conditions—perhaps by signing the printed list of conditions. Would taking that extra step lead to a material advantage for the criminal justice system?

William McVicar: I do not think that it would make an awful lot of difference. In the court where I practise, people who are given bail are obliged to sign the bail order anyway. What we do not have on the bail orders is the date of the case. That would certainly help a lot of people. People often lose touch with their solicitor and, sadly, do not have the wit to contact the court themselves to get the information that they need. People end up appearing from custody some weeks or months later with the lame excuse that they did not really know the date of the case. We often deal with disadvantaged people, so perhaps that can be excused to some extent. However, it would help even those individuals to have a clear date on a form that they had to sign and then take away.

Marlyn Glen: We know from visiting courts that some courts already have such a system. Is it just a question of spreading that good practice, or do we need to make it a requirement?

William McVicar: I do not think that it is necessary to legislate for it; it should be developed as good practice.

Mike Pringle: I will move on to part 2 of the bill, which deals with proceedings. We would all agree that we want to speed up the delivery of justice and that a quicker system would be better for everyone. Much of part 2 aims to achieve that. Are there any areas in which you have concerns? Which of the bill's proposals will speed things up? Do you have a view on undertakings?

William McVicar: I will deal with undertakings first. When we listened to the evidence that the members of the first panel gave, we identified the concern that section 6 contains no provision that will require the undertaker to appear at a particular time shortly after liberation. That issue should be examined and consideration should be given to whether a time limit should be set when undertakings are given. A desire to speed up the process is not the only reason for such a measure. We have concerns about whether the police—who are not a competent judicial authority—should be permitted to release people on bail on particular conditions if those conditions might last for any longer than a very short period of time. Our concern about the provisions on undertakings is whether they are compliant with article 5 of ECHR.

Gerard Brown: When it comes to efficiency and speed—some people will know that my athletic prowess is all about efficiency and speed—we must keep in mind the interests of justice and the adversarial system. As one of my colleagues said, we do not want the system to speed up to such an extent that justice is railroaded.

One of our concerns—it is a major concern—is that although the bill is well thought out in many respects and is laudable in its aims, there seems to be a huge amount of work going on in the background. The wee legs are paddling away furiously, but we do not know what is above the surface. We are concerned about giving the committee a view without knowing what, in practice, will emerge from all the pilots, working groups and workshops. If I was asked for a personal opinion, I would have to say that I do not think that the bill, as drafted, will speed up the system and make it more efficient. There are various provisions that could be put into it that would assist with the achievement of that goal, and I would be happy to elaborate on them.

As was raised during consideration of the Bonomy reforms, it is necessary for the Crown to engage in proper and focused disclosure to the defence, following a proper timetable. Intermediate diets, which have been mentioned in some of the evidence, will not work unless that is done. We have certain ideas about how intermediate diets

could work. Perhaps the committee might have questions about that later.

Mike Pringle: Just proceed.

Gerard Brown: Our view is that, as part of the operation of intermediate diets, individuals should be cited to appear, and solicitors should arrive, at a set time in the morning—10 am, for example. The court should start at 2 pm. If there is proper disclosure in advance and a timetable is produced 28 days, say, before the intermediate diet, between 25 and 30 cases—no more—could be dealt with at 2 pm. The sheriff should have received—and should have read—all the papers in advance. Consultation and discussions with the Crown could take place between 10 am and 2 pm, while the accused persons were present in the court building.

If such a system is to work, there must be a sanction. We cannot have people coming along saying that they have not done this or that. The ultimate sanction in exceptional cases—taking into account the public interest and the interests of victims, witnesses and the accused—would be to give the sheriff the power to desert the case simplicita.

12:00

As I understand it, the only obligation in the bill regarding intermediate diets is on the defence. I make no criticism of the other parties in the process; however, before I can advise a client on his position, I have to know, for example, when the time of the offence was. How do I know that unless I have a list of witnesses whom I have interviewed and a summary of the evidence or statements? I cannot submit an alibi defence on the instructions of the client without knowing that.

I would like the system to work. Judging by the letter from the Executive, which I have read, the work that is going on in the background is excellent. However, the bill is different from the Bonomy reforms. I was fortunate enough to be a member of the Bonomy reference group, and what Bonomy produced was a system—in place, thought-out, tested and viewed from other jurisdictions. What came out of Bonomy, subject to the input of the Justice 1 Committee and Parliament, was a framework that hardly changed things in many respects. This is a different situation, as I perceive it.

I apologise. That was more of a speech than an answer to your question, but I wanted to get that off my chest.

Mike Pringle: That is why you are here—we want to hear your views.

I understand that, following an intermediate diet, in quite a lot of trials, the accused comes to court on the day of the trial and pleads guilty. We want to stop the process at the intermediate diet and get the accused to plead guilty at that stage—if that is the plea that they are going to enter. In that way, only cases in which there is going to be a trial will proceed to the trial date.

Gerard Brown: You want the process to be front loaded.

Mike Pringle: Yes.

Gerard Brown: There is the issue of diversion, but I will not go into that. The way to front load the process is to convey the information to the accused so that he can give instructions to a solicitor and the solicitor can advise him at the earliest possible stage. For example, the Crown routinely receives papers from the police with a summary of the evidence. Would there be a difficulty with photocopying that summary, taking the confidential bits out and attaching it to the copy of the complaint? I do not understand the problem with that. Information could be passed on that, for example, the accused had been seen running away from a fight, with a bottle and with blood coming from his hands, shouting and swearing. That could be put to the individual at the earliest stage.

The Convener: You are right. I am interested in the question of intermediate diets, and, like Gerry Brown, I want to get something off my chest. I do not see the point in allocating resources to continue intermediate diets in sheriff courts if they are not producing any results.

Gerard Brown: Correct.

The Convener: When I have suggested that previously, people have thrown their hands up in horror, as if we could not possibly abandon intermediate diets. I do not particularly want to go down that route, but I am finding it difficult to pin anybody down about who exactly is at fault. Are you saying that it is the Crown that is primarily at fault because it does not have the resources or whatever to produce the information that the defence needs in order to judge whether the accused should enter a plea at the point of the intermediate diet?

Gerard Brown: No. I do not think that you can blame the Crown in a general sense for the fault. The Law Society's criminal law committee has members who practise throughout Scotland. Bill McVicar's experience in Dumfries is different from my experience in Glasgow. Glasgow is a different animal altogether. I do not think that you can blame the Crown—nor would you want to. The Crown is reliant on the information coming from the police, and various timescales are involved. I am simply saying that, if intermediate diets are to be effective, there must be more front loading and

the information must come to the accused and his advisers at an earlier stage.

The Convener: I accept that. Let me retract the word "blame", as it is not a helpful word. Does everybody need to change their systems? You are saying that the Crown should give the defence a summary of the evidence, and the police witness statements need to be available, which is a matter for the police.

Gerard Brown: Yes. It is also up to the solicitors to communicate with the Crown and to encourage the production of information. It is difficult to put matters into context when individual clients do not come to see their lawyers and do not co-operate. That aside, in view of the case of Anderson and the complaints that can be made, professionally, the solicitor must be able to advise properly. That cannot be done routinely without information.

The Convener: Should there be a duty in the bill, similar to the duty under the Bonomy reforms, to try to enforce that approach?

Gerard Brown: Personally, I would prefer a timetable to be laid down in statute, or a protocol—as there is in Bonomy—regarding the timetable and structure for disclosure.

The Convener: When we questioned the Procurators Fiscal Society on this point, it seemed that a distinction between the Bonomy reforms and the reforms in the bill is the fact that, in the bill, we are dealing with the bread and butter, if you like—the volume of cases. Do you accept that that might be a barrier to introducing similar provisions?

Gerard Brown: Yes, I accept and am sympathetic to your point. I am delighted with and complimentary about the way in which the Crown has addressed disclosure in solemn cases. That has been essential to the way in which the system is working and progressing. Now, a similar change is required in the summary system. How that system is adapted, subject to manpower and resources, is not for me to say.

Mr McFee: The Procurators Fiscal Society was very nice about it and did not point the finger in any particular direction; however, I have a bit of a problem with the concept that everybody is responsible. In my experience, when everybody is responsible, naebody is responsible at the end of the day and nothing actually happens.

You say that you have a problem with proper and early disclosure by the Crown. That clearly puts the Procurator Fiscal Service in the frame. The police may be in the frame as well, if they are not providing the information timeously. In your experience, is the problem the late availability of the evidence from the police, or is it tardiness—for want of a better word—or overwork in the procurator fiscal's office? We keep hearing about the situation in Glasgow. Can you tell us in which areas there is a particular problem? Is it down to any other factors in those areas? Has it just become accepted in Glasgow that intermediate diets are a waste of time and end up with a guilty plea being submitted five minutes before the court convenes? Is there an attitude problem? This is a very long question—it is even longer than your speech. How much of the problem is down to the tardiness of some members of the Law Society?

Gerard Brown: This discussion is not about blame; it is about rectifying the system. The problem is also down to the tardiness of solicitors and their not being more proactive. People who operate in the High Court are more proactive because they have to be. There is a preliminary hearing at which they have to answer for what they have done, and so on; however, that structure does not apply across the board in the sheriff courts.

I will say something about what is happening in practice in Glasgow—others can speak about what is happening in other areas. There is a huge volume of business in Glasgow, and in summary proceedings, it is difficult to have disclosure across the board by the time of the intermediate diet. Cases are routinely being adjourned at the intermediate and trial diet stages because there is no list of witnesses, summary of evidence or statements. I do not know what causes that, but things must change in order to make the bill work and make intermediate diets what they were intended to be when they were introduced. Things must certainly change in Glasgow in the light of the volume of the business there.

William McVicar: There is a problem with disclosure in Dumfries, where I practise. Obviously, the court in Dumfries is much smaller and deals with a relatively small number of cases, but we still do not have disclosure when we come to intermediate diets. Even when disclosure happens, we may not have the full information. A police witness statement might say that the accused was interviewed on tape, but there might be no tape or transcript of the interview and we might have no idea of what the accused said. Even when there is disclosure, such things cause delays.

New technology causes problems. Much is made of the closed-circuit television system in Dumfries town centre, and videos and footage from it are regularly played in court, but there are problems with getting information from the system into a format that people can look at in court. We are trying to address that problem with the fiscal's assistance. That is one example of the problems over which our control is limited.

If you are looking for anyone to blame—

Mr McFee: I am not looking for anybody to blame—I am trying to find out who must change to make the system work.

William McVicar: I appreciate that. However, I should say that I do not think that anyone is to blame. The problem is that the system does not work at the moment. The answer to the problem lies in the defence and the Crown communicating more, but it seems to me that the Crown must come up with information in the first place. I do not see a problem with the Crown disclosing the summary from the police along with the complaint, as Gerry Brown said, provided that appropriate steps are taken to remove confidential information.

Mr McFee: So, in effect, you are saying that the Crown must up its game.

Gerard Sinclair (Law Society of Scotland): That is not necessarily what we are saying. We are talking about systemic failures, to be fair. A logistical problem has been imposed on all parties to some extent by the decisions in the cases of Holland v HMA and Sinclair v HMA, which require the Crown to make fuller disclosure in summary cases.

We sympathise with the position that the Procurators Fiscal Society representatives identified. We are talking about 95 per cent or so of criminal business in Scotland and therefore the logistics that are involved in dealing with the problem are great. The solution in any front-loading system may be to put additional resources in at the front. However, there will be resource implications—which I am sure the Crown will be happy to identify and tell the committee about—if we are talking about the Crown having to assess hundreds of thousands of cases per annum, having to decide what, if anything, can be disclosed at the outset, and having to reach decisions on those cases.

Likewise, if sheriffs in Glasgow sheriff court have before them a case load of 50 or 60 intermediate diet cases that they know they must get through in a morning, it is clear that they will be unable to be as proactive in dealing with them and investigating the manner of disclosure as they might be if they worked in Hamilton or Airdrie sheriff court, where a sheriff might have five or 10 cases. The obvious and simple solution in Glasgow is to ensure that there are only five or 10 cases before each sheriff at the intermediate diet, but I do not have to tell members the financial implications of such an approach. The question is whether increased costs or expenses at that stage would lead to a reduction in costs in the kind of cases that Mr Pringle identified—cases that are proceeding to trial in which a plea is intimated in the morning and police officers, medical experts and defence and Crown witnesses are inconvenienced by and put to the expense of going to court.

That is why we think that the proposals are, to some extent, premature. As Gerry Brown indicated, pilot tests are going on. As we have not seen the results as yet, we cannot decide which of the various proposals will produce the best results. Until we see the results of the pilots, our view remains that the bill's proposals on intermediate diets will not make a major difference.

The proposals do not address any of the matters that were raised in the McInnes report, including the agreement of evidence and the ways in which non-contentious issues can be dealt with. The proposals in the bill are very similar to the existing legislation on intermediate diets. We will see a sea change in attitude only if we address the implementation of policy.

12:15

The Convener: How is the Crown dealing with the decisions in the Holland v HMA and Sinclair v HMA cases?

Gerard Brown: It accepts that there should be disclosure and has said that the information and statements that it has in its papers will be disclosed, but often those are not there. A procurator fiscal depute can have a pile of papers in which there is a summary of the evidence in an incident that happened a number of months ago and yet the statements that have been requested are not there.

The Convener: Police statements?

Gerard Brown: Yes; the statements from witnesses, including police witnesses. That is the practical position to date.

Mike Pringle: How will the proposals in the bill affect legal aid?

Gerard Brown: There may be an impact in that regard. If decisions are to be given in writing, and if we are to have more bail appeals, I suspect that it will have an impact. The presence of the accused may be required at bail appeals, either in court or via a videolink; any conditions of bail may have to be agreed.

On the general changes to the legal aid structure, the Law Society's view is that, if we are to have front loading, legal aid should also be front loaded. However, I am cautious about saying anything about that until I know what the structure will be. Any change to legal aid provision will have to take account of the geographical variations and the varied nature of practices across Scotland. Practices differ from Dumfries to Oban and from Glasgow to Aberdeen. That is why I suggested earlier that, if there is to be disclosure, a consistent approach will need to be taken across the country. In my view, that is the trigger that will

allow a legal aid system to be developed on the back of these changes.

The Convener: I know that the legal aid issue is important to speeding up the system. We must ensure that it kicks in where it should kick in. Bonomy himself was clear about the need to reform legal aid so that it fits into our present system. However, as we are still dealing with statutory instruments on legal aid, we know that the issue has not been resolved. I am concerned that, when the committee agreed to the Bonomy reforms, the need for change was generally accepted. Certainly, I accepted it—I think that Stewart Stevenson is the only other member of the present committee who was on the committee at the time. I am concerned that the Scottish Legal Aid Board is still dragging behind on the promises that it made to resolve the situation. I guess that you are watching the situation too.

We have experience of Bonomy, and it worries me that substantial changes that will impact further on legal aid are being proposed although we have not resolved the existing legal aid issues. Is it fair to say that if we resolved the legal aid issues that Bonomy saw, we might have some faith that we could resolve the issues raised by the Criminal Proceedings etc (Reform) (Scotland) Bill?

Gerard Brown: The systemic change has to be put into place. My view is that solicitors have made Bonomy work in a big way. They have bought into the reforms. Unfortunately—although I do not think that it is the Scottish Legal Aid Board's responsibility—solicitors have been promised an increase in fees, but that increase has been rejected by the paymasters. The system has changed and the fees have to reflect that. A solicitor today is paid the same for preparing a solemn case as he was paid 14 years ago. That is unsustainable.

The important thing about the new changes, which are totally separate, is that, if the structure changes, legal aid must accommodate that structure and give fair and reasonable remuneration for the work required. The legal aid system cannot be changed before we have the new changes, because we do not know what the system will be like.

The Convener: If we change the system, we need to know that the appropriate reforms will follow.

Gerard Brown: Yes. You have to know the structure and then say, "We'll put an extra fee here and an extra fee there to accommodate the structure."

The Convener: We move now to a subject on which you had a lot to say in your submission.

Mr McFee: This is on the question of a trial when the accused is not present—it may give the witnesses an opportunity to get something else off their chest. They will be aware of the concerns expressed—mostly by them—about proceeding to a trial in the absence of the accused.

Gerard Sinclair: You will be pleased to know that I will deal with that, and I hope that it will not take me long to get matters off my chest.

The Law Society of Scotland's position on trials in absence is, I hope, succinctly put in our submission. I do not want simply to repeat that to the committee today, but I will say this—on this matter and others. We prefaced our written submission by saying that the changes to the summary justice system must be made in such a way as to make the system more efficient and effective—that is a given—but two other principles must also apply: the system must be certain and predictable—which applies both to the accused and to witnesses; and the system must be just and fair to all parties.

One of our main objections to the idea of trial in absence is that we perceive a number of possible difficulties with the system that would make it not just and not fair. I will give an example that relates to fairness to the accused. In the trial process, there must often be a trial within a trial to decide on the admissibility of certain evidence. When there is a drugs charge, there may be some dispute over whether the drugs were found legitimately by police officers, and there may be a trial within a trial to consider that. In such a trial within a trial, it is almost inevitable that the accused will be expected to give evidence and to give his or her position on how certain items were recovered by police officers. If a trial in absence took place, that would not be possible.

Mr McFee: I accept that such trials within a trial happen, but if that is so, perhaps a wee bit of emphasis should be placed on the accused turning up. Do you accept that if the accused simply does not turn up at the trial, that can bring the whole system into disrepute?

Gerard Sinclair: Very much so.

Mr McFee: Given your zeal for defending the right of the accused in all circumstances, should not the accused reciprocate by turning up on occasion?

Gerard Sinclair: In fairness, I was going to talk about the rights of others. You talk about encouraging people to turn up. The encouragement to turn up is in other aspects of the bill and would already exist if it were properly enforced. The bill will extend the sentences for people who fail to turn up for trial, who in most cases would breach bail, from three months to 12 months on summary conviction and from two years to five years in solemn proceedings. If that were properly enforced, that would be a fine incentive for people to turn up for trial.

I know from experience that trials in absence in the limited form that they take at present are used rarely. If we have a section in a new bill to extend that power, but everyone's general view is that the power would be used rarely, it will not be an effective deterrent.

Mr McFee: We have heard evidence that one problem is that in many circumstances breach of bail conditions does not even incur a sentence, because it is a waste of time to give a three-month sentence to run concurrently with another three-month sentence. Will that situation continue?

Gerard Sinclair: Is that not a problem with the system? The three-month sentence should not be made to run concurrently with the other three-month sentence; the sentences should run consecutively. The point is that the powers and the sentences must be used properly if they are to have any effect.

Mr McFee: Is it the Law Society of Scotland's position that if somebody is found guilty, a sentence for breaching bail conditions should run consecutively to other sentences?

Gerard Sinclair: That depends on the circumstances. I am saying that the trial in absence is not an answer to the problem. As we all know, we are talking about people who lead chaotic and peripatetic lifestyles. The difficulty is that having trials in absence abdicates responsibility for bringing people to justice.

We have not considered the victim. Someone who has been assaulted may well want to see the accused buy into the justice process. They may want to see them engaged in having to go to court and proceed to a trial. Why should the victim have to turn up to give evidence against someone who has not taken the trouble to get out of their bed that day? All such issues in relation to trials in absence must be addressed.

Mr McFee: Why should the victim have to turn up time and again because the accused cannot be bothered to get out of their bed?

If trial in absence is not the answer to the problem, I am interested in your alternative. Do you have anything else to suggest?

Gerard Sinclair: As opposed to trial in absence?

Mr McFee: You said that the compulsion to turn up was in effect in other legislation and we discussed whether a breach of bail conditions should result in a sentence that runs concurrently or consecutively. Is anything else a reasonable alternative to trial in absence, given that we are probably talking about a small number of cases?

Gerard Sinclair: The imposition of bail conditions can very much deter people from not turning up. If they know that the almost inevitable consequence of not turning up will be that, when they are apprehended, they will be detained in custody until the earliest time that a trial can take place, that is a much greater incentive to turn up than knowing that if they do not turn up, the trial may proceed in their absence. The accused is not inconvenienced if the trial proceeds in their absence.

As the explanatory notes to the bill say, the problem with a trial in absence is that a custodial sentence cannot be imposed until the accused is brought to court. The difficulty with that is that a victim might be concerned that a sheriff will be more likely not to impose a custodial sentence, to ensure that the matter is dealt with, although a custodial sentence might be merited and justified.

12:30

Mr McFee: So your view—or the Law Society's view—is that if an accused does not turn up for trial, that individual should immediately be taken into custody and retained in custody until the trial.

Gerard Sinclair: It is the Law Society's view that if someone does not turn up for trial, they should be suitably punished unless a reasonable explanation is given. As I said to you, their absence could be due to lack of information or a chaotic lifestyle. We really must deal with each case on its merits, but the answer is not to proceed with the trial in the accused's absence. That would be using a sledgehammer to crack a nut.

Gerard Brown: I will give a simple example. The other day, I was to appear for someone who had a common name, such as Smith or Brown. He did not turn up, and we found him later at a different court. He had been sent there instead of another Smith.

The question was about the alternative to trial in absence. It would be to have the first pleading diet and the trial diet closer together rather than months apart. If an accused pleads not guilty today in Glasgow, which is always exceptionally busy, his trial will be in the middle of October because of the volume of business. It is to be hoped that the bill's provisions will reduce that volume, so that a plea of not guilty today results in a trial being fixed for 14 June, let us say. That would alleviate the risk of the accused saying that they forgot the date or that something happened or of them moving address.

Question 2 of the Sentencing Commission's consultation paper on bail asked:

"What steps do you consider could be taken to ensure that those granted bail appear in court when required to do so?"

The first sentence of our response to that question said:

"The consultation document refers to the fact that there is a proportion of accused persons who fail to attend court whilst on bail, not due to wilful disregard of the court process, but rather as a result of their chaotic lifestyles."

If we have a structured bail system with supervised bail, which is referred to later on in the Sentencing Commission's consultation paper and our response, we can engage people and, as Bill McVicar said—I will elaborate briefly on his comments—make the bail structure such that we deal with their chaotic lifestyles. If an accused is an alcoholic or a drug addict, what is wrong with putting him on bail on condition that he attends some counselling or rehabilitation? If he comes to court at a later stage and pleads guilty to one of two charges, he can show the sheriff that he has completed counselling, is now drug free or has reduced his alcohol intake. We should make bail conditions proactive.

Mr McFee: I agree with you on that, but we have received evidence from a couple of current pilots that suggests that it is difficult to get that early intervention, even in the pilot areas. I suspect that you are describing something that should happen but, to be frank, does not exist at the moment.

Mrs Mulligan: I will ask about penalties. On the appropriate use of alternatives to prosecution, the bill proposes to give procurators fiscal greater powers by increasing the range of alternatives to prosecution. Are you confident that fiscals will have sufficient information to take the decisions that they will be asked to take?

Gerard Sinclair: As we explain in our written submission, we have a number of concerns about the extension of those powers. One is whether the Crown Office and Procurator Fiscal Service will have the necessary and relevant information to enable procurators fiscal to take decisions in what I assume will be relatively weighty matters. Considering that the bill will allow fiscal fines of up to £500 and that the average sheriff court fine is just over £300, the extension of powers potentially covers a very wide range of criminality.

Although a fiscal may well have been provided with a summary of information by the police, it is highly unlikely that any mitigatory factors will have been placed before them. Another concern is that the natural logistics of such situations mean that it may take several weeks for a report to get from the relevant police office to the relevant fiscal's department. It may then be another few weeks before the fiscal gets to that case and makes their assessment.

We have identified that the people who are likely to be considered for fiscal fines lead chaotic, peripatetic lifestyles. Although such a person may have been earning X amount of money when they were dealt with by the police, that may not be the case when the fiscal comes to offer a fiscal fine. Although the address to which notification of the fine is sent may have been the address of the accused when they came into contact with the police, that may no longer be the case when the fine is issued. The fact that the bill proposes an opt-out process for fiscal fines means that there is a much greater likelihood that people will be deemed to have accepted such a fine when, in fact, they have no knowledge that an offer has been made.

All those issues give us cause for concern in respect of the two principles that I have mentioned—the certainty and predictability of the process and its justness and fairness. Although the Lord Advocate may well give guidance on which cases merit the imposition of fiscal fines, as Val Bremner of the Procurators Fiscal Society said, the fact that that guidance will not be known to the public at large will take away from the certainty and predictability of the justice system.

Given its proposals on fiscal fines and trials in absence—which I described in one of our internal discussions as justice lite—it seems to me that the bill seeks to achieve efficiency and effectiveness in the justice system by not involving potential offenders in it in any way. They will not suffer the inconvenience of having to worry about answering an offer of a fiscal fine. They will not even have to worry about turning up at trial to answer the allegations that have been made against them.

I have heard it said that being a doctor would be a great job if one had no patients and that being a lawyer would be a great job if one had no clients. It would appear that the aim of running an efficient and effective justice system is to be achieved by having no criminals come to court. I do not think that that is necessarily the way to proceed with summary justice. Such proposals might make the system more efficient and more effective, and perhaps even cheaper, but they will not necessarily answer the public's concern that people should be held accountable for their actions and should be made to answer for them publicly and proactively.

Gerard Brown: I have a wee supplementary to that. I am also concerned about the notice. A person who receives a notice must be able to read it in their language and it must be made crystal clear whether it is a notice of a fiscal fine or of a conviction—I am still confused about what it is—and what implications it might have for disclosure purposes. I know that the chief constable has the power to include details of circumstances, even when there has not been a finding, but for an employer there is a big difference between someone noting a circumstance and accepting

that circumstance. I would say that the latter is more detrimental to the unfortunate prospective employee.

Given that numerous jobs now require disclosure, I am concerned that the proposal for people to have to opt out of the system will endanger more individuals than was the case before, especially in the light of the lack of time that people will have to request that a decision be reviewed—they will have only seven days to do so.

I am sorry—I have been talking too long.

Mr McFee: If I was cynical, I would say that if fewer folk go to court, fewer lawyers eat.

Gerard Brown: That is obvious from looking at us.

Mr McFee: I am saying nothing on that front.

Do you feel that, in trying to speed up the summary element, we may be sacrificing the justice element? Would an opt-in system be far better than an opt-out system, because it would imply acceptance? We will deal with the question of whether it would be a conviction later on, because the answer depends on whom you talk to. Would you say that we are removing the justice element to achieve the summary element?

Gerard Sinclair: I certainly would, and that is a key issue that we have tried to bring out today.

There is a common misconception that the Law Society of Scotland will always consider only the representation of its clients, but there is a bigger picture. If we extend the right to the remedy of a fiscal fine or a fixed penalty to a level of £500—which I think everyone agrees is a substantial sum—a wide range of criminality will be covered, as I said. Will members of the public be happy if someone who is causing trouble in their street or their town is offered what some might regard as the softer option of a fiscal penalty that they do not even need to reply to?

I do not have the statistics for the difficulty that the court system has in recovering penalties that are imposed by the courts, but I suggest that non-payment of fiscal fines will be far more likely if the person has not even been engaged in the process. As I have said, a large proportion of the people who are sent such a letter either will not understand that it is a fine that will be imposed after 28 days if they do not respond, or will not get the letter at the address that they are staying at.

As Gerry Brown said, people will have seven days in which to apply for a review. To be frank, that is a sop. When the 28 days have expired, the clerk will write to the fiscal's office saying whether a payment has been received or not. If no payment has been received, I suspect that it will take a week or so, in the normal post, for a further letter to be sent out to tell the person that they have not started paying. If that is their first notification that they should have started paying, and they want to challenge it, the seven-day period will already have expired.

Mr McFee: I am aware that this is Mary Mulligan's question, but I want to make a brief point. The committee has heard that a person who transgresses for the first time—or is caught transgressing for the first time, which might be more accurate—could be offered a fiscal fine as an alternative to prosecution, to keep them out of the court system. You can surely see the argument for that, especially on an opt-in basis. If people will be kept out of the court system, is there an argument for making the fine more punitive?

William McVicar: The fine should reflect the degree of criminality, should it not?

Mr McFee: I do not know; I am asking you.

William McVicar: Crimes should be dealt with in a consistent way and the fine should reflect the level of criminality. You should not impose a more punitive level of fine just to give somebody the chance of keeping their record clear. That would be an encouragement to them to opt into something that they might not have done. They might not have committed the offence but might just go for the fine for the sake of an easy life.

Gerard Sinclair: The difficulty is that people would be entitled to buy a lack of previous convictions. Those with greater incomes would be more likely to take up that opportunity than others, which would not be fair.

Mr McFee: That is an argument against fiscal fines per se.

12:45

Mrs Mulligan: My questions are being answered in reverse order, but it is helpful to hear how the witnesses feel about the opt-out option.

My initial question was about the increased powers of the procurator fiscal. In answer to that question this morning, the witnesses from the Procurators Fiscal Society said that having the information was crucial to their being able to make an appropriate decision. I asked whether they were concerned about the police's ability to furnish them with the necessary information. Do you have any concerns about that?

Gerard Brown: It is not just about the police; an accused person can simply say to the police, "I'm not telling you that." That is the starting point. Even if the police have a willing participant who gives all the information, including a précis of their income and outgoings, that does not take account

of mitigating factors, as Gerry Sinclair said. The timescale that is involved worries us, as well. If a report is received about an Anne Keenan who has been misbehaving in Livingston and the papers from the fiscal—when they are eventually received—state that, at the time, she was employed by the Law Society, although she is now unemployed, a fiscal fine will be fixed on the basis of out-of-date information. That is wrong and it must be addressed. There could also be a situation involving multiple accused. How would one differentiate between their activities, or would they all be treated the same?

I supported the introduction of fiscal fines when they were introduced, many years ago. They dealt with minor and trivial offences and took a lot of the rubbish out of the system—I use that term advisedly and with the greatest respect. However, we are moving a stage further and talking about fiscal compensation orders of £5,000. I find it difficult to assess human distress when I am advising a client; how can a procurator fiscal make that assessment unless they have exceptionally good training? The issues are not as simple as they first appear.

Mrs Mulligan: Some groups—Scottish Women's Aid, for example—have said that there are some offences for which a fiscal fine would not be appropriate. Do you agree with that?

Gerard Brown: Yes. I think that we say that in our written submission. A fiscal fine might be appropriate for damage to property, where there is avouched damage; however, as Gerry Sinclair said, a fiscal fine is perhaps not the answer when a woman has been assaulted.

Stewart Stevenson: According to the most recent figures that I have, there were more than 6,000 receptions at prison for unpaid fines in the past year. Outstanding court-imposed fines are currently running at £14 million. Does that provide a cautionary context for the use of other financial penalties that might arise from the fiscals?

Gerard Sinclair: That very much puts fiscal fines in context. I assume that those fines were imposed by the court when the accused was present. The accused would have been aware of both the input of the fine and the likely outcome of non-payment; yet, there is still that level of non-payment through myriad circumstances, both personal and otherwise.

We are talking about what I would describe as justice lite—someone getting a letter through the post and not even having to bother to open it, which I suspect will happen in some situations. I know that it was stated this morning that fiscal fines will not be used on a regular basis, but people who are involved in such matters regularly will begin to know what the envelope signifies. They will not even have to open it to find out how lucky or unlucky they have been. I foresee the figure for unpaid fines snowballing and fines not really addressing the issue. In fact, they will provide no form of service to the victim.

The Convener: I note what you say in your submission on the matter, but I ask you to put it on the record. Are you opposed to a fiscal fine being treated as if it were a previous conviction?

Gerard Sinclair: Very much so; for the obvious reason that the matter has not been tested in court. My understanding is that the documentation that is provided with the fines at the moment indicates that the fine is not seen as a conviction. If the measure is to be extended, one would hope that that will be made clearer in the information that will be provided. A clear decision has to be made on whether these processes are seen as convictions. It is not good enough to say that the fine is not seen as a conviction, but also to say that, in any matters that proceed to court, the judge will be made aware of them on a schedule, albeit that that they will be listed in a different section from the list of previous convictions. If the issue is not addressed, the public and the legal profession will be confused about the treatment of these matters.

The Convener: I think that you also made a separate point in your submission about previous convictions being attached to the complaint.

Gerard Sinclair: I am not aware of that.

The Convener: I will see if I can find it.

We move on to questions on justice of the peace courts.

Mike Pringle: I have one or two questions on the subject. A number of witnesses have raised concerns that the provisions in the bill may contribute to a reduction in district, or JP, court business, which could lead to the end of lay courts in some areas. Is that a problem?

William McVicar: Whether cases are sent to the JP court is a matter for the prosecution. When we responded to the proposals in the bill, we expressed the view that a unified judiciary should deal with cases at all levels—whether we call it a district court, sheriff court or whatever. That remains the view of our committee. Nothing that we have seen has changed our view on the matter.

Gerard Brown: Our view is that there will eventually be a unified system. Our response can be found in part 4 of our submission and gives the basis for our argument. As I understand it, the average fine in the sheriff court is £304.72 and the proposal is for fiscal fines to be extended up to £500. The average fine in the district court is far lower. Unless changes are made to the transfer of

business—which, again, would have legal aid implications because of the fixed-fee system—there will be an inevitable impact on the JP courts.

Mike Pringle: Could that lead to the disappearance of JP courts in some areas? Clearly, McInnes suggested initially that JP courts should disappear. However, for very many reasons, it has been decided that they will be retained, one way or another.

Gerard Brown: It would be disappointing if we were to lose them. Arguments were made for and against JP courts and a decision has been made. Local justice is very important as the following example shows. If a number of individuals are annoying people at a bus stop by causing a mess there, local justice can impact on that. Many local fiscals do that, but only in certain jurisdictions. In the big jurisdictions, such as Glasgow, Edinburgh and the larger towns, it is difficult for fiscals to do that. If we are to have JP courts, they have to work; they must be made part of the system.

My only concern on the matter is that, if we are to have a unified court structure, the JPs will have to buy into that by way of training, time, expertise and so on. That is a big commitment for individuals to make.

Mike Pringle: On that point, you say in your submission that there should be

"Proper and focused induction, support and training programmes as well as appraisals".

Do you think that the current training is adequate? Will what the bill proposes be adequate? The bill suggests that a training programme should take three days. Do you think that that will be adequate?

Gerard Brown: No. If JPs are to buy into what is proposed, there must be proper judicial training and technological back-up—for example, access to statistics and case law.

Mike Pringle: And that should be unified across Scotland so that everybody is doing the same.

Gerard Brown: Yes. If it is to be a unified system, it should be one in that sense. I am concerned about section 36 of the bill—sorry to digress briefly—which gives power to ministers to prescribe sentences in JP courts by order. I would prefer such prescription to be included in the legislation, so that it is a matter for the Parliament.

Mike Pringle: That is interesting.

The Convener: We presume that that power would be exercised by statutory instrument after certain issues had been addressed, such as training and standards. If the power were included in the bill, I suppose that that would require the inclusion of a commencement order. Is that what you mean?

Gerard Brown: Yes.

The Convener: The problem is that we would not get to scrutinise the power. Like you, I have reservations about the provision in section 36 because the power to which it refers is, at the end of the day, a sentencing power, and we usually deal with such powers in primary legislation. A commencement order on the provision would not come back to the committee for scrutiny. If the sentencing power was used, would it come in across the board or come in at different times depending on location?

Gerard Brown: It depends on the roll-out of the JP courts. I do not know the timetable for that, although I saw a suggestion of 2017.

The Convener: It is 2014 for Glasgow, which we have had comments on.

Gerard Brown: I look forward to it.

Mike Pringle: Will you not have retired by then?

Gerard Brown: Not on legal aid fees; perhaps on private fees.

My mind has not got round the provision in section 36, but there is something there that I am not happy about. Perhaps I can come back to you on that.

The Convener: Yes, please do.

Mike Pringle: On JPs and JP courts, I was interested in something in your submission. As a justice of the peace, I was often faced with a lawyer not turning up or being late. Whenever I asked why a lawyer was late, I was told that he was appearing in another place. Sometimes a lawyer would come to the court at the beginning of proceedings to say, "Please, can I be heard first, because I have to appear in another place?"

I was interested in your comment that, with a unified system, it might be easier to deal with persistent offenders by bringing up all their cases at one time rather than, for example, having one case in the sheriff court and another in the district court. The suggestion is that both cases would be brought to either the district court or the sheriff court. Do you envisage that being a real prospect?

Gerard Brown: It is intended that we should be able to bring at one time cases that are triable in different jurisdictions. Instead of calling different cases against someone in, for example, Dumfries, Dumbarton and Glasgow, they would be brought to the one jurisdiction. The power is there to do that. It depends on the procurator fiscal identifying the cases and putting them together.

Mike Pringle: Will the fiscals identify such cases?

Gerard Brown: They can and do do it just now. The computer system that they have in place should allow them to put in someone's name and identify everything.

13:00

Mike Pringle: On where fiscals send cases, fiscals obviously represent different areas. Do you think that they lack confidence in JP courts in some areas? Might some fiscals say, "Well, we don't have any confidence in that JP court, so we won't send the case there. We'll make sure that it goes to the sheriff court"? Will the new proposals do away with that problem?

William McVicar: I am not aware of any such difficulty in the area in which I work, which is Dumfries and Galloway. There has never been any suggestion from the fiscals with whom I deal that they have concerns about the district court at all. The cases that are dealt with in the district court where I come from are minor cases indeed. I do not know whether the procurator fiscal would continue to have confidence in the system if such courts were dealing with much more serious matters. I suspect that it rather depends on how the training works out. However, only the Crown can answer on these matters.

In my experience, there is no problem where I come from. I hear stories that there are problems, but they are no more than stories. I do not know what information you have been given from other places.

Mike Pringle: With the proper training that JPs will have to have for the new system to work, is there a possibility that things will move down? For example, currently, a JP can disqualify somebody from driving only for totting up offences, but with greater powers they will be able to disqualify someone directly.

Gerard Brown: I think that that is almost inevitable in view of the panoply of changes that we are talking about, particularly the change in sentencing to up to five years in the sheriff court. That has been working out through the system in the past year or so. For example, major sheriff courts such as the one in Glasgow have six or seven jury trials on some days; before it was four or five. If sentencing powers increase in the summary criminal court, more business will go there, which means that some business will have to be taken out of the sheriff court. The question is what the impact of that will be. My only caveat concerns the impact of fiscal fines and other forms of diversion—for example, the bill refers to work orders. If many cases were diverted, that is where there might be a lacuna in business.

The Convener: That ends our questions. As usual, we have had a thorough and helpful exchange. If the witnesses want to get back to us on any points, particularly if they have further thoughts on how the Executive should deal with the sentencing power issue, we would be happy to receive them. I thank the Law Society of Scotland's three representatives for appearing before the committee to give evidence.

We will deal with the final agenda item in private, as previously agreed. We will simply draw out issues of interest from the report. I promise members that the meeting will be brief, although that is up to them. The next public meeting of the committee will be on Tuesday 30 May, at which we will continue with the Scottish Criminal Record Office inquiry.

13:03

Meeting continued in private until 13:22.

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