JUSTICE 1 COMMITTEE

Wednesday 31 May 2006

Session 2

£5.00

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

CONTENTS

Wednesday 31 May 2006

JUSTICE 1 COMMITTEE
20th 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 GAVE EVIDENCE:

Mrs Elish Angiolini (Solicitor General for Scotland)
Jim Brisbane (Crown Office and Procurator Fiscal Service)
Anne Cairns (Scottish Executive Legal and Parliamentary Services)
Wilma Dickson (Scottish Executive Justice Department)
Hugh Henry (Deputy Minister for Justice)
Scott Pattison (Crown Office and Procurator Fiscal Service)
Noel Rehfisch (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald
Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 6

Scottish Parliament

Justice 1 Committee

Wednesday 31 May 2006

[THE CONVENER *opened the meeting at 9:57*]

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

The Convener (Pauline McNeill): Good morning and welcome to the 20th meeting in 2006 of the Justice 1 Committee. I introduce our adviser, Des McCaffrey, who has been with us for the duration of our consideration of the Criminal Proceedings etc (Reform) (Scotland) Bill, and Frazer McCallum and Graham Ross from the Scottish Parliament information centre. We have received apologies from Mary Mulligan, who cannot be with us for the whole meeting, but might join us later.

I welcome Elish Angiolini QC, the Solicitor General for Scotland, and, from the Crown Office and Procurator Fiscal Service, Scott Pattison, who is known to the committee because he has appeared as a witness before, and Jim Brisbane, the deputy Crown Agent. I also welcome Hugh Henry, the Deputy Minister for Justice, who is accompanied by Wilma Dickson and Noel Rehfisch from the Scottish Executive, who have previously given evidence on the bill.

Stewart Stevenson (Banff and Buchan) (SNP): I will begin by asking some fairly basic questions to set the scene. Part 1 of the bill appears to put into statute the common-law provisions on bail. What does the Executive think that the effect of that will be? Why do it?

The Deputy Minister for Justice (Hugh Henry): It is sometimes difficult for the public to understand why bail decisions are taken, because reasons for granting or refusing bail are not always given. No clear statutory framework for decision making in that regard is set out in Scots law. We want to make two changes, which complement each other. The bill will ensure that the courts give reasons for all bail decisions. It is important that people are confident that they know exactly why a decision has been made. I do not know what members' experience is, but I receive complaints from people who cannot understand why someone has been granted bail, and I think that it is important that reasons are given.

We want to set out in statute law the reasons that are recognised in case law under the European convention on human rights and in Scots common law for the refusal of bail. In a sense, we want to introduce both clarity and consistency and ensure that all courts give reasons. Currently, many do so as a matter of good practice, but it is important that that practice applies everywhere.

I do not think that there is anything in the bill that would undermine the role of the court in taking the final decision, which must remain with the judge. We believe that what we propose would simply lead to greater transparency about the basis of court decision making. It is important that while we ensure the independence of the judiciary, we also ensure that the court system retains public confidence. I think that what the bill proposes will help to achieve that.

10:00

Stewart Stevenson: Thank you. I think that that makes it clear that the aim is to ensure that we all, including newspaper reporters and the general public, understand why certain decisions are made.

Section 2 of the bill seeks to amend sections 24 and 25 of the Criminal Procedure (Scotland) Act 1995, on bail and bail conditions. Section 2(1)(a) will insert the following sentence into section 24 of the 1995 act:

"Whenever the court grants or refuses bail, it shall state its reasons."

That is exactly what you just described. However, although the provision will be made statute law, it does not specify when the court must give its reasons. Your answer to my previous question certainly suggests that you imagine that the sheriff will give reasons orally at the time of a bail decision. Is that what you expect will always happen, or will complex situations require reasons to be given at a later stage?

Hugh Henry: No. Our expectation is that reasons will be given orally at the time, where that is reasonably and practically possible. However, it would be foolish of me to rule out a circumstance in which, because of the complexities to which you alluded, reasons may have to be given in writing at a later date. I would not expect that to be the norm; I would hope that, where possible, that could be avoided and reasons clearly stated in court at the time.

Stewart Stevenson: It is helpful that that is on the record, just to make clear what is intended. Of course, if the giving of reasons was deferred, the process would become more complex and potentially less transparent.

Some witnesses have raised issues in relation to the non-exhaustive list of reasons for refusing bail. Again, I think that it would be useful to have on the record your views as to the benefits and potential

risks of providing a list that is intended to be non-exhaustive. Fears have been expressed that the list might be viewed in practice as being exhaustive and that reasons that are not on the list would be considered to be of lower quality and therefore given less regard.

Hugh Henry: I am not sure that there is anything particularly difficult in what we are considering. I return to my earlier point, which is that we are seeking to improve consistency. Currently, statute law sets down the procedure for dealing with bail issues, but it is largely silent on matters that the court should consider when dealing with a bail application. We may well want to set out a framework, but if we attempted to enshrine in the bill every possible situation in which a court could grant or refuse bail, we would have a list that would be so long that it would be difficult for people to follow. The bigger danger is that we would undoubtedly miss out something that would crop up in the future and which we had not anticipated.

I agree that we must seek to ensure that people understand the system and know why decisions are made, which is why we are encouraging transparency. Equally, however, we need to retain sufficient flexibility to ensure that justice is properly done in the courts as well as being seen to be done.

Stewart Stevenson: Could you give some examples of what

"any other substantial factor which appears to the court to justify keeping the person in custody"

might cover?

Hugh Henry: I am not sure that it would be wise for a minister to start suggesting to the judges the kinds of circumstances that might influence their decisions. A judge may decide, having regard to all the facts of a case, that bail is or is not appropriate, but it would not be proper for me to start suggesting on an ad hoc basis what judges may or may not consider, other than what we specify in legislation.

Stewart Stevenson: I will phrase the question in another way. Your policy position is encapsulated in proposed new section 23C(1)(d) of the 1995 act, which I read to you. When you were establishing that position, what did you have in mind that caused you to put that paragraph in the bill?

Hugh Henry: The Solicitor General for Scotland and Wilma Dickson are eager to help to clarify the matter.

The Solicitor General for Scotland (Mrs Elish Angiolini): The list in proposed new section 23C distils ECHR jurisprudence, which is scattered over a wide number of cases and is therefore difficult to discern not only for a lawyer but for a layperson. Our common law is also listed in that section. As a pragmatic prosecutor, I must say that the list is pretty comprehensive but, in certain exceptional circumstances, there might be other considerations that are not on the list. One possibility is the protection of the accused, which would be a rare consideration. Strasbourg recognises that there may be exceptional circumstances in which factors in addition to those that are listed would have to be taken into account.

Wilma Dickson (Scottish Executive Justice Department): I was going to make the same point. For example, in certain serious terrorism-related cases, the protection of the accused has been recognised as a factor that could count against the granting of bail. The same goes for the prevention of the public disorder that might be caused by someone's release. However, that would be very unusual so, rather than spell things out in great detail, we have introduced the catch-all to ensure that all the possible ECHR factors are covered.

The Convener: I seek clarification. When the bill team gave evidence at the beginning of our stage 1 inquiry, we had an exchange about the status of proposed new section 23C—whether it was a codification of the law or whether it was illustrative. Wilma Dickson explained to the committee that it was illustrative of grounds for refusal, but the explanatory notes to the bill use the word "codify". The committee would like to be clear about that because of the evidence that we have had from the Procurators Fiscal Society, which takes the view that, if grounds for the refusal of bail are missing from the bill, someone will challenge it. Is proposed new section 23C codification or not? If it is not codification, will the Executive amend the explanatory notes so that they are more reflective of what it is trying to achieve?

Wilma Dickson: We picked up that issue in the first evidence-taking session and I wrote to the committee to say that, in proposed new section 23C(1), we are essentially setting out the reasons for refusal of bail that are recognised in ECHR case law. In subsection (2), we set out in a non-exhaustive list some of the considerations that apply. I apologise if the word "codify" implied that the proposed new section covered absolutely everything that could ever be taken into account on bail. Subsection (1) is the ECHR case law boiled down, if you like; subsection (2) is intended to be helpful, as it is a non-exhaustive list that simply groups together the major considerations that are reflected in case law under the ECHR and Scots law as providing grounds for refusal.

Perhaps the Solicitor General might want to come in on this question. The word "codify" might be misleading.

The Convener: We need a clear answer from the Executive that, as you have said, subsection (1) of proposed new section 23C deals with ECHR case law and subsection (2) is a non-exhaustive list. It is important to stress that. The word "codify" implies something different, and I would take the view that the Procurators Fiscal Society is probably right. I want to be clear about this, as we are near the end of stage 1. In case there is any dubiety about what proposed new section 23C(2) means, will someone confirm that it is a non-exhaustive list that is not intended to be a codification of the law?

Hugh Henry: There is no attempt to codify in these provisions. As Wilma Dickson has explained, subsection (2) of the proposed new section is a non-exhaustive list. If there has been some unintended inference given to the notion of codification—

The Convener: It is not an inference. I am referring to the explanatory notes, in which the word "codify" is used. I am sorry, but that is where the confusion lies.

Hugh Henry: That use of "codify" in the explanatory notes was possibly inappropriate. We were seeking to describe a process, but the word clearly has wider implications.

The Solicitor General for Scotland: I suspect, convener, that you take the concept of codification to require a great degree of specification, and that you regard it as exhaustive in itself. There are of course different forms of codification, but it amounts to the distillation in statute of common law, traditional law or the law of practice. The extent to which codification specifies and to which it is exhaustive will depend on the approach that is taken to it.

Proposed new section 23C distils into statute common factors, which are clearly indicated as not being exhaustive in gremio of the statute. The use of codification is itself open to different variations. That is precisely what—

The Convener: Exactly. That is why it is very important to get the minister's comments about this on the record. It is what he says to us today that matters. I am clear that he is telling us that proposed new section 23C(2) is not intended to be any form of codification, but a non-exhaustive list, as outlined by Wilma Dickson.

Hugh Henry: Yes.

The Convener: That is helpful.

Stewart Stevenson: Proposed new section 23C(2) states:

"the court must have regard to all material considerations including (in so far as relevant in the circumstances of the case)"

and the list then follows. Would it be useful to make the drafting more clear, as you have done in proposed new section 23C(1)(d), which contains a catch-all that effectively means "or anything else". The phrase "all material considerations" in proposed new section 23C(2) is a kind of catch-all, but it is not a very explicit one. Might you be minded to consider whether the drafting could be improved?

Hugh Henry: We shall reconsider the matter. If the drafting can be improved, it will be. If your suggestion can strengthen the intention behind the new section, we will seek to incorporate it.

Margaret Mitchell (Central Scotland) (Con): Given the Solicitor General's answer about incorporating into statute what is currently in the common law, is there really any advantage in doing that? Does the common law not have enough flexibility? Under the common law, could it be stipulated that reasons must be given when it is decided that there is a justification for refusing bail?

The Solicitor General for Scotland: There is great advantage in making the law more accessible. Although the common law has great advantages and a certain flexibility attached to it, it should be an objective of the criminal justice system to be more readily understood. With the introduction of the ECHR, 6,000 new cases have been brought into the jurisprudence of Scottish criminal law. The law is therefore not as readily decipherable, and it tends to be characterised in a particular way.

The bill makes it plain that the ECHR embraces common sense. It embraces many of the principles that have been evident in our Scottish common law, and it is compatible with much of it. It gives cognisance to the public interest and to the rights of victims. Without the law being distilled in such a form, there tends to be a vague notion, derived from a variety of cases, that the ECHR is in some way unhelpful. The bill sets out in plain language what the law is, as distilled from the ECHR and our common law.

About 20 years ago, Lord Wheatley set out, in Smith v McCallum, what were clear tests at the time. Those clear tests are not available from our common law at the moment, however. There is no authority that sets out in the pristine form that was available to Lord Wheatley the law on bail. The bill brings the benefit of reintroducing greater certainty and clarity about bail.

Margaret Mitchell: Is it your contention that, previously, something that might not have been ECHR compliant could have been challenged, as was the case soon after the ECHR was directly incorporated into Scots law, but that, now that the

considerations are to be set down in statute, there will be no more problems in that regard?

10:15

The Solicitor General for Scotland: It is not about challenges. Strasbourg case law is very fact specific, so for any decision made by a sheriff, there will always be an opportunity to challenge the judgment and whether it was compatible with the convention. That will depend on the circumstances of the case.

The bill sets out clearly a framework of law for public authorities and the courts, although it is not exhaustive. It will be very useful to the courts as well as to the wider public and victims. It will also be useful to prosecutors. It will explain the law precisely and in a nice, compartmentalised form.

Margaret Mitchell: Time will tell.

Stewart Stevenson: I want to move on to the concerns that were expressed by the Association of Chief Police Officers in Scotland, Victim Support Scotland and Sacro, in relation to whether public safety should be separately identified as a specific reason for refusing bail. For example, a person before the bail court may merely be the person we have managed to get hold of, and may be part of a group of people who threaten public safety. In such circumstances, we might want to stop that person meeting other members of the group—who may not be known to the criminal justice system—and discussing the case with them. That is a specific example, but, in general, could public safety reasonably be added as a specific heading?

Hugh Henry: I am not sure whether adding public safety as a heading would take us further forward. Indeed, it might actually create a hindrance. The very first provision in the bill requires courts to take account of "the public interest" in every case. I would argue that public safety is very much part of the public interest. If we narrow the definition to "public safety", other issues that are in the public interest but do not pertain to public safety could be missed. I understand fully the desire behind the suggestion, but it could have unintended consequences.

The bill sets out clearly the reasons recognised in both Scots law and ECHR case law for the refusal of bail. The ECHR provides for decisions about the rights of individuals to be balanced by considerations of the wider public interest, including public safety. I therefore feel that what we are suggesting gives greater protection to the public and recognises their needs. Narrowing the definition to "public safety", although putting the focus on what is probably a more easily understood phrase, might also narrow the matters that can be considered.

Stewart Stevenson: You are asserting that the term "public interest" encompasses "public safety".

Hugh Henry: Yes, it does—very clearly.

Stewart Stevenson: And goes beyond it.

Hugh Henry: Yes.

Stewart Stevenson: That is fine—although I might test the point again later.

The Solicitor General for Scotland: I want to add a point in relation to the more explicit test in the bill about

"any substantial risk of the person committing further offences".

That is a very explicit public safety test—it has to be the greatest evil that is struck at in relation to bail.

Stewart Stevenson gave a good example, which would be covered by the wording of proposed new section 23C(1)(c)(ii):

"otherwise obstruct the course of justice".

That test would cover the notion that an accused person could tip off other accused people, or assist in covering up evidence, if granted bail.

Stewart Stevenson: I want to talk briefly about witnesses and victims. Do you think that the current arrangements, which the bill might improve, for ensuring that victims and witnesses know what is going on with bail are adequate?

Hugh Henry: We all understand the difficulty that many witnesses experience when they go through a court case. It is a very stressful experience and it is unlikely that we will ever be able to remove that stress completely. However, we take seriously the need to give support to victims and witnesses.

It is a criminal offence to frighten or intimidate a witness. Measures are taken to ensure that witnesses can give their best evidence. I will leave it to the Solicitor General to talk about some of the measures that the Crown Office and Procurator Fiscal Service has taken but I can say that not only have we taken steps to improve the processes in the courts—I recognise fully that there is more that can be done in that regard and that we need to cascade the experience down the court system as far as possible—but we have invested significantly in supporting organisations such as Victim Support Scotland. The core funding that we provide to Victim Support Scotland has risen by 72 per cent to around £3.8 million—there has been a year-on-year rise of 8 per cent. That reflects our determination to give better protection to victims and witnesses. People to whom I have spoken value that service and I commend it to the committee.

Some of the figures that have been quoted are estimates but, nevertheless, I accept that more can be done.

The Solicitor General for Scotland: Stewart Stevenson made a good point about bail. It takes a lot of courage for a witness to give evidence in even an ordinary case. It is a nerve-wracking experience and it is important that information is given to witnesses and victims that will enable them to be confident in the system, particularly with regard to bail.

When we set up the victim information and advice service in the Crown Office and Procurator Fiscal Service, the availability of information was a particular priority. We wanted to identify the most vulnerable witnesses in High Court cases, sheriff and jury cases, cases of domestic violence and so on and ensure that information was given to them about bail within 24 hours of the appearance of the accused in court. That target has been reached in relation to cases that are covered by VIA, which has considerably enhanced the understanding of many victims of what it means when an accused person gets bail. To many members of the public, the granting of bail does not connote anything in particular. However, special conditions can be attached to an accused person's bail, such as a condition that they must not approach a certain town or street or make contact with certain people. It is vital that the victims understand their rights and are aware that, if they see the accused person, they can pick up the phone and the police will arrest the accused person without warrant or corroboration and take them back before the court so that the bail status can be reviewed.

Powerful tools are available and giving the victims information empowers them to use bail to assist themselves if an accused person is in breach of their bail conditions.

Stewart Stevenson: Excuse my ignorance, but is it the court or Victim Support that informs the victim?

The Solicitor General for Scotland: The victims are informed by the victim information and advice service, which is part of the Crown Office and Procurator Fiscal Service.

Stewart Stevenson: Victim Support told the committee that it dealt with 70,000 people in the past year, of whom 3,000—just under 5 per cent—experienced some limited intimidation when they were in court. Have you any corresponding figures about what happens outside the court?

The Solicitor General for Scotland: That is a dark figure, but we are conscious of the difficulties in that regard. Even attending a sheriff court and going through the front door can be a fairly intimidating experience, not only because of the lawyers who you might meet in there but because the witness might see the accused or someone who they think is the accused. It is not necessarily the case that people are there with the intention of intimidating a witness; their presence alone might be intimidating. That is why we have had to become much more creative. We provide stand-by arrangements for vulnerable witnesses, so that they do not have to attend until their evidence is due; we agree evidence, where possible, so that witnesses do not have to come at all; we arrange for routes into the court room that do not take witnesses through the front door; and we provide separate witness accommodation and access to Victim Support and the witness service, which provide reassurance to witnesses and act as a point of contact if they have concerns. Further, the Vulnerable Witnesses (Scotland) Act 2004 enables particularly vulnerable witnesses to give evidence by remote means.

We are conscious of the issue, and reassurance needs to be given to many victims. The reality is that, statistically, not many of them are assaulted or become the subject of crime in relation to intimidation, which is more a fear than the reality for many victims.

Stewart Stevenson: That is very interesting for the committee.

I have a final point on the power for the court to decide whether a person should be remanded in custody even when the prosecution does not oppose bail. It has been suggested that there are instances in which a fiscal does not wish to disclose in public their reasons for not opposing bail. How can that be dealt with?

The Solicitor General for Scotland: At the moment, if there is a significant intelligence-based or operational reason for not having someone remanded in custody, we would say to the sheriff, "M'lord, in this case we are not opposing bail because we have good operational reasons for not opposing it. In these circumstances, the accused should be admitted to bail." The sheriff would not explicitly be given the particular reason, as that would defeat the purpose of our taking that stance.

Sheriffs across Scotland exercise common sense in such circumstances. If a maverick decision was made despite the Crown's strong position, the Crown would ultimately have another remedy: it would appeal the decision or seek a Lord Advocate's liberation at a later stage. However, such decisions would be extremely rare; it is highly unlikely that our sheriffs would behave in that way.

Stewart Stevenson: I will not ask for a list of mavericks, convener.

The Convener: I have put this question to Victim Support Scotland, which represents witnesses. The VIA system also represents

witnesses, but people do not always get that impression from its name. The Executive has done an awful lot of work—as has the Crown Office—in addressing the position of victims in the system. It strikes me that we perhaps need to consider further the profile of witnesses, as distinct from victims. You talked about witnesses coming to court, and there are issues to do with witness expenses. Do you think that we need to do a bit more work on the experience of witnesses, given the fact that a lot of cases rest on the appearance of witnesses?

The Solicitor General for Scotland: You are right. The title of the victim information and advice service suggests that the service is narrowly focused on the victim; however, many people are called victims of crime. A bystander could be extremely traumatised by what they have seen, rather than being a victim of it. That is recognised in the scope of the service, which is also available to witnesses who can be considered vulnerable. The next of kin in a murder case is clearly not the victim, but they are deeply affected by the outcome; therefore, the service is provided to them. It is also provided in sensitive or difficult cases—for example, to the parent of the child victim in a child abuse case, who may also be a witness. Therefore, information is provided to witnesses.

We struggled long and hard with the title. The branding is not the most profound aspect, but it is important that people understand that the service exists. The witness support service is clearly available to all witnesses—both Crown witnesses and defence witnesses—who require that support. VIA, however, provides support to people other than victims. Perhaps we need to go away and think again about how we can ensure that there is an understanding that services are available more widely than simply to victims.

The Convener: Is there any difference in the way in which victims and witnesses are treated by VIA? If someone is a witness, are they treated exactly the same as a victim?

The Solicitor General for Scotland: If they come within the services that are provided by the VIA, they will be treated in the same way.

Marlyn Glen (North East Scotland) (Lab): Let us move on to breaches of bail. The bill seeks to tackle the problem of people breaching bail by, for example, increasing the sentences that courts may impose. What work is being done to tackle the problem by providing more support for people who are on bail?

Wilma Dickson: We said that we would, in the bail and remand action plan, review the services for bail supervision and support that are available in all local authority areas. That work is under way. If that is the kind of thing that you are talking about—complementary bail support mechanisms—they are already available in all local authorities and have been funded centrally.

10:30

Hugh Henry: We are concerned to ensure that adequate support services are available. People breach bail conditions for a range of reasons; sometimes there is a good explanation and sometimes the intention is to thwart the progress of justice. We have to be able to support people who have specific needs, but we must ensure that we identify effectively and bring back to court people who have breached bail because they want to disrupt a trial or do not wish to give evidence for whatever reason. There is a role for the police in that.

Bigger changes to the criminal justice system are under way. We need consistently and continually to review our support services within the community. I hope that some of the changes that we are introducing in the delivery of criminal justice services will begin to have a positive impact.

There needs to be better integration and more joined-up thinking, such as considering whether someone who has breached bail has done so for medical reasons or because they have a drug problem, and whether they need to access treatment services. At times, we still work in too fragmented a way, so we are considering how to promote better joined-up working.

Marlyn Glen: We have heard evidence that there is less reoffending when people who are on bail are supported and supervised. It is important to put a lot of thought—and resources, if necessary—into that part of the system.

Hugh Henry: Substantial resources are already going in. We are committed to improving and expanding the system. However, it is also incumbent on us to ask what we get for the substantial resources that we put in currently and whether we can do better. In recent years, there have been a number of initiatives that are pointing us in the right direction, but I think that we still need to be much more rigorous in examining how we operate.

Marlyn Glen: We have heard various suggestions for ensuring that an accused person who is released on bail understands fully the conditions of bail—so that they do not breach them because they did not understand them in the first place—and knows when to return to court, such as by setting out future court dates on the bail slip. What are you doing to ensure that best practice in this area is applied in all courts?

Hugh Henry: Marlyn Glen is right to suggest that if a person is told when he or she needs to return, they cannot plead ignorance. There are issues of practice and training. It is in everyone's interests to remove the excuse that someone did not know when to appear. Wilma Dickson can provide examples of what we are doing in that respect.

Wilma Dickson: We said in the bail and remand action plan that we would ensure that people are clearer about the date of return and the obligation that they are under. There are different ways of doing that. In Airdrie and Edinburgh sheriff courts, we are piloting the most straightforward option, which is to give the person a card as they leave, which tells them the date of their next appearance and that they must appear or they will be in breach of bail conditions. Other local pilots have experimented with getting in touch with people near the date of their next hearing, which has substantial cost implications. There are different ways of addressing the problem.

One of the fears is that if we draw the date of appearance to the attention of the person as they leave the court, they might simply discard the card. We want to test whether the system works before we roll it out. That does not require legislation. There are different ways of drawing to people's attention the fact that they are obliged to return to the court.

Marlyn Glen: Will you tell us a bit more about costs? It might be worth the up-front cost if people turn up when they should and understand the conditions.

Wilma Dickson: The cost of giving someone a card as they leave is minimal. The West Lothian pilot has experimented with a service that sends a text message or e-mail near the date of the next hearing, which could be more costly. A cost-benefit analysis of that is needed.

Marlyn Glen: Exactly.

Margaret Mitchell: Part 2 of the bill is on proceedings. The McInnes committee identified that intermediate diets have had varied success—sometimes they work well and sometimes they do not. Will you say precisely what you intend to do to ensure that intermediate diets work effectively throughout Scotland?

The Solicitor General for Scotland: The bill contains several measures. The intermediate diet was reintroduced by the 1995 act and presents a tremendous opportunity. It is what the Bonomy reforms are based on, because it provides the ability to deal with miscellaneous matters in an attempt to avoid the trial diet.

The success of the intermediate diet has varied. In the first two or three years of its implementation, the number of disposals from intermediate diets was possibly greater than at present. Much of that relates to the culture, court programming—the number of intermediate diets at a court—as well as on what happens at the intermediate diet and the judge's approach. Judges' approaches to the intermediate diet vary. In some cases, the judge will be extremely proactive, will test both sides' state of preparation and will be reluctant to let the diet go—they will continue the intermediate diet rather than discharge the trial diet, in an effort to deal with matters early. Others might take a less proactive approach.

We seek to achieve the success that we have had in the High Court. Because their Lordships have taken a collegiate approach to preliminary hearings in the High Court, the approach to the diets is consistent. That ensures maximum success and maximum output from the diets.

The prosecution service wants to ensure that more is made of the intermediate diet by taking an aggressive approach to plea negotiation and the availability of solicitors to deal with possible pleas. The bill will provide a basis for considering how we can use the intermediate diet more creatively. I know that one witness talked about a template or form—perhaps to be specified in regulation—in considering how consistent practice in intermediate diets could be achieved across the board.

Margaret Mitchell: The intermediate diet was the key in the Bonomy reforms to speeding up the process. It is the key in the bill, too, yet the reference in section 10 is really all that sets down what you rightly say you want to achieve and what you realise will speed up the summary process. In view of that, should the bill do more to strengthen the judicial approach and to ensure that when the prosecution and the defence come to the intermediate diet, they are fully prepared or have a very good reason not to be?

Hugh Henry: We will consider further some of the issues that relate to the intermediate diet. The bill might need to be amended or it might be possible to do something through an act of adjournal. The Solicitor General set out clearly some of the benefits that will accrue from the changes that we propose, but if we can do something to clarify the matter, we will do it. We will reflect on that. Officials have written to the committee on that point.

The Solicitor General for Scotland: Perhaps the deputy Crown Agent could add comments.

Jim Brisbane (Crown Office and Procurator Fiscal Service): It is important to realise that the intermediate diet is just one stage in the process. The response that our department is producing

jointly with the police to prepare the prosecution side concerns the overall picture.

Part of the difficulty with the summary position is that many cases are at the intermediate diet stage. Our analysis suggests that about 90 per cent of cases that are set down for trial do not go to trial. Therefore, part of the difficulty is in knowing whether cases will get that far. Drawing on the lessons from the Bonomy reforms, one of the reasons why cases can be disposed of at preliminary hearings in the High Court is because of much better preparation all round. The ethos of Bonomy was that parties should come prepared to the preliminary hearing.

The work that we have been doing with the police that stretches back into last year has been done with a view to ensuring that the Crown does all that it can not only to secure our desk preparation but to facilitate defence preparation from the earliest possible stage. We are doing a lot of work on that and on disclosure in particular so that there is potential for the programming of court business to be relieved by facilitating earlier disposal of cases. We need to conclude that work, but we have been working with the police for some time to put in place a series of business rules that will allow us to come to the court at various stages and say, "We've done all we are required to do", and to give the court the confidence that the Crown and the police are supporting any change in culture by doing all that we need to do.

Additionally, we will need to make ourselves more available to discuss pleas, for example. We realise that that has been a weakness. The conversations that we have about guilty pleas take place much too late in the process. The defence and the prosecution often have a sense of what can be resolved. Lord Bonomy highlighted that concern when he analysed the position in the High Court and said that the challenge is to ensure that cases that are sent down for trial are genuinely would-be trials.

We have reflected on the matter and are prepared to commit to much earlier disclosure of information about the cases in the summary world and, in particular, to provide a summary in time for the pleading diet so that the defence can take instructions on a much fuller basis than it can at the moment. All that might help to shape the route of a case from the earliest stages.

In respect of cases that go on to trial, we need to ensure that the material that the defence needs for the purposes of the trial—such as statements, copy productions, video tapes and access to lawyers to discuss pleas—are fully available. That would take the pressure off the system and allow intermediate diets to be much more focused than they are at present when the courts are heavily loaded and the time that is required to focus down on what is required to manage the business is that much greater.

Margaret Mitchell: You said that the intermediate diet is just one stage in the process, but I suggest that it is a key stage rather than one that is equal to any other.

The McInnes committee reflected that the intermediate diet sometimes works very well. You identified that one reason why it might work well in other courts is because fiscals make themselves available—I think that it is between 10 and 12 in the morning when defence agents can go to the fiscal to say in advance how the accused will plead. Their doing so would mean that everything was organised before parties ever got near the court, as opposed to—as you say is currently the case—there being a hurried conversation in front of the justice or sheriff about the plea. Have you done any analysis of why the intermediate diets work well in some courts, apart from when the fiscals make themselves available?

Jim Brisbane: We are examining the situation comprehensively. I said that undue focus is placed on the intermediate diet because 90 per cent of cases still reach that stage. That is why we think—as Bonomy did—that the biggest challenge is to stop cases being sent down for trial at all if we can avoid it, because of the cases in which we cite witnesses who are ultimately not required, and all the necessary work that goes with that. I agree that if cases are to go to trial, the changes are absolutely critical to ensure that the appropriate witnesses are there.

The Convener: That is the provision with which I am struggling. When we considered the Bonomy report, it was clear that the minds of the Crown and the defence were focused on putting the mechanism in the bill. We all agree that the Criminal Proceedings etc (Reform) (Scotland) Bill is about trying to get parties to focus their minds. There is also an issue about making information available before a determination is made. We are having difficulty understanding why we legislated for the Bonomy reforms but are not legislating in this case. Can you explain that?

10:45

Jim Brisbane: In many ways, the two systems are different. In the High Court, there are only 1,000 cases a year. The summary court system is much larger.

The Convener: Is the reason for the difference simply volume? Are you saying that we could not deliver the measures if they were put into legislation?

Jim Brisbane: Volume is not the only reason, but it is one aspect. Many summary court cases

can be dealt with very simply, without the complexity of the arrangements that were put in place by the Bonomy legislation. The legislation has worked because a tremendous amount of work has to be put into every case. Before every hearing in the High Court—unless there is a guilty plea in advance—there must be an exchange of information and completion of a written record. A very large percentage of summary court cases are disposed of at the first diet by a letter plea of guilty or a personal appearance. It would be wrong to add unnecessary process to that, but we need to examine whether we are doing all that we can to ensure that the process is managed at intermediate diet stage.

The Convener: I would like the Executive and the Crown Office to think about the issue. I am struggling to understand why there are no provisions in the bill relating to it. As I have said to other witnesses, I wonder why we are putting resources that could be used elsewhere into intermediate diets, if they continue to be ineffective.

The Solicitor General for Scotland: In solemn proceedings, there is no pleading diet as such. The introduction of the preliminary diet was crucial because it provided an opportunity to focus issues before the trial. In summary procedure, there is a pleading diet. Although I agree with Margaret Mitchell about the intermediate diet, I reinforce what the deputy Crown Agent said. In summary cases, we should really focus not on the intermediate diet but on the pleading diet.

The Convener: Should we do away with the intermediate diet?

The Solicitor General for Scotland: Why are the 90 per cent of cases that do not go to trial tying up resources of the prosecution service and the courts in preparing for trials that will never take place? The issue is not simply the intermediate diet, on which a lot of work has been done, but how we incentivise the system so that cases in which the solicitor is satisfied with the Crown case and people know that they are guilty can be dealt with at the earliest possible stage. The deputy Crown Agent is suggesting that the prosecution service may be able to accelerate the process by providing a summary of the Crown case with a complaint, so that when the accused gets his charge, he and his solicitor know what the evidence against him is and minds can be focused earlier. We want to pull the whole system back so that all the resources that are currently tied up in doing X, Y and Z can be focused more significantly on cases that are truly going to trial, which will ensure better preparation. Intermediate diets will then be much more productive than they are; at the moment, they are clogged up with several cases that will never go to trial.

The Convener: I do not disagree, but you are asking us to take on trust that the steps that you have outlined will be taken. The question is whether, the measures should, like the Bonomy reforms, be included in legislation.

Hugh Henry: Essentially, we are talking about two different systems. The summary system deals with 96 per cent or more of all cases. The Bonomy reforms related to a very small number of cases, so it was possible at an early stage to be much more prescriptive in setting out a detailed model. We are working on the model that we think will develop. We hope that at stage 2 we will be able to show the committee how the system will work. I am not persuaded that dealing with the issue in the bill would necessarily address the committee's concerns.

Margaret Mitchell: Given what the Solicitor General has said, might it be helpful to have early and more consistent disclosure of prosecution cases so that witness statements and summaries of prosecution cases were routinely attached?

The Solicitor General for Scotland: That is what I suggested. A group, of which the deputy Crown Agent is a member, and the Association of Chief Police Officers in Scotland are actively considering an approach in which the accused will be served with a copy of the summary of the case when he first finds out about the prosecution. Instead of simply being told, "You, Jimmy Smith, did on 10 May on Argyle Street assault Joe Bloggs to his severe injury", the accused will also receive copies of the evidence of, say, the two police officers and three civilians who witnessed the assault, an indication of the process of identification, the time of day and so on. If the material points on which the prosecution decides on such cases are shared with the accused and the defence solicitor early on, that will create a sea change and will allow that knowledge to be disclosed earlier.

Margaret Mitchell: Should the provision be in the bill to firm up matters and make it clear what is expected?

The Solicitor General for Scotland: There is no reason why it should not be in the bill, but I do not think that it has to be. One of the real success stories of the Bonomy reforms was that even before the legislation was passed the Crown had set about changing its practices on disclosures. The procedures and practices that we intend to adopt indicate our willingness to accelerate the process.

Margaret Mitchell: That might well be the theory; however, in practice, such aims might not be achieved because of certain pressures. For example, I know from my time on the district court bench that fiscals regularly grabbed cases just as

they were walking into court and began without even looking at the details. If the provision that we are discussing were in the bill, that could not happen. Fiscals would have to be prepared and resources would have to be made available to ensure that the manpower was in place to deal with matters.

Jim Brisbane: As the Solicitor General has said, the Bonomy reforms proceeded on the basis of the Crown's commitment in a published statement on what it intended to deliver with regard to disclosure. That statement went far beyond what Lord Bonomy asked for. He acknowledged the difficulties of legislating on the complex area of disclosure, which—as he predicted—would become a process in itself.

The Crown has received appropriate recognition for its work on this matter. Indeed, the Law Society said as much last week. We are more than happy to confirm to the committee that our intention is to disclose a copy of the summary of the case with the complaint. That is not a matter of making additional resources available; it is a change in practice. Except for additional pilot cases, this has never been done before.

The change will involve a substantial change in how the police report cases to us, because they will have to deliver them to us in a form that is suitable for disclosure. They had to make similar changes to police statements ahead of the Bonomy reforms. Confidential material, such as a witness's personal background and contact details, will be included only in the appropriate place in the police report. That approach will give the defence the same information that the Crown has when it decides whether to prosecute. That represents a sea change; the Crown and the police are committed to delivering it when summary justice reform is fully implemented.

The Solicitor General for Scotland: The bill should not legislate on disclosure in a piecemeal fashion. Given the decisions that are made in the Court of Appeal and by the Judicial Committee of the Privy Council, disclosure is a very live and dynamic issue that we want to consider comprehensively and to legislate on fully, rather than just in the context of the bill.

Margaret Mitchell: If we are seeking to speed up the summary justice process, surely we should try to tighten up procedures even at the margins, which could, after all, make a difference. When committee members—including the convener, Marlyn Glen and me—considered the Bonomy legislation, we spent a lot of time pushing early disclosure at the pre-meeting to ensure that everyone was ready when the case went to court. We are delighted to hear anecdotally that that reform has speeded up the system, which shows that we were right to press hard on the issue. The same is true for pleadings and intermediate diets.

The Solicitor General for Scotland: I hope that the fact that we did what we said we would do and the fact that the evidence exists that the measures are working well satisfies you that, when we say that we will disclose the summaries, we will do so. We will make a public statement to that effect and there may be a protocol with the police. However, disclosure is a highly complex area of law; if we legislate on it, we need to do so systematically rather than piecemeal.

The Convener: I agree with the Solicitor General that it is not appropriate to legislate on disclosure in the bill, but I am interested in a mechanism to increase the robustness of the summary justice system. I am of the view that the biggest challenge remains the challenge for the Crown to deliver—that is where the heaviest burden lies. I acknowledge the Crown's role in making the Bonomy reforms work and I hope that the work that has gone into that is acknowledged. However, I am worried in relation to the bill. I know that the deputy Crown Agent, Jim Brisbane, said that you will not necessarily need more resources to deliver the disclosure proposals, but I struggle to understand why. Is that your position?

The Solicitor General for Scotland: The disclosure measures are an information technology fix. IT has enabled our department to deliver a significant proportion of the Bonomy reforms without the additional labour that would otherwise have been required. Thankfully, the IT systems that we have put in place give us the opportunity to do all sorts of different activities without additional labour.

The Convener: Yes, but human beings still have to prepare the information for the IT systems.

The Solicitor General for Scotland: As the deputy Crown Agent said, the trick is to ensure that the raw product—the police report—is configured so that it can be disclosed readily without alteration.

The Convener: What if it is not ready? People will have to prepare the information so that it is available within the required timescale.

The Solicitor General for Scotland: The deputy Crown Agent can tell you about the work that has gone into ensuring that, as far as possible, the information will be received in a ready state.

Jim Brisbane: It would be appropriate to offer the committee reassurance on the matter. The committee heard recently from Assistant Chief Constable Smith and Chief Constable Strang. One of the most significant developments in our work in the past year or so has been the fact that the

Association of Chief Police Officers in Scotland has set up a criminal justice business area. The two gentlemen that I mentioned have played a huge part in enabling us to work closely with all eight Scottish police forces and the Scottish Drug Enforcement Agency to consider how to align our business to ensure that information is available. That work started last year. One of my colleagues who is present today has, with a senior officer from Strathclyde police, led work to ensure that the police sign up to the timescales for the delivery of the material. We have never before had business roles of such a depth and patent nature.

With the Bonomy reforms, the Crown had to do a lot of extra work but, ultimately, savings have resulted because we do not have to set down cases three or four times for trial and do the extra preparation work. Furthermore, as a result of the measures on pleas, we no longer have to deal with so many cases. The number of cases that are dealt with under the accelerated procedure has risen from 60-odd to 160. If we get the focus right on the early delivery of information, we will take out—we hope—a large percentage of the 90 per cent of cases that we set down for trial, so we will not have to prepare for trials, cite witnesses, take police officers off the street and take civilians to court. That is where the true savings will lie. We hope that we will be able to deploy our resources much more effectively.

We are taking a proactive role. In the next couple of months, we will publish a practice statement, to which the committee will doubtless have access, that sets out precisely how we will deliver on the issue jointly with the police.

Hugh Henry: Wilma Dickson has a point, convener.

Wilma Dickson: It is the same point. As with the Bonomy reforms, the aim is to save by investing up front to reduce wasted effort at the back end. Churn is one of the big factors in the system. We are trying to eliminate the churn, which will save money.

The Convener: So your position is that there would be no requirement for additional resources and staffing at the early stages. There would be no additional impact on staff.

11:00

Jim Brisbane: We hope that by the middle of next year we will have introduced an IT change that will make the process much more straightforward. As the committee will be aware, our reports come in electronically now. It will be possible to extract from the system a suitable form of summary to send out with the complaint. That is what we are committed to doing.

Margaret Mitchell: From what we have heard in evidence, there does not seem to be a problem with the police keeping to their various deadlines and producing the material that they have to produce. Where are those discussions going? If there is no problem at present, will there be a huge improvement?

Jim Brisbane: There has been a problem. I would be surprised if the police did not acknowledge that, because it is part of the work that they are doing with us. On many occasions, we come to intermediate diets and find that the statements have not been delivered or that other material is not available. We want to move away from that position. As Wilma Dickson said, we are working on a system model that will build in the timescales that the police are agreeing to for the delivery of statements. The disclosure practice statement that we will make does not just relate to the summary; it will also commit to disclosing material in statements in cases that proceed to trial.

Margaret Mitchell: Sheriff Principal McInnes told the committee that someone gets a legal aid premium only if they plead not guilty; therefore, there is no incentive for the accused to plead guilty at an early stage. With that in mind, how could reform of legal aid improve summary justice?

Hugh Henry: That is something that we need to consider. It would be unfortunate, to say the least, if guilty pleas were delayed simply to maximise the income of lawyers. I am sure that that does not happen; I am sure that lawyers act objectively and professionally. However, to avoid any undue temptation, it is probably incumbent on us to consider how we can provide incentives for earlier pleas, so that people are rewarded for the work that it is done at an early stage and there is no need to prolong a case unnecessarily. We should not require primary legislation to do that; it could be done through changes to the regulations. We will remain in contact with the committee as that progresses.

Margaret Mitchell: Sheriff Principal McInnes's suggestion was that for someone to get—and continue to get—the best legal advice, they almost have to plead not guilty right up to the trial. By providing an incentive early on, it is hoped that legal advice would be there at the beginning and that that might facilitate an earlier plea.

Hugh Henry: I think that is what I said, so I am happy to confirm that.

Margaret Mitchell: The difference was the suggestion that the lawyers or solicitors might be at it.

Hugh Henry: You may well say that; I certainly did not.

Margaret Mitchell: You could not possibly comment.

The Solicitor General for Scotland: I started as a prosecutor when I was very young. One phenomenon that we now face is that of drugs and drug addiction. It bolts on to the system. It may be bizarre for a prosecutor to defend defence lawyers, but people now have chaotic lifestyles and, in fairness, many solicitors have difficulty getting instruction from their clients at an early stage. The legal aid aspect is a significant factor in ensuring that there are not perverse incentives for prolonging cases and that preparation is rewarded, so that the cases that the Crown presents can be thoroughly tested by the defence. Equally, the system must take account of the fact that the type of accused we are dealing with now is a much more complex creature than the type of accused prior to the 1980s, who would turn up religiously. Drug addiction is a variable that makes matters much more complex for everyone in the system.

The Convener: On police liberation of the accused on undertaking, I have a couple of points of clarification and a couple of questions about policy. Is it intended that more use should be made of undertakings? If so, should they be used mainly for people who are currently held in custody until their court appearance or for people who are currently cited to appear in court?

Hugh Henry: It would depend on each individual case. We believe that there is a benefit in the police being able to impose additional conditions. Some people suggest that that is too onerous a responsibility. However, it is in everyone's interests for people who would otherwise be detained in custody and who are prepared to accept the conditions that are set to be liberated, if the police are satisfied that that is appropriate. If someone is not happy with the conditions that are imposed, they do not need to accept them; they can take their chances on going through the system in the normal way.

At what point would it happen? It should happen as early as possible. When someone gets to court, it can impose its own conditions on bail.

The Convener: Before you come on to that, I want to be clear about who would be covered by such undertakings. Initially, we thought that the intention was that those who would otherwise have been held in custody would be subject to a police undertaking with conditions attached but, when we took evidence, it seemed that the use of undertakings might be much wider than that.

Hugh Henry: Perhaps Noel Rehfisch can comment.

Noel Rehfisch (Scottish Executive Justice Department): Although the matter is dealt with in one section in the bill, it is fair to say that there are two purposes.

The McInnes report recommended an increased use of undertakings as a way of getting summary cases to court. In such circumstances, we would be dealing not with people who would be kept in custody but with people on the slower trajectory of a report to the fiscal and a cited case. The summary justice reform angle of getting cases into the start of the system quicker is one purpose of an increased use of undertakings.

At the other end of the scale is the provision to allow the police to impose conditions, which is in the same part of the bill. It is envisaged that that power would probably be used in fewer cases. The existence of the power would allow the person to be liberated on an undertaking instead of being held in custody. The provisions deal with two separate classes of case.

The McInnes recommendations were very much about the former category. The idea was that we should make more use of undertakings to get cases into court more quickly in the first place. The power to impose conditions is about a separate class of case, namely cases that would now be bordering on custody. If the police can impose certain appropriate conditions, it might be appropriate to release a person on an undertaking with those conditions.

Jim Brisbane: Noel Rehfisch explained that very well. I have two points of amplification.

The first category of case that he mentioned in essence comprises cases that would now go into a pleading diet. They would be reported to the procurator fiscal and the fiscal would mark the case then contact the clerk for a date—that all builds time into the process. McInnes said that the presumption should be that cases come in earlier. Bringing the person to court kicks the process off. The proposal also provides some certainty about the person coming to court. We sometimes lose cases when the person has changed address, because the citation does not get served and so on. The provision is an attempt to smarten up that process.

On the second point, on occasion the only reason why a person is kept in custody is so that what might be a very simple special condition can be applied. Rather than the person being kept in custody so that they can appear before the court for the condition to be agreed by the person and the court, the provision gives the police the opportunity to impose the special condition and release the person at an earlier stage on that condition.

The Convener: In what types of case do you expect the provision to be used?

Jim Brisbane: Do you mean in respect of that category?

The Convener: Yes.

Jim Brisbane: For example, if someone had been involved in a disturbance at a particular locality and the police were concerned that they might return, they could be placed under a condition to stay away.

The Convener: So what guidelines will the police get?

The Solicitor General for Scotland: The Lord Advocate will issue guidelines on the use of undertakings and on bail more generally following implementation of the legislation. The provision is a good one, and will be useful. It will allow individuals to be given specific, tailor-made conditions rather than just being told to turn up next week. The police will make it very clear to them that there are so many things that they cannot do.

The Convener: The issue is not whether it is a good idea or not. We seek clarity because the bill gives no indication about the guidelines. You have clarified that the use of the provision will be slightly wider than we thought, but we are not really sure. You say that there will be guidelines; will we see them before the bill is passed?

The Solicitor General for Scotland: The Lord Advocate will issue guidelines once the bill has passed and we know what it contains. There is no point in doing so in advance of the legislation.

The Convener: So how does the committee determine whether the provisions are a step too far? We are being asked to grant powers to the police to impose undertakings with no idea about the type or category of case in which they will be used.

The Solicitor General for Scotland: The police have had that power since 1975.

The Convener: But this is a much wider power.

The Solicitor General for Scotland: All it does is give the opportunity to make the undertakings more productive.

The Convener: Potentially, more people will be caught by undertakings than are at the moment. That is the point.

The Solicitor General for Scotland: Yes, but they could be used at the moment without any legislation being passed.

The Convener: So without the new provisions in the bill, the power could be used for the same number of people and in the same categories of case.

The Solicitor General for Scotland: Yes.

Stewart Stevenson: Are you minded to ensure that victims and witnesses are notified of the conditions associated with undertakings?

The Solicitor General for Scotland: That is an important point. For particular types of case, undertakings will not be considered to be appropriate and remand will still be used. However, the police are good at communicating with victims and will inform them of the situation if someone is liberated by a police officer. That point and appropriate cases will be considered specifically in the guidelines that will go to the police.

The Convener: I have one final question on this. We had evidence from the Procurators Fiscal Society on its concerns about the additional time pressure on fiscals. I suppose that that will depend on how the legislation operates, but I wondered if you wanted to comment.

Jim Brisbane: Essentially it is just a rearrangement of the work, which will come in over a different timeframe. It will be gradual. There will be programming issues as the legislation is introduced, and we will have to work with the Scottish Court Service to ensure that we are able to bring in the cases at an earlier point but, overall, we will not be doing any additional work. Indeed, the raft of measures that the legislation will make available will take some cases out of the system. The way in which we do work will be reshaped and that will have effects here and there but, overall, the pressure on fiscals should be less.

The Convener: Is there a need for time limits in relation to undertakings?

Jim Brisbane: Much will depend on programming. For example, there would be no point in doing the programming months ahead because, by that stage, the person might want to move or reschedule the proceedings, notify no proceedings, or issue an alternative, and the case would then be too distant. The drive behind the legislation is to get cases in early. Ideally, we would like to do everything within 28 days, but we are still considering whether that is feasible. We are still scoping the extent of the business that we might be able to handle through undertakings.

11:15

The Convener: If the bill specifies no time limit, will you still have a target?

Jim Brisbane: No purpose would be served by having long timescales. Timescales are currently short, because such cases are few. We should bear in mind the fact that the police must have the capacity to deliver a report to the fiscal in any timescale that is set. The more work that the police must deal with in a short period, the greater

the impact on their operation. Currently, the police sometimes take more than the general target of 28 days to deliver a report, because of shift patterns and the like.

Stewart Stevenson: Will you confirm that the volume of work that is associated with the preparation of reports is entirely independent of the timescale over which the reports must be delivered, given that the same work must be done whatever the timescale? Is it acknowledged that there are overheads in relation to long timescales, when reports are put down and picked up later? The question is about managerial matters.

Scott Pattison (Crown Office and Procurator Fiscal Service): We can confirm that. I know that the committee made a number of helpful visits to fiscals' offices and witnessed the effect of front loading of marking. Members witnessed how much more quickly prosecutors can mark cases as a result of the future office system.

On undertakings, the work will simply come in at an earlier stage. There might be a payback for us later, because if cases are reported more quickly and the approach is aligned with the work that we are doing to maximise early resolution of cases, we hope that ultimately savings will be made. I hope that my answer is helpful to the committee.

Mike Pringle (Edinburgh South) (LD): Witnesses have told the committee that they are concerned about the fair representation of the accused at trials that proceed in the absence of the accused. How do you respond to those concerns?

Hugh Henry: To some extent, we addressed the issue in the Bonomy reforms. Ultimately, it is for the judge to be satisfied that it is in the interests of justice for a trial to proceed. For example, the judge must be satisfied that the accused knew where and when the diet would take place. The court can take a balanced decision.

Trials in the absence of the accused take place successfully and are ECHR compliant in other jurisdictions. There could be cases in which it is in everyone's interests to expedite matters or in which people have used their absence to try to avoid justice.

Mike Pringle: When members visited Linlithgow sheriff court and other courts, people told us that they thought that the provision would be very seldom used. I understand Hugh Henry's point. For example, if four people were accused in a case, they might take it in turns not to turn up and therefore delay the trial four times. However, the policy memorandum says:

"In 2002-03 over 4,000 hearings resulted in a warrant being issued for an accused as a result of their failure to attend."

Is that not the much wider problem that must be addressed?

Hugh Henry: There are two separate issues. We need to ensure that people are in no doubt about the date when a trial is fixed. Wilma Dickson gave some examples of the pilots that we are running to ensure that people know when they are due to appear in court. Notwithstanding the volume of such cases, which we need to minimise where possible, if it appears to the judge that a trial can safely go ahead and that that is in the interests of justice, we believe that it is right to allow that to happen. Mike Pringle gave an example of how people can use the system to avoid a determination in a case and I am sure that there are other examples. As I said, what we propose is ECHR compliant and it is used in other jurisdictions. We should also remember that, under the bill, there will be an increased penalty for non-appearance.

The Solicitor General for Scotland: I agree with Hugh Henry. I have prosecuted several trials in absence. They are not new. We have had them for a long time. For example, we have them for road traffic cases at Dumfries sheriff court. The change that the bill makes is to widen the group of cases to which trials in absence can apply.

The significance of trials in absence is that they are part of the motivation for the accused to turn up. They are a deterrent. Experienced defence solicitors such as Mr McCaffrey will say to their client when they are released at pleading diet, "Here's the date of the trial. You'd better turn up, because if you don't, the trial will go ahead and you won't be there." That is important because if the client wishes to contest what has been said by the police or the civilian witnesses in the case, they will have another motivating factor to attend—the fact that if they are not there, the show might go ahead without them.

Clearly, it will be for the judge to determine whether a fair trial can take place in the circumstances. If identification is a major issue in a case, we will not be able to hold a trial in absence. Common sense will run throughout the use of the provision. However, trial in absence is a useful part of the armoury in trying to motivate individuals to turn up and comply with the system rather than to cock a snook at it. Mike Pringle gave the classic example of the accused taking it in turns not to turn up at the trial. Victims and witnesses are traumatised by the fact that they have to turn up and they do so religiously only to find that they are being mocked by the behaviour of the accused.

I mentioned the chaotic lifestyles of drug addicts. However, they can turn up for their methadone. They know when to appear for important appointments and they can order their lives. We have to ensure that they are motivated by the

range of provisions in the bill to ensure that they take appearance before the court seriously. Trial in absence is a useful part of the armoury in ensuring that they do that. It is not a panacea and it will not be subject to widespread use, although in England and Wales 15 per cent of trials in magistrates courts take place in the absence of the accused.

Marlyn Glen: I move on to the appropriate use of alternatives. How do you respond to the concern that, by increasing the scope of alternatives to prosecution, we might detract from the principle that justice should be seen to be done?

The Solicitor General for Scotland: The same concern was expressed when fiscal fines and other alternatives to prosecution were introduced more than 20 years ago, but the evidence suggests that, far from being trigger happy, procurators fiscal reacted cautiously and conservatively to the powers and exercised common sense.

I was present when the Parliament—unanimously, I think—supported the notion that fiscals should have increased scope for alternatives. That reflected the trust that is placed in their approach to the new power. The provision is by no means radical in the context of European jurisdictions. Dutch prosecutors can give financial penalties of up to £50,000 outwith court. In comparison, our proposal is modest. It is a sensible approach to ensuring the earliest possible disposal of cases.

Although visibility of justice is important, it is known internationally that the sooner one deals with a case and with an accused, the more effective is the impact on their behaviour and the impact on restoring the community's confidence by reassuring it that action has been taken. Action will be clearly visible in some of the alternatives to prosecution that are suggested in the bill, such as compensation orders and work orders. Those alternatives are important and significant provisions to speed up justice, to ensure that it is fair and to give the prosecutor in Scotland—who has a quasi-judicial role, in any event, as we come historically from an inquisitorial system—the ability to ensure that we play our part in ensuring that justice is visible and effective as well as efficient.

Marlyn Glen: How do you respond to concerns that fiscals may not have sufficient information—for example, about the circumstances of alleged offenders or the impact on victims—to use the increased powers to use alternatives to prosecution appropriately? In particular, will fiscals be aware of any underlying problems that a person may have that can lead to offending behaviour—for example, drug problems—and any limitations on a person's ability to carry out unpaid work?

Jim Brisbane: There will be limitations on the amount of information that we have. We cannot have everything, but we recognise that we need to have as wide a picture as possible. For that reason, we have been working with the police for some time on what information they can supply to us in the police report. We are conscious of the need to have information about the offender, the impact of the crime in the local community and, in particular, the impact on any victim. The decisions that we make in any case are always made against the backcloth of their having to be in the public interest. We can carry out that exercise only if we have the fullest information possible.

In many ways, we are trying to allow the police to give us more information than they have traditionally felt able to give us. In the old days, the police used to hand deliver their reports to us; now, they all come in electronically. There has been a degree of disconnection, so we are trying to restore a greater input from the police, who can bring local knowledge about the circumstances of a case. Given the vast number of factors that we may have to take into account in relation to lower-level offending, it would be useful to have that information.

Sometimes, those are the most difficult cases in which to work out what the correct disposal or other measure should be. In a serious case, the option for the procurator fiscal is almost straightforward: the person may appear on petition and go to a trial before a jury in the sheriff court or the High Court. However, with lower-level offending, we need to get from the police more information about the circumstances in which the police report is made. ACPOS appreciates that, and the idea that we need to get that connection back is supported and recognised by the Scottish Police Federation.

In the pilot projects that we have undertaken throughout the country—with the youth court, in West Lothian and in Grampian—there has been a closer connection and more detailed information passing between the police and the Crown. I am part of a team that is working with the police to produce comprehensive guidance on the reporting of cases for all the Scottish forces. It is hoped that that will deal with the sort of issues that the committee has raised today.

Marlyn Glen: What guidance is in place at present to ensure that alternatives to prosecution are used only in relation to appropriate offences, take account of the impact of the offence on the victim, and are not overused for particular offenders? How will that guidance be developed to take account of the provisions in the bill?

The Solicitor General for Scotland: There is extensive guidance for procurators fiscal on the use of alternatives to prosecution. It is internal, confidential guidance about what types of cases would be suitable for their use. We have a work stream that is chaired by Tom Dysart—a senior area procurator fiscal who was part of the McInnes group—which is considering the guidance that is expected for the implementation of these provisions.

Marlyn Glen: Do you agree that some cases, such as those that involve domestic abuse, should be dealt with by the courts rather than by fiscals?

The Solicitor General for Scotland: You will be aware that we have a robust policy on the prosecution of domestic violence, which sees such cases going to the sheriff courts. I do not envisage those cases being subject to alternatives to prosecution, as we intend to maintain a robust stance on those cases.

Marlyn Glen: Do you think that it is workable for fiscals to make compensation offers in cases that involve personal injury or distress?

The Solicitor General for Scotland: Yes. I think that there are cases in which that would be appropriate. It would depend on the nature of the offence and whether there was only minor injury or distress. Trauma and distress can be caused to a victim of a breach of the peace; we libel the stress to the individual in the charges. That is fairly commonplace; it is not exceptional, which is what I inferred from your question. If someone were to come to your house shouting and swearing at you in the middle of the night or to stand outside your window urinating, that could impart immense distress. We would consider compensation in such cases, as well as cases in which there is material damage to property, although vandalism would be one of the more commonplace areas for compensation.

11:30

Marlyn Glen: I understand being able to put a price on damage to property; the difficulty for fiscals would be to put a price on personal injury or distress.

The Solicitor General for Scotland: Yes, but that will be subject to guidance, and experience will clearly inform how we react in such cases.

The Convener: A number of witnesses have raised compensation for personal injury. The Law Society of Scotland took the view that it would not necessarily be appropriate. Might you use criminal injuries compensation as a guide? That is an example of quantification of injury.

The Solicitor General for Scotland: Scott Pattison is considering that issue.

Scott Pattison: Detailed work on that is taking place at the moment, as the Solicitor General has said. I am sure that those who are leading that work will take the convener's suggestion on board. There are lessons to be learned and detailed guidance will be needed for prosecutors, particularly on the use of compensation for offences of violence. We will consider all sources of potential assistance for that.

Stewart Stevenson: I thought that it would be useful to give the Solicitor General the opportunity to acknowledge that the political waters might ripple slightly more than she suggested in relation to fiscal compensation orders. I continue to be of the opinion that there are serious social exclusion issues with their use—although I may yet be persuaded otherwise—as rich gits such as MSPs like me would be able to pay off £5,000 fiscal compensation orders that they received because they behaved in a disorderly manner, which, of course, I never do, while people of more limited means would be unable to do that. It would be useful if the Solicitor General acknowledged that there are significant political debates around that.

The Solicitor General for Scotland: I acknowledge the issues, but I hope that you would trust us to have the common sense to ensure that compensation offers are not applied arbitrarily so that those who are in poverty are discriminated against in the decisions that we make. We make decisions based on what we consider to be fair and just in the circumstances, which clearly takes into account an individual's means. The compensation would not simply be an arbitrary amount but would take income into account as a relevant factor.

I should also say that, for many years, fiscals have informally used restitution if an accused has agreed to pay compensation. The bill formalises a useful provision and gives it statutory support. In that sense, it is not new. I do not think that defence agents or others have had any grave concerns about its abuse.

Stewart Stevenson: Persuasion may yet carry the day.

To pick up on the exchange on victim compensation, are you likely to include provisions such as those in existing legislation that exclude victims who are convicted criminals of one sort or another from compensation? I have dealt with a constituency case in which someone was murdered but the family got no compensation because the victim had a significant criminal record. We could debate whether that was right.

The Solicitor General for Scotland: We might not be subject to the limitations that are inherent in other legislation, but it is difficult to comment on an

individual case without knowing the circumstances.

Stewart Stevenson: I am not inviting you to do so.

The Solicitor General for Scotland: The reality of what happens in our courts is that there is no clear dichotomy between victims and accused. Many accused people are vulnerable individuals who might appear as victims the next day. Therefore, it is important that, when fiscals decide on compensation, they take a rounded approach to considering what is fair and equitable in the circumstances, rather than compartmentalising individuals as victims or criminals.

Stewart Stevenson: For the benefit of anyone who reads the *Official Report* of this exchange, my use of the word "murdered" was unintentional. I was referring to a death in a criminal situation, not to a murder.

Margaret Mitchell: Is it the intention to extend the use of fiscal fines to cover offences that would not have been covered before?

The Solicitor General for Scotland: Yes.

Margaret Mitchell: Will you give an example of some of the offences that you think will now be covered?

The Solicitor General for Scotland: That is difficult to do because there is such a wide range of summary offences—a cornucopia of offences will be covered. The marking exercise that we carried out suggested that up to 20 per cent of the business that the district court deals with could be handled using fiscal fines. It will be important to examine the range of offences as we develop the guidance. We are examining what types of case would come into that category. The marking exercise that we carried out suggested that the current mindset on the use of fiscal fines was that that was the approximate volume of cases that they could be used to handle.

Scott Pattison: The shadow or parallel marking exercise to which the Solicitor General refers identified that, in general, an increased range of offences of violence, disorder and vandalism could be taken out of the system. We are talking about cases that would, at present, go to the sheriff court as well as cases that would go to the district court. Although the upper limit will be £500 if the bill goes through unchanged, in the main—if our exercise is accurate—fiscals are likely to make use of fiscal fines of up to about £250. However, we think that there would be a use for fiscal fines of £500. As both the explanatory notes and the policy memorandum set out, such fines could be issued for offences by companies that could be viewed as regulatory, for example. That is the justification that Sheriff Principal McInnes set out in his report.

Margaret Mitchell: Would the criterion be the setting of the £500 limit and anything within that would be considered to be fair game?

The Solicitor General for Scotland: No—that has never been the position on prosecution. You will be aware that, in general, cases involving child witnesses, cases of domestic violence and cases with an element of racial aggravation are not prosecuted in the district court. Within our marking policy, we identify particular circumstances. For example, any offence that requires the destruction of a dog or that involves a licensing issue will have to come before a court, so the nature of some offences means that they cannot be dealt with using fiscal fines because they require judicial consideration. Those factors will be built into the guidance in a detailed way.

Margaret Mitchell: Will petty theft be covered?

The Solicitor General for Scotland: Yes. That offence is already covered by fiscal fines.

Margaret Mitchell: There was some concern that if greater use was made of fiscal fines to deal with petty theft, that could send out the wrong message that petty theft was considered to be a lesser crime, which could lead to an escalation in such crime.

The Solicitor General for Scotland: The whole objective of fiscal fines is to do with effectiveness rather than efficiency. The idea of early intervention by the prosecutor is that within days of an offence being committed, the person who committed it will receive the opportunity of paying a penalty that is closely associated with their conduct. All the evidence that emerges on the effectiveness of criminal justice systems is that the closer a penalty is to the offending behaviour, the more effective it is in changing that behaviour. That is what is important.

We are considering what is the most effective way of dealing with those individuals who may be taking a tentative step into a criminal career but who can be got out of that by the use of a measure that is more effective than one that sucks them into the formal criminal justice system, after which their behaviour will escalate. It is clear that we want to be able to ensure that those people who are likely to embark on a significant period—if not a lifetime—of offending are identified early on. If it is not possible to do that in the children's hearings system, we must ensure that those offenders who should be dealt with in the formal prosecution system are dealt with there and that those people who are on the periphery, who will grow up within two years, marry and never come near the system again, are not criminalised disproportionately for their immaturity in stealing a Mars bar from Woolworths when they were 17.

Margaret Mitchell: I appreciate your desire to nip a pattern of behaviour in the bud, but if someone who has a drug and alcohol problem is given a fiscal fine rather than referred to the sheriff court on summary procedure, will the opportunity to hear about their problems and to hand down a disposal such as a drug treatment and testing order or a direction to go on a rehabilitation programme, which could address the person's behaviour as early as possible, not be lost?

The Solicitor General for Scotland: The quality of information is important in that regard. Equally, if someone has difficulty with alcohol or has a drugs problem, the intention should not be to discriminate against them because of that condition by bringing them into the system; the answer is to ensure that an holistic approach is taken. That is the direction of the momentum that we have at the moment. Criminal justice agencies, social work and the courts are working together much more closely. Further, I refer you to the models of the drugs court, the youth court and the domestic violence court, in which information about the accused is better known. Again, that would be an important factor with regard to prosecutors having more alternatives to prosecution. With wider information about what the individual's likely pattern of behaviour might be, prosecutors will have a better basis on which to make decisions about whether the individual requires formal measures of support or whether informal measures of support, such as diversion to a drugs-related offenders programme or a drugs clinic, which is already available, would be a better way of addressing that behaviour at an early stage.

Margaret Mitchell: Is that information to be accessed electronically? What are the practicalities of ensuring that it is available?

The Solicitor General for Scotland: That is what the deputy Crown Agent was alluding to when he spoke about the information in the police report. Some police reports are extremely explicit and explain the background of an offender and give good information about the individual's means. If that is not enough, the fiscal can ask for more information to be obtained in those circumstances. That could be helpful. We do that already in relation to decisions to prosecute and not to prosecute. If additional information is required in order better to furnish a decision and populate it with more information about the accused, more information will be requested from the police and, sometimes, the defence, who will provide information about the background, needs or vulnerabilities that the accused might have.

The Convener: Can you clarify the prosecution policy in relation to the extended use of fiscal fines? Are you saying that there will be no summary offences that will be excluded from the use of a fiscal fine?

The Solicitor General for Scotland: No, there will be summary offences that will be excluded by dint of the guidance that is given by the Lord Advocate, such as those in relation to which there is a conscious desire to prosecute. The internal guidance will be confidential to fiscals because we do not want to advertise to an individual the way in which they should temper their behaviour to ensure that they get one penalty rather than another. You will understand that, in certain types of cases, it is important that confidentiality is attached. Further, in other cases, such as knife crimes, it will be obvious that we are unlikely to take an alternative approach.

The Convener: Yes, but given that we are talking about giving fiscals quite an extended provision, should we not have some idea about how the Crown intends to use the provision? Are you saying that that is going to be private?

The Solicitor General for Scotland: With respect, that is why we have an independent prosecution service; it has to consider independently all the circumstances and individual cases based on the policy that is applied at that time. You are quite correct to say that the scope of the provision will apply to summary offences. However, the application of the policy will be informed by guidance and by changing circumstances that might occur. If particular problems erupt or there are particular local difficulties, there might be variations of the policy.

The Convener: I appreciate that. However, it is up to Parliament to set the parameters within which the Crown operates. The committee could say that we are not happy with giving the Crown the power to impose a fine of up to £500 and that the maximum figure should be £200 or £300. It is difficult to make a judgment if we do not know what the exclusions will be.

The Solicitor General for Scotland: Yes.

The Convener: Can I ask the minister to comment? I think that we should have some indication of when the upper limit of the fine will be used and of whether there will be policy exemptions. In the interests of transparency, the committee that is scrutinising the bill should be given some indication in that regard.

Hugh Henry: You have raised two different points. The Solicitor General has indicated that fiscal fines are used effectively at the moment and that the decisions about whether to impose a fine and the amount of the fine are at the discretion of the fiscal, having regard to all the circumstances. However, if we were to try to set down explicitly the conditions under which the procurator fiscal might decide to exercise that judgment, we would

be in danger of allowing politicians to intrude on the territory of the fiscal. It is right that we set the upper parameters, which we are trying to do but, within those parameters, it must be left to the fiscal to decide.

11:45

The Convener: So you do not think that it would be reasonable and appropriate for the committee to take the view that it is not appropriate public policy for a fiscal fine to be used where there has been a violent crime.

Hugh Henry: The Solicitor General has already indicated that the Lord Advocate will issue guidelines. The fiscal will operate within those guidelines and also exercise their judgment. As a layperson, I would find it astonishing if a fiscal fine were used in a case of serious violence, rather than someone being sent to court—I do not think that that would happen.

I can only speculate, but there might be a case where minor violence was used, such as one person claiming that he was punched while the other believes that he only lifted his hand to defend himself and accidentally hit the first one in the face. Would we say that that must, in all circumstances, proceed? I am merely commenting as an observer; I do not think that it is for us to decide whether one case is more appropriately prosecuted than another. As the Solicitor General said, there is a very clear steer about how knife crime should be treated, and the Lord Advocate has already issued guidelines on it.

It is right that we should set the upper parameters within which the fiscals can operate, but we should then leave it to the Lord Advocate to issue the guidelines and to the fiscals to make individual judgments.

The Solicitor General for Scotland: The Lord Advocate and I are accountable to Parliament for how we use those disposals. The Parliament will have control not only of the outer limits but of how the disposals will be used. We will be reporting on that subsequently.

Violence is a very wide notion in Scottish criminal law, as members know. It includes spitting and chasing someone, for example. Therefore, there are a variety of types of case. Clearly, we would not consider the use of alternative disposals in cases of serious violence. As the deputy Crown Agent pointed out, the decision making in serious cases is much more straightforward in the sense that there is an inevitability about the disposal of such a case. It is in the relatively minor cases, in which individuals are beginning to manifest such behaviour but might not be going into a criminal career, that fine judgments need common sense, experience and expertise. It would be extremely rigid to prescribe it in legislation.

Mrs Mary Mulligan (Linlithgow) (Lab): I want to go back and follow up the questions that Marlyn Glen asked about the information that the fiscal might have prior to offering an alleged offender a work order, for example. How will you ensure that the alleged offender is able to undertake the work?

The Solicitor General for Scotland: Clearly, the individual will have to agree to a work order. It will not be like a fiscal fine, where acceptance can be deemed. Again, the quality of information will have to be relied on. Does the accused have a disability? Is there any type of work that is not suitable for them? We hope that work orders will be sufficiently flexible that they will not discriminate against an individual because of any disability they have.

Work orders will be piloted. We hope that they will be a fast way of dealing with antisocial behaviour after the event, and that they will be a visible sign that the criminal justice system is working with the community.

Mrs Mulligan: Do you have any plans for the pilot at the moment?

The Solicitor General for Scotland: Pilots are currently being discussed with Scottish Executive Justice Department officials.

Mrs Mulligan: How will a distinction be made between the giving of a fiscal fine and the offer of a work order, or could both be offered?

The Solicitor General for Scotland: I am not sure that there is an option to offer a work order and a fiscal fine in the same context. I think that it will be one or the other. However, I think that compensation orders and work orders could be combined, although I stand to be corrected.

On types of cases, every decision that we make depends on the individual facts and circumstances of the case. Prosecutions are not like widgets; we are dealing with human beings, and the view of the victim, the circumstances of the case and whether the accused is likely to be willing to carry out a work order are all factors that are tailored to the individual case rather than to a group of cases. We need to be careful that the guidance that is given to fiscals takes into consideration the types of situation involved and the types of work order that would be appropriate, without being so prescriptive as to hamper the common sense and local knowledge of the procurator fiscal, who is in the community and knows what the problems are.

Hugh Henry: It would be wrong of me to intrude on the kinds of decisions that a procurator fiscal might make, but the situation that Stewart Stevenson described when he talked about the so-called rich git could conceivably arise. A fiscal

might decide that a work order would be more beneficial in altering behaviour than imposing a fine on someone who could well afford to pay it. There is a range of options.

Mrs Mulligan: We accept that restricting some people's time might be more of a penalty to them than asking for their money. That fairly good example has been voiced before.

Hugh Henry: That sounds like a plea from the heart of a hard-pressed member who sits in committee for long hours.

Mrs Mulligan: We will not go there.

The Convener: Well played.

Mrs Mulligan: I move on to fiscal fines and the opt-out provision. The committee has received evidence that requiring an alleged offender to opt out of a fiscal fine is, in effect, to presume guilt through silence. Do you agree with that?

The Solicitor General for Scotland: No, because it will not result in a conviction—the fiscal fine will not be treated as a conviction. Sheriff Principal McInnes's observation, and his expert group's work on the matter, nicely identified the problem. The vast bulk of people who are offered fiscal fines—75 per cent of them, I think—do not pay them out of inertia rather than because of some strong disagreement with the penalty. Inevitably, they plead guilty as soon as the case hits the court.

The provision is clever, in that it will motivate an accused person to do something. If they are concerned about the situation, they should go and see a solicitor. That will be the obvious step to take. The service of the summary will tell the accused about the evidence that we have, together with other information, and they will make their decision. There is also the saving provision of the recall, which should ensure that there is not a miscarriage of justice, such as the imposition of a fine when it should not have been imposed when a person has a genuine excuse, such as their being in hospital for three months.

Mrs Mulligan: You referred earlier to the chaotic lifestyles of some people. How will you determine that an offer has been missed due to that lifestyle, so that it is not deemed to be accepted when, in fact, it has not been?

The Solicitor General for Scotland: There is a general challenge for the criminal justice system when it comes to drug addiction, which our predecessors did not have to face 20 or 30 years ago, when people would scrub up for court. Because of drug addiction in particular, the chaotic element can now come in. People are, however, able to motivate themselves in circumstances that are important to them. Using a combination of measures from among the rich range of provisions in the bill, we have to provide a system that gives positive incentives to ensure that people turn up and do not offend while they are on bail, but which has much greater penalties if they offend while on bail. The system should positively reinforce the importance of people's decisions to their lives. I hope that those factors will be foremost in the minds of those who get the opportunity of an alternative to prosecution.

Mrs Mulligan: You will acknowledge that there is some nervousness about that being accepted properly rather than by default. There is also the matter of the disclosure of accepted fiscal fines over a certain period. Do you anticipate that that will have any impact on the likelihood of people accepting fiscal fines?

The Solicitor General for Scotland: It is difficult to know what is in the mind of an accused when they accept a fiscal fine. Being able to pay the administrative penalty, avoiding going through the courts and not getting a conviction are important to individuals. Most people will be philosophical about the fact that information that they accepted and paid such a fine will be relevant in the event that they misbehave again. The hope is that that will not happen again, in which case the information will not be disclosable.

However, courts are currently given information that is not conviction based. If people have fixed penalties on their licence, that information will be put before the court even though the penalties are not court convictions as such. If the accused has appeared before the children's panel, that information may be put before the court. Also, significant information will be contained in the social inquiry report relating to the person's behaviour. Such details form part of the information that a court will reasonably want to know. We have taken a reasonable approach in providing that the information should be disclosable for a period of two years.

It is important that the court knows the type of individual in the case. In inquisitorial systems, there is no such preciousness about previous convictions and judges know everything about the accused's background. As we have an adversarial system involving juries, we prevent convictions from going before the court as part of the process of proof, but the provision of such information is certainly not unusual in the context of other jurisdictions in Europe and, indeed, worldwide.

Mrs Mulligan: Given that fiscal fines and so on are not convictions, what impact will the revelation of such information have on sentences?

The Solicitor General for Scotland: I think that the court will just take cognisance of the information in the sense that it will know about the individual but it will not treat the fine as a

conviction. Judges are well able to do that. Many sheriffs in our small towns know the accused intimately, and each time the accused appears back in court he has to put out of his mind the fact that the accused appeared in a trial three weeks before. The judge needs to treat the case based purely on the evidence before him and on the information that he considers to be relevant. That is a discipline that judges are well able to exercise.

Mrs Mulligan: That answer suggests that the accused might reappear perhaps after only a short period. How often do we expect fiscal fines to be offered in such circumstances?

The Solicitor General for Scotland: I hope not very often. The idea is that the person will be given one such fine and thereafter the position will be reconsidered. It is not beyond imagination that someone who was involved in a misdemeanour at the age of 17 but who has since been out of bother for three or four years might commit another offence. Such a person should not be automatically propelled into the courts system because of that previous weakness. However, where there is a clear pattern of closely related offending that shows that the person will be a persistent offender, we will want to take the person into the courts system at an early stage.

The Convener: On a related issue, other witnesses have raised concerns about the fact that a person's failure to respond to a compensation offer will be deemed to be acceptance. Why did the Executive opt for that provision?

The Solicitor General for Scotland: As I alluded to earlier, Sheriff Principal McInnes's committee considered that issue carefully. It took the view that the fact that almost 75 per cent of cases in which fiscal fines were not paid resulted in a guilty plea at the first instance was due to inertia rather than a dispute about the facts of the case. Therefore, it deemed acceptance to be an important part of making fiscal fines more effective and compelling.

Margaret Mitchell: For fines enforcement, the McInnes committee recommended a single agency. In his evidence to the committee, Sheriff Principal McInnes stated that, in his opinion, the bill's provisions on fines enforcement fail to address some aspects of the problem as effectively as they might. How does the Executive respond to that?

Hugh Henry: Sorry, I am not clear what point is being made.

Margaret Mitchell: It is suggested that a fines enforcement officer will not be able to address the problem in the way that a single agency could.

Hugh Henry: Fines enforcement officers will be able to identify people and differentiate between those who cannot pay and those who will not pay. The bill will introduce officers who can be deployed flexibly and who can work quickly to try to ensure that fines are paid as required. In many cases we are dealing with small fines, and we do not want to build a significant structure around the collection of such small fines. Other forms of diligence are available, but I believe that the provisions in the bill are a proportionate response to what we accept is a problem. I am confident that we will see some positive results.

Noel Rehfisch will expand on the matter.

12:00

Noel Rehfisch: The McInnes committee's recommendation for a stand-alone agency to enforce fines, which the Executive obviously took ownership of, was carefully considered, but the ultimate view was that the vast majority of the benefits that would accrue from having a single fines enforcement agency—such as a single IT system, shared practice and single sets of procedures—could be achieved through unification of the summary court system. As the process of court unification proceeds, all fines enforcement officers will be employed by the Scottish Court Service and there will be single fine accounts on the Scottish Court Service's IT system. The issue boiled down to the conclusion that fines enforcement through a stand-alone agency as opposed to fines enforcement being a function of the Scottish Court Service would result in minimal additional benefits. The view was also strongly expressed that it was important to maintain fines enforcement within the body of the court system. We are talking about criminal penalties, which is why it has been suggested that fines enforcement officers should be located within the Scottish Court Service and should work as part of it in enforcing fines.

Margaret Mitchell: Do you not accept the points that Sheriff Principal McInnes made about consistency, flexibility and the desirability of minimising the involvement of police and the courts in the fines collection system? A stand-alone agency could meet such requirements. As for diligence, courts have the power to arrest wages and benefits, but they practically never do so. Would not an agency address such problems?

Hugh Henry: The short answer is that we do not accept what has been suggested. We carefully considered the matter, but reached a different conclusion. As Noel Rehfisch said, improvements will be made through unification of the court system. We do not think that the suggested single agency would be useful.

Margaret Mitchell: It could deal with all fines and take them completely out of the court system.

We should consider all the time and costs that are wasted in means courts through issuing warrants and so on.

Hugh Henry: We considered the matter and reached a different conclusion. Perhaps Noel Rehfisch wants to say something about it.

Noel Rehfisch: Having a specific function that is located within the Scottish Court Service will be more effective because penalties are imposed within the court system. Dedicated fines enforcement officers, who will have specific powers to take certain types of enforcement action, will work closely with people who have been dealing with cases in which fines have been imposed. The very existence of those officers will result in benefits by reducing the number of cases that go to court, the number of means inquiry courts that are required, police involvement and so on.

The courts necessarily will have to be involved until the disposal in a case, but the fines enforcement officer's role will be to take all legitimate forms of enforcement action for which the legislation provides. It is hoped that every fine that is imposed will be collected but, ultimately, there will be recourse to the courts if fines enforcement officers try all the various available options for enforcement but none prove successful. It is hoped that, in the vast majority of cases, dedicated fines enforcement officers will use their powers to take all the different forms of enforcement action that are necessary to enforce fines and therefore reduce the number of cases that must go back to court, the number of means inquiry warrants that must be issued and, therefore, the workload for the police and the court system. It is also hoped that, as a result of a higher proportion of fines being collected by means of a range of effective enforcement actions, a large number of cases will not slip back to means courts and people will not eventually be imprisoned for fine default simply because a court regards imprisonment as the only effective option that is available to it.

Margaret Mitchell: Why does the Scottish court system not arrest wages and benefits at the moment?

Noel Rehfisch: Factually, that is an option, as the court can grant that a fine be enforced by way of civil diligence. To recap on something that I have said already, the dedicated fines enforcement officers will be tasked with examining each individual fine account and asking what they might do to ensure that payment of the fine is made. They will consider individual cases and the powers that are available to them, which will include powers for the arrestment of earnings and funds in bank accounts. We hope that we are addressing your point by introducing dedicated fines enforcement officers who will have that option among their powers to ensure enforcement.

Hugh Henry: We also need to remember that some of the fines about which we are talking are of relatively low value. However, Margaret Mitchell raises a valid point about the use of wages arrestment. We have been examining that and we continue to do so, because there are people with substantial means who refuse to pay fines for whatever reasons, and it is patently absurd to allow them to take up expensive places in prison because of some obscure point when we know how much they earn and where they work. Such issues need to be examined more closely.

Margaret Mitchell: What consideration has been given to the use of sheriff officers for fines enforcement?

Hugh Henry: We considered the use of sheriff officers but we decided that the introduction of fines enforcement officers would allow more flexibility and a closer working relationship with the court system. Moreover, the fairly substantial cost of employing a sheriff officer to collect relatively small fines would add disproportionately to such fines. We concluded that using sheriff officers was not the most efficient way to progress as it could unnecessarily add to the financial burden and that using fines enforcement officers was a better and more flexible way of collecting fines.

Margaret Mitchell: Will you comment on the concern that has been expressed about the sanction of vehicle arrestment and the complications that we discovered in probing it more deeply?

Hugh Henry: We accept that, in theory, the bill could allow the court to dispose of a vehicle when the fine defaulter is the registered keeper but someone else paid for or owns the vehicle. We need to come back to the committee at stage 2 with further details on that.

Margaret Mitchell: What plans are in place to monitor the effectiveness of the provisions on fines enforcement officers?

Hugh Henry: The same monitoring provisions that apply to any initiative that we take will apply. It is incumbent on the Executive as part of its accountability to the Parliament to be able to report through parliamentary questions and appearances at committee on any measure that is used. Whether we are talking about the effectiveness of youth courts, drugs courts or DTTOs, we always need to ensure that public money is being used effectively, that it is having the desired outcomes and that there are no other alternatives. We will monitor the effectiveness of the bill's provisions on fines enforcement officers, keep statistical information on that and, in due course, review the situation.

The Convener: We have had additional correspondence from the Society of Messengers-at-Arms and Sheriff Officers, from which we took evidence, because we pressed it on the detail of sheriff officers' recovery costs. As you know, we agree their fees by statutory instrument, although perhaps that slips by us sometimes. The society mentioned that sheriff officers were prepared to consider a reduction in fees if they had more involvement in the delivery of documents and the collection of fines. Will you consider that?

Hugh Henry: That is an interesting offer and it will be considered carefully when we make decisions. In this case, we determined that the use of fines enforcement officers was a more effective way of proceeding than using sheriff officers.

The Convener: I tend to agree with that, having considered the issue. However, I wonder whether a case could be made for a mixed system if you were satisfied that more extended use of sheriff officers could be effective and could provide efficiency savings.

Hugh Henry: In the fullness of time, if the business escalates to the extent that fines enforcement officers cannot cope, and if we do not wish to invest in further fines enforcement officers, we may consider other options. Of course, we may just decide to extend and expand the provisions for fines enforcement officers. We do not rule anything out. We will listen to any suggestion that is financially effective and efficient.

Noel Rehfisch: I have two points of clarification. First, the bill will not remove the courts' current power to order recovery of an outstanding fine by civil diligence. That power will remain, so sheriff officers could be involved in that way. Secondly, the bill is not absolutely prescriptive about who should hold the role of a fines enforcement officer in future, so it will not close all our options absolutely, although we have made our current intentions clear.

The Convener: That is helpful.

Mike Pringle: I turn to justice of the peace courts. Several witnesses have raised concerns that the increase in the scope of alternatives to prosecution—I think that Elish Angiolini said that 20 per cent of the business of the district courts will disappear as a result of the changes to fiscal fines—may contribute to a reduction in lay court business, which may lead to the end of lay courts in some areas. Are you committed to retaining a network of lay courts and, if so, how will you ensure that they have sufficient business?

Hugh Henry: I will put on record the ministerial policy on that, after which the Solicitor General will explain some of the practicalities. We are committed to the retention and development of lay courts. We are expending a considerable amount of effort through the bill, and we will continue to do so subsequently, to ensure that lay courts are fit for purpose and can make a contribution. We take seriously the contribution that lay courts make, but we also take seriously the need to ensure that appropriate standards are in place. We will invest heavily in training and consider how we recruit and develop. The short answer is that we are committed to the continuation of the lay courts. The Solicitor General may want to expand on that.

The Solicitor General for Scotland: There will be a reduction in the overall workload that at present goes before the district courts. However, although we considered what business will go out, we also considered what could go from the sheriff courts to the justice of the peace courts. That is where the greatest potential lies. Hugh Henry has talked about his enthusiasm for local justice. Unification provides a big opportunity to make local justice much more effective and to ensure that local delivery of justice is maintained and strengthened.

The new system of training and appointments for justices of the peace will give us an opportunity that we have not had. As the McInnes committee said, prosecutors have historically not had uniform confidence in the lay magistrates throughout Scotland. However, we have an opportunity to make much greater use of the district courts, particularly in relation to antisocial behaviour. Local magistrates have a good feel for the particular problems. They can engage with the local population and they know what the difficulties and priorities are. We want a shift of business from the sheriff courts to the district courts. Powers will exist to increase the penalties that magistrates can give in future. We look forward to that.

I give our assurance that we intend to use magistrates as much as possible. Our policy is to prosecute in the lowest appropriate forum and not to overegg the pudding. That will provide headroom for sheriffs to focus more creatively on the persistent offenders—the one-man or one-woman crime waves—at the summary offence level. We hope that magistrates will be able to make a major contribution to dealing with the major issue of antisocial behaviour in communities, where they have their fingers on the pulse.

12:15

Mike Pringle: I will come back to that issue. However, section 46(6)(b) of the bill provides that

"The Scottish Ministers may by order provide for … the disestablishment of a JP court."

Although current ministers may have no intention of doing so, future ministers could use that provision to get rid of JP courts. In effect, that is

what the provision means. Does the minister agree?

Hugh Henry: No. I think that the provision probably refers to a specific JP court in a specific area in the circumstances of relocation. Section 46(6)(a) refers to the relocation of a JP court and section 46(6)(b) refers to the disestablishment of a JP court. That might happen in an area where, whether because of insufficient demand or for some other reason, it is decided to transfer the functions of a JP court elsewhere. I see nothing in section 46 that would allow ministers comprehensively to disestablish JP courts. Indeed, section 46(4) provides that

"There is to be at least one JP court located in every sheriff court district except where, in relation to a district, the Scottish Ministers determine that a JP court is not necessary."

We would need to make such decisions on a case-by-case basis in each sheriff court district. There is nothing in the bill that would allow the arbitrary disestablishment of all JP courts.

Stewart Stevenson: On a related point that is connected with secondary legislation, I want to pick up on what the Subordinate Legislation Committee said about section 50(2), which will give ministers the power to provide that a JP court can be constituted by one JP only. The subject has previously been discussed by this committee. The Subordinate Legislation Committee's report states:

"The Committee felt strongly about this issue and agreed to write to the Executive. It draws the attention of the lead Committee to this and invites it to pursue the matter with the Executive."

I am always willing to accept such invitations.

Basically, the Subordinate Legislation Committee has suggested that the Executive should lay out reasons why it thinks that it may be proper to make changes to the nature and structure of the JP bench. Can the minister also give us a timetable for when those decisions, which are not mentioned in the bill, will be made?

Hugh Henry: Such decisions are certainly not for the short term. Although the bill includes a provision that will allow ministers to provide by order that is subject to the affirmative procedure that a JP court is to be constituted by one JP only, we do not intend to impose a uniform size of bench in the immediate future. In the longer term it would, arguably, be beneficial to have a consistent approach across the country. If we were to impose a consistent approach, I would argue that JP courts should probably be constituted by one JP rather than by three. However, we recognise that the three-member bench works reasonably well in some parts of the country and we have no immediate plans to change that.

Noel Rehfisch: I am aware that the Subordinate Legislation Committee also raised a technical point about the way in which it is proposed that the power be taken. The minister's statement of policy is absolutely correct, but we will consider the Subordinate Legislation Committee's comments, which we have received just in the past day, about the way in which the power is to be taken, given the reservations that that committee expressed.

Stewart Stevenson: I am content to wait and see.

Mike Pringle: Elish Angiolini has referred to the fact that some fiscals do not have confidence in how some cases are handled in the district courts—like her, I see that as a problem. How will we solve it? We will come on to training later, but how will fiscals gain that confidence?

The Solicitor General for Scotland: As I said, that experience is not uniform but patchy and local. It is suggested that the tendency has been towards an upward drift of cases into the sheriff courts. Sheriffs have sometimes observed that some cases could have been dealt with in the district court.

The provisions in the bill are vital. It will provide for the training of magistrates—the quality of magistrates can be very good. The sheriff principal might have a role in mentoring sheriffs, the unification of the court will provide an opportunity to achieve greater consistency of approach to cases, and training will be centralised. The appraisal procedures and the five-year term will mean that those who are in post will take their duties extremely seriously.

There is cause for optimism about the use of justice of the peace courts. Many JPs make a major contribution to justice in their communities and are well respected by procurators fiscal. It would be a great shame to lose that element of community involvement in justice. We want to ensure that the criminal justice system is closer to the community and that it engages more with it. Lay justice is an obvious and patent use of the community that contributes to the system. We want to use lay justice as much as we can; we hope that the bill will give us the opportunity to do so.

Hugh Henry: It is fair to say that the bill will give JP courts a significance and status that will introduce more rigour to the recruitment and appointment of JPs, which is not to criticise those who have worked as JPs in the past. We need to consider how the JP courts will fit in with the other changes that we are making. As the Solicitor General said, there is a need for appraisal and training. I do not think that we can allow someone to operate in a JP court on a casual basis if they are not willing to invest the time and effort that are

necessary to their carrying out the job properly. There are challenges for those whom we appoint. We acknowledge the contribution that JPs make. I hope that, given their new responsibilities and support, they will make an effective contribution.

Mike Pringle: I will return to training. We have talked about the Crown Office issuing guidance. I presume that, at the moment, fiscals get guidance about to which court cases they should go. How do you envisage the guidance changing things? I remember that when I was a JP, I could disqualify drivers only by totting up; I could not disqualify them immediately.

The Solicitor General for Scotland: That is a legislative provision, rather than a matter of choice for the prosecutor. However, it relates to the sentencing ability of the justice of the peace court. It is hoped that it will be possible to use JP courts to deal with a significantly greater number of road traffic matters in a cognitive way. That is a good example of the greater use that could be made of JPs.

Wilma Dickson: We intend to empower JPs to deal with disqualification other than by totting up. That matter is not in the bill because it is reserved and we have to deal with it through an order under section 104 of the Scotland Act 1998. We are in the process of jumping through those hoops; we hope to introduce a section 104 order shortly after the bill is enacted.

Mike Pringle: We talked about facilities in sheriff courts, in which there has been investment. There has been some investment in district courts, but it has not been nearly so great. We have to ensure that witnesses are happy to go to a district court because defence and prosecution witnesses will not be sitting in the same room, so people cannot be intimidated. Do you intend to try to improve the facilities within district courts?

Hugh Henry: As part of the process of unification of the court system, we will review the facilities that are available throughout Scotland, which is an extensive operation. We need to consider whether our courts are fit for purpose and whether the facilities are user friendly. In some areas, in the fullness of time we might need to consider using different buildings or accommodating different courts in one building. However, those are issues for the future; they are part of the management process that needs to evolve.

There is no doubt that we have invested significantly in improvements to our court system. More such investment would have to be concerned with the fabric and the physical infrastructure of the buildings. Clearly, however, it will also have to be concerned with what we do for witnesses, victims and others who use the courts. Negotiations are under way about the transfer of ownership of many of the properties because the change that has been brought about is significant. I could not give you chapter and verse just now about what will be done, but I can say that we recognise that, in some parts of the country, improvement is needed.

Mike Pringle: At the moment, there are two types of justices of the peace: those who sit and those who do not sit. People have expressed concern to the committee that the bill says that every JP can, in effect, get a contract for five years. However, a substantial number of JPs do not want to sit—perhaps they will simply say that they do not want to be involved anymore—and many JPs think that they are capable of sitting even though it has been decided that, given local circumstances, they are not. How will you address the problem that you might end up giving contracts to JPs who are not fit for purpose?

Hugh Henry: There are sensitivities associated with this issue and there are legal implications in relation to how we act. If we unilaterally remove JPs, that could cause problems. We would not want to do something that would have the unintentional effect of removing or even restricting office holders who are capable of doing a job.

We have sought to require that JPs undergo full training and appraisal. However, we recognise that the issue that Mike Pringle raises is a problem to which we do not have a solution at the moment. We are considering how to make progress in that regard, but the issue is complex.

Mike Pringle: Perhaps one way forward would be to address the issue through training. Your policy memorandum says that JPs will be required to sit as observers in a district court for three sessions as part of a training scheme that you will set up. It seems to me that sitting in court for three sessions will be completely inadequate because JP courts get various kinds of cases. Before I was allowed to sit—

The Convener: Can you come to the question, Mike?

Mike Pringle: Sorry. In Edinburgh, we had to observe for a considerable number of days.

Might training be the way to address the problem that you accept exists? People have told us that training is absolutely vital. At the moment, training is virtually non-existent in some JP courts and in other places it is very complex. How are we going to ensure that the situation is the same across Scotland? That way, we could ensure that everyone went through training before they were appointed.

Hugh Henry: We intend to ensure that a rigorous training programme is available and that

completing it is a requirement of becoming a JP. Training is fundamental and can make a significant contribution. It might well be one of the ways in which we address the problem that I described earlier. I do not know whether the requirement for that training will be sufficient in and of itself to address the problem that Mike Pringle described. Therefore, there may be other things that we need to do as well as ensuring that we have consistent training standards across the country.

12:30

Margaret Mitchell: I am curious that, given that the bill comprehensively considers lay justice, JPs and JP courts, there has been no mention of honorary sheriffs.

The Solicitor General for Scotland: I am not sure how many honorary sheriffs there are. They tend to be used in the Highlands and Islands, where I was a regional fiscal in a former life. They have the jurisdiction of a sheriff rather than of a JP, which means that they will appear only in place of the sheriff. They tend to be solicitors or former or retired sheriffs. Lord MacKay of Clashfern is an example of an honorary sheriff—

Margaret Mitchell: But there are those who are also lay justices.

The Solicitor General for Scotland: That is right. I have not thought about that—it is an issue that we should look at.

Hugh Henry: We will reflect on the issue that Margaret Mitchell has raised. If there is anything that needs to be done in that respect, we will do it.

Margaret Mitchell: I am merely interested in the fact that, although we are talking about five-year appointments and so on, honorary sheriffs, who are not qualified, have not been mentioned.

Mrs Mulligan: The bill team leader sent us a table showing the number of sittings that JPs attend. It ranges from four a year to 32 a year. Does the Executive have an opinion on what would be the best number of sittings for a JP to attend?

Wilma Dickson: We considered carefully whether we should set a minimum number in the bill. However, because of Scottish geography and the wide urban-rural split, we have decided that a JP will be required to meet the business needs of their sheriffdom, as set by their sheriff principal. That will give a bit of room for flexibility. We accept that people will have to sit frequently enough to keep their skills up, which is one reason for not moving away too quickly from three-person benches in rural areas, which offer that opportunity.

The view is that, rather than stipulate a single number, it is better to give sheriffs principal the task of ascertaining the right balance for their areas, taking into account the geography, the workload and the extra cases involving road traffic, which make up a huge proportion of district courts' work in rural areas.

Mrs Mulligan: The table suggests that the number of times that JPs sit is dependent on the number of justices. When the JPs took part in our round-table discussion, they signalled that they have had difficulties in recruiting in some areas. Given your commitment to the new JP courts, do you have any proposals for encouraging people to put themselves forward?

Hugh Henry: Yes. We will publicise the role of JPs to encourage people to come forward. However, we need to make it clear that responsibilities are attached to the position. It would be wrong of us to go on a recruitment exercise and say that, because we have reached a certain number of people, we are satisfied. We have to ensure that the people whom we get are of the requisite quality.

Mrs Mulligan: It is important to ensure that people understand what obligations they would have as JPs.

Mike Pringle: The bill makes provision for significantly increasing the sentencing powers of JP courts. What makes you believe that JP courts might need the power to impose sentences of up to six months imprisonment, and will JP courts be able to use such powers effectively and consistently across the country, in view of what we have said previously about some courts not being consistent?

Hugh Henry: Obviously, we will assess the impact of the changes, but the increased powers are part of the process of professionalising the court service, in which JPs will have a new and improved role. Earlier, the Solicitor General mentioned the opportunity to transfer business from the sheriff court to the JP court. Given the volume of cases in the court system, there is potential to transfer some of them to the JP court. If that means giving the JP courts extra powers, that would be the right way forward, but it would have to be done within clearly defined limits. I am not pretending that JP courts will be sheriff courts by another name. They will still deal with low-tariff disposals.

Mike Pringle: Under the bill, people who are elected to local authorities will have signing functions, as will MPs and MSPs. My understanding is that, currently, they cannot sign. I think I am right about that. Will people get training with regard to signing? When I became an MSP I was told that I could not sit on the bench and that I

could not be a signing justice of the peace, although people still phone me to ask for a signature.

Wilma Dickson: We accept that point. The bill gives councillors the right to sign non-judicial documents in a non-judicial capacity. There is no provision in the bill for MSPs to sign. That was raised by the committee earlier; the committee might want to come back to us on that.

You are right to suggest that we will need to do something about training. As on a number of other issues, we propose to liaise with the Convention of Scottish Local Authorities. There will probably be a training manual for councillors who will exercise signing functions. The functions are quite limited, so there will not be a huge volume of training information, but we commit to liaise with COSLA to provide suitable training materials.

Hugh Henry: We need to keep our perspective on the matter. It is not a huge function and it has changed significantly over the years. A number of documents can now be signed by many professionals. Previously, that was not the case. Where a specific signature is required and someone is thinking about becoming involved in that, we need to provide appropriate materials. To talk about training manuals and so on might give the impression of huge tomes coming along, but the training could be something short and simple that explains what is required.

Mike Pringle: I was quite taken by something that was suggested when the justices of the peace were at the committee for a round-table discussion. One of them suggested that JP courts could sit on a Saturday on the basis that a lot of the work that they do is about road traffic offences such as speeding. Many people work from Monday to Friday but would be quite happy to come to court on a Saturday. Has that option been considered?

Hugh Henry: That is a matter for the sheriff principal rather than for the bill. I am sure that that could work well in some areas.

The Convener: That was a popular answer.

Margaret Mitchell: I have a comment for the Solicitor General. Part 5 of the bill will place the existing inspectorate of the Crown Office and Procurator Fiscal Service on a statutory basis. The Association of Chief Police Officers in Scotland and the Glasgow Bar Association expressed concern about the appropriateness of the Lord Advocate making appointments to the inspectorate and of the inspectorate being accountable to him, given that he is head of the Crown Office and Procurator Fiscal Service and is responsible for how it performs.

The Solicitor General for Scotland: I saw those comments and I was surprised by their surprise. The intention to put the inspectorate on a statutory footing is to ensure that the Lord Advocate's independence is preserved. The inspector will act independently of any person, including the Lord Advocate.

As far as appointments are concerned, we intend to have an open recruitment process with a lay element that will provide advice and make recommendations to the Lord Advocate. After all, the Lord Advocate has a legal duty to act independently of any other person, which means not only the general public and politicians but the Executive itself. The individual who is appointed should have the Lord Advocate's confidence and should understand the nature of those functions. He or she will report to the Lord Advocate, who is ultimately accountable to Parliament. The fact that the inspector will not be subject to any political clamour about or, indeed, any parliamentary pressure on, his functions should bolster his independence.

Margaret Mitchell: Is not there a conflict of interests?

The Solicitor General for Scotland: No, because the inspector will function independently of the Lord Advocate.

Margaret Mitchell: But the Lord Advocate will perform both roles.

The Solicitor General for Scotland: The state appoints judges, but once appointed they carry out their functions independently of the state.

Margaret Mitchell: To avoid doubt, would not it be better to consider the Glasgow Bar Association's suggestion that the Judicial Appointments Board make the appointment?

The Solicitor General for Scotland: Prosecution requires an entirely different set of skills from those that are needed for judicial matters. The bill proposes an open recruitment process that might well involve a judge, but will ensure that appointees have credibility and are able to carry out the functions robustly and with Parliament's confidence. Again, all the reports will be published for parliamentary scrutiny and the individual and the Lord Advocate will be available for questioning by Parliament.

Margaret Mitchell: Would not it be more sensible simply to bypass the Lord Advocate and give Scottish ministers the power of appointment? Surely such a measure would mean a clear division of powers.

The Solicitor General for Scotland: It sounds a bit precious to talk about prosecutorial independence but, with due respect to my colleague Hugh Henry and the other ministers, I have to guard the prosecutorial function of my role ferociously against political expedience, the

parliamentary desires of the month or lobbying from pressure groups. Very often, there is great clamour for prosecutors to behave in a certain way; as a result, not only must they be protected, but they must carry out their functions clinically, thoroughly, objectively and independently of any other person. The inspectorate of prosecution must have the same protection to carry out its duty in the same way.

Margaret Mitchell: So you do not have confidence that the Judicial Appointments Board would be able to carry out that function.

The Solicitor General for Scotland: That would simply not be appropriate because, as I have said, entirely different skills are required. Not all judges have been prosecutors and a fairly detailed and expert understanding, often gathered over a number of years, is needed of the mechanisms of and tasks that are involved in prosecution. Because the skills of a defence agent such as Mr McCaffrey are entirely different from those of a prosecutor, it is important that the individual be appointed by persons who are able to make an objective assessment of the skills that are required for the post.

The Convener: We will leave the matter there.

I do not necessarily expect an answer to this question but, after discussions with our adviser, I am concerned that bail appeals, which are usually made privately in chambers, are not covered in the bill. Given that the Executive is seeking to develop the theme of providing the public with an understanding of the reasons behind bail decisions, I wonder whether it has given any thought to applying the same ethos to bail appeals.

Hugh Henry: I am not sure that the matter has been raised in discussions.

The Convener: I realise that it has not been mentioned; it is not covered in the bill. My question was not meant to be a surprise. The committee simply wondered whether, given the Executive's intention to make bail decisions open and transparent to allow the public to understand them, it might want to consider bail appeals in that respect, although not necessarily in the context of this bill.

Hugh Henry: We will consider the matter.

The Convener: We have reached the end of a very helpful three-hour evidence taking session. On behalf of the committee, I thank the Solicitor General for Scotland; Jim Brisbane; the Deputy Minister for Justice, Hugh Henry; Wilma Dickson; Noel Rehfisch; and Scott Pattison for their evidence.

We will now have a five-minute suspension.

12:45

Meeting suspended.

12:55

On resuming—

Subordinate Legislation

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2006 (Draft)

Advice and Assistance (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/233)

Criminal Legal Aid (Summary Justice Pilot Courts and Bail Conditions) (Scotland) Regulations 2006 (SSI 2006/234)

The Convener: Items 2 and 3 on the agenda comprise consideration of three related items of subordinate legislation. The first Scottish statutory instrument is subject to the affirmative procedure, whereas the other two are subject to the negative procedure. Because of the connection between the three sets of regulations, we will use a format that is slightly different from the one that we usually use. The Deputy Minister for Justice will make introductory remarks on all three SSIs, after which members will be able to ask questions. When we come to the formal proceedings, the minister will move the motion on the affirmative instrument and members will comment on the negative instruments.

Hugh Henry will remain with us—

Hugh Henry: Forever.

The Convener:—for the remainder of the afternoon. Poor you—you must have done something bad in a former life.

I welcome Gillian Mawdsley and Phil Burns, who are from the Scottish Executive Justice Department. Thank you for joining us. I invite the minister to make his opening remarks.

Hugh Henry: The three sets of regulations are designed to support the two summary justice pilot courts that have been set up in Grampian and West Lothian, which have been designed to encourage criminal justice organisations to co-operate to achieve speedier resolution of summary criminal cases. The regulations include changes that make provision for probation progress reviews and payments in respect of bail hearings for remote monitoring.

The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2006 will allow assistance by way of representation to be provided to any accused person who appears from custody without application of the means and merits tests

"until the conclusion of the first diet at which he is called upon to plead and in connection with any application for liberation following upon that diet"

or until the case is disposed of, if the accused has tendered a plea of guilty and no grant of criminal legal aid will be made until then. The regulations will also allow such assistance to be provided to an offender for a court hearing at which their probation order is reviewed; when they are sentenced, provided that the means and merits tests have been satisfied and criminal legal aid has not been granted; and when they make a change of plea once the Scottish Legal Aid Board has refused a legal aid application.

The summary justice pilot courts adopt a number of the key recommendations that Sheriff Principal McInnes made as part of his review of summary justice cases. The changes, which are designed to underpin such reforms, will be monitored to obtain necessary information on how the provision of legal aid should be developed to support the other reforms that are being advanced as part of the process of summary justice reform.

Parole review hearings represent a new procedure whereby a fee has been introduced for solicitors' remuneration.

The Convener: Do any members wish to comment on, or to ask questions about, the three SSIs?

Margaret Mitchell: I have a question about SSI 2006/234, which deals with bail conditions, but it is not germane to the payment of the fee. Is there any indication of how many remote monitoring orders have been breached?

Hugh Henry: We do not have that information at the moment.

The Convener: As there are no more comments or questions, I invite the minister to move motion S2M-4448.

Motion moved,

That the Justice 1 Committee recommends that the draft Advice and Assistance (Assistance By Way of Representation) (Scotland) Amendment Regulations 2006 be approved.—[*Hugh Henry.*]

Motion agreed to.

The Convener: Do members wish us to report anything on the two negative instruments or should we simply note their contents?

Mrs Mulligan: We note their contents.

The Convener: Minister, will you be remaining for the next item on the agenda? You would be welcome to do so.

Hugh Henry: I would love to—but what is the next item?

The Convener: You should have asked that first.

Divorce (Religious Bodies) (Scotland) Regulations 2006 (SSI 2006/253)

Divorce and Dissolution etc (Pension Protection Fund) (Scotland) Regulations 2006 (SSI 2006/254)

Parental Responsibilities and Parental Rights Agreement (Scotland) Amendment Regulations 2006 (SSI 2006/255)

The Convener: Item 4 is consideration of regulations relating to divorce and the Family Law (Scotland) Act 2006.

Mike Pringle: I am sure that the minister would be delighted to stay with us.

Hugh Henry: If it will help the committee, I will remain.

The Convener: The Family Law (Scotland) Act 2006 inserted into the Divorce (Scotland) Act 1976 new section 3A, which allows the court to postpone the granting of a divorce decree in circumstances in which a barrier exists that would prevent one of the applicants from entering into a future religious marriage. New section 3A defines a religious marriage as one that is solemnised by a marriage celebrant of a prescribed religious body and allows ministers to define a religious body in an order.

For our consideration of the three sets of regulations, on which the clerks have prepared notes, we are joined by Anne Cairns and Christina Phillips. Thank you for joining us. I have a question about SSI 2006/253. My reading is that it simply changes the terminology that was used in the 1976 act. Is that correct?

Anne Cairns (Scottish Executive Legal and Parliamentary Services): SSI 2006/253 simply prescribes any Hebrew congregation as a religious body for the purposes of new section 3A of the 1976 act, which is on the postponement of decree.

The Convener: Does that represent a change in terminology?

Anne Cairns: It is a slight change. The order under the 1976 act prescribed the Hebrew congregation, whereas SSI 2006/253 refers to any Hebrew congregation. The change was made in consultation with the Jewish community, which was satisfied with the proposal.

The Convener: Are we satisfied with the regulations?

Members *indicated agreement*.

The Convener: As there are no further comments, I ask members simply to note the three sets of regulations. I thank Anne Cairns and Christina Phillips for joining us briefly and Hugh Henry for volunteering to stay with us until the bitter end.

At a previous meeting, the committee agreed, in keeping with our usual practice, to take in private item 5, which is discussion of the issues that have arisen during our evidence taking on the Criminal Proceedings etc (Reform) (Scotland) Bill.

13:02

Meeting continued in private until 13:10.

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

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

The deadline for corrections to this edition is:

Tuesday 13 June 2006

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

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

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

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by Astron and available from:

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

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

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

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

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

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

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

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

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron