JUSTICE 2 COMMITTEE

Tuesday 24 April 2001
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
†7th Meeting 2001, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Mrs Lyndsay McIntosh (Central Scotland) (Con)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Christine Grahame (South of Scotland) (SNP)
*Ms Margo MacDonald (Lothians) (SNP)
*Mrs Mary Mulligan (Linlithgow) (Lab)
Tavish Scott (Shetland) (LD)

*attended

WITNESSES

Dr Alastair Brown (Crown Office)
Frank Crowe (Crown Office)
Hugh Dignon (Scottish Executive Justice Department)
Len Higson (Procurator Fiscal Service)
Andrew Normand (Crown Office)
Sandy Rosie (Crown Office)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Fiona Groves

ACTING ASSISTANT CLERK

Graeme Elliott

LOCATION

The Chamber

† 6th Meeting 2001, Session 1—joint meeting with Justice 1 Committee.

Scottish Parliament

Justice 2 Committee

Tuesday 24 April 2001

(*Morning*)

[THE CONVENER *opened the meeting at 10:01*]

The Convener (Pauline McNeill): We are now quorate, as three members are present, so I will open the meeting. This is the seventh meeting in 2001 of the Justice 2 Committee and I welcome the witnesses and members of the public who are here today.

I have a brief announcement. We have a new senior assistant clerk—I extend a welcome to Claire Menzies, who was previously assistant clerk to the conveners liaison group.

International Criminal Court (Scotland) Bill

The Convener: The first item of business is the International Criminal Court (Scotland) Bill. The bill has not been officially referred to the committee for stage 1 consideration, but we expect the Parliamentary Bureau to do that this week. In expectation of that referral, we have invited Executive officials to give evidence on the general principles of the bill. Hugh Dignon will introduce the Executive team and has up to 15 minutes to make a presentation. We will then move on to questions from members.

Hugh Dignon (Scottish Executive Justice Department): I have with me Dr Alastair Brown, who I believe will also give evidence to the committee on a different matter later this morning. Dr Brown has played a key role in the policy and drafting of the bill, although he is not a formal member of the bill team—he is with the Crown Office. Jan Marshall is a member of the bill team and is with the Office of the Solicitor to the Scottish Executive. Danny Jamieson works with the bill team on the administrative side. My statement will follow the structure that was suggested in a letter from the clerks. I will start by speaking in general terms about the policy behind the bill.

The Convener: I will interrupt for a second to ask Hugh Dignon to speak a little louder so that everyone can hear. There is a problem with the acoustics in the chamber, which means that sound tends to drift.

Hugh Dignon: The policy behind the International Criminal Court (Scotland) Bill is to make the changes to Scots law that are required to allow the UK to fulfil its obligations under the Rome statute. The International Criminal Court Bill, which is currently before the Westminster Parliament, will make parallel changes to the law of England and Wales.

The Rome statute is the international treaty that was signed on 17 July 1998 at Rome, where it was agreed to set up a permanent international criminal court. That agreement was the culmination of preparatory work that had been going on for about three years. The idea for a permanent ICC goes back as far as 1948, but it did not make progress because of cold war tensions. However, atrocities and conflicts throughout the 1980s and 1990s led to resumed support for the proposal.

The court will come into being 60 days after the 60th state has ratified the treaty. The treaty currently has 139 signatories, which represent more than two thirds of the international

community, including all members of the European Union, all NATO members—except Turkey—and four of the five permanent members of the United Nations Security Council. At present, 29 states have ratified the treaty. The UK Government's aim, which is strongly supported by the Scottish Executive, is for the UK to be one of the first 60 states to ratify the treaty. The International Criminal Court (Scotland) Bill and its Westminster counterpart are necessary to allow ratification by the UK.

Both the UK bill and the Scottish bill include provisions that allow for the incorporation of ICC statute crimes into domestic law and co-operation with ICC investigations. They also allow for fines, forfeitures and reparations to be levied and for ICC prisoners, who are sentenced by the court in The Hague, to serve their sentences in the United Kingdom.

The key differences between the Scottish and Westminster bills is that the Westminster bill contains provisions that deal with the granting of privileges and immunities to the ICC and, perhaps more significantly, that deal with the arrest and surrender of individuals wanted by the ICC. The arguments for including those aspects in the Westminster bill were set out by the Deputy First Minister during the Sewel debate on the bill on 18 January. On the more significant arrest and surrender provisions, the Executive perceived that, although the provisions would have been in the competence of the Scottish Parliament, there was a risk that it could be argued that they were analogous to extradition, which is a reserved matter. That would have opened the possibility that an ICC fugitive could avoid being surrendered to the ICC if a court agreed with that view. The better course, therefore, to avoid any room for doubt, was to include all the arrest and surrender provisions in the UK bill.

Part 1 of the International Criminal Court (Scotland) Bill incorporates the offences in the ICC statute into Scots domestic law. The statute does not require that, but our doing so allows for the important principle of complementarity, which enables us to try in Scotland those individuals who commit ICC crimes within the jurisdiction of the bill rather than handing them over to the ICC to take proceedings. The Rome statute provides that the ICC will proceed in the case against an individual only if the relevant state party is genuinely "unable or unwilling" to proceed.

Many of those crimes, including murder or assault, are already offences under Scots law if committed in Scotland. However, the principle may not be applied with total certainty unless the relevant offences are made offences under Scots law in identical terms to those in the ICC statute. As well as creating the offences in Scots domestic law, the bill provides for prosecution of those offences in relevant circumstances where the act is committed outwith the UK, including where the offence is committed by a UK national.

Part 1 also covers repeals and amendments including the repeal of the Genocide Act 1969. That act is included because its jurisdiction is more limited than is the case under the new provisions. The Criminal Procedure (Scotland) Act 1995 is amended to ensure that the protection provided to victims is extended to those giving evidence in relation to offences under the bill.

Part 2 deals with assistance to the ICC. In order to ratify the treaty, states are required to be able to provide assistance to the ICC in its investigation and prosecution of ICC crimes. The general pattern in part 2 is to make such provision, as far as is possible, equivalent to provision in Scots domestic law. For instance, where a request from the ICC appears to require the exercise of a power of entry, search and seizure, that would be done in line with the court's powers to grant a warrant at common law. Another example is the definition of a sample, which is based on the Criminal Procedure (Scotland) Act 1995. Also in part 2, sections 19 and 20 provide for the investigation into and the freezing of the proceeds of ICC crime.

The detail of those measures is set out in schedules 5 and 6, which are based largely on current practice in the area—for example, under the Terrorism Act 2000 and the Criminal Justice (International Co-operation) Act 1990—and dovetail with the relevant provisions in legislation such as the Bankruptcy (Scotland) Act 1985.

Part 3 deals with the enforcement of sentences and orders. It will provide for the potential detention in Scotland of ICC prisoners who are sentenced at The Hague and for the enforcement of orders for fines, forfeitures and reparations that are issued by the ICC against the convicted person. Although the enforcement of orders is obligatory under the statute, the detention of prisoners is optional. However, if the ICC—which will not have prisons of its own—is to function effectively, it is important that state parties take on that responsibility.

It will be for the secretary of state to agree with the ICC whether a prisoner should come to the UK. If it is considered appropriate that the prisoner should serve a sentence in Scotland, the Scottish ministers will be consulted. Under the provisions in the UK bill, the Scottish ministers are entitled to refuse such a request. However, if they agree to it, the Scottish bill provides for the issuing of a warrant pursuant to such a detention. ICC prisoners who serve a sentence in Scotland will be treated in like fashion to domestic prisoners, except that domestic law on the determination of the length of sentence will not apply, as it is for the

ICC to determine the period that a prisoner should serve.

Part 4, which has the heading "General", sweeps up and provides for miscellaneous administrative matters, such as the authentication of documentation that is issued by the ICC, and interprets certain terms that are used in the bill.

That is a brief overview of the bill. The clerk has suggested that we also refer to the extent to which there is discretion for signatory states to choose how they ratify the treaty. Article 120 of the Rome statute states:

"No reservations may be made to this statute."

However, under article 124, a state may upon ratification declare that

"for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8"—

which is war crimes—

"when a crime is alleged to have been committed by its nationals or on its territory."

A state can declare that reservation for a period of seven years.

Countries may also choose to make declarations at the point of ratification, but those will not alter the terms of the statute. It is the view of the UK Government that such declarations would have no legal effect. As I mentioned, there are areas in which we are doing more than is strictly required by the statute—for example, in the incorporation of ICC offences into domestic law. That is the extent to which states have discretion in the way in which they choose to ratify the treaty.

The Convener: Thank you very much. I invite members to ask questions or to make comments.

Mrs Lyndsay McIntosh (Central Scotland) (Con): I was curious about your comments on the jails and where people might serve their sentences, which the ICC will decide. Is it possible that people will avoid serving sentences in Scotland until we have cleaned up our jails and had them properly plumbed?

Hugh Dignon: I am not aware of any problem with prisoners serving sentences in jails in Scotland as opposed to in any other country. As far as I am aware, as soon as the bill is passed and the UK ratifies the treaty, the UK will be as good or bad a place as anywhere for a prisoner to serve their sentence.

10:15

Christine Grahame (South of Scotland) (SNP): I will ask a couple of general questions. You state that 139 states have signed and 29 have ratified the treaty. Could you advise me on the distinction between signing and ratifying and on the time scale? I understand that, until 60 states have ratified the treaty, the ICC cannot be established. Why are we dealing with this now if it might be years ahead until the court is established?

Hugh Dignon: I am not sure that this is a matter of years ahead. The ICC is working on the assumption that the 60 states will have ratified by about July 2002.

Christine Grahame: That is very helpful. How many judges will there be in this criminal court? I beg your pardon—I see that there will be 18 judges. Perhaps we have had this information in a briefing that I missed, but how will the judges be appointed and what system will operate for the duration of the appointments?

Dr Alastair Brown (Crown Office): The judges are all to be full time. The Rome statute requires them to be chosen by election from among persons who possess the qualifications necessary for appointment to the highest judicial office in their home states. They are to be people who have established competence in criminal law and procedure or in relevant areas of international law. Fairly complicated rules for the election of the judges seek to maintain a balance between those two groups and require states in selecting judges to take into account the need for representation of the principal legal systems of the world—the different legal traditions—equitable geographical representation, a fair representation of female and male judges, and expertise on specific issues, such as violence against women and children. Those subject areas are specifically identified in the statute.

In negotiating the statute, the states put a lot of effort into ensuring that there would be good-quality judges; given the kind of offences with which the court will be dealing, judges will be required to demonstrate the expertise that we want. From what has gone on in the former Yugoslavia and Rwanda, we have, usefully but regrettably, a pretty good idea of what kind of things happen during the commission of such offences. The appointment is time-limited; I am told that the limit is nine years.

Christine Grahame: Obviously there will be regulations in due course—I do not know whether the committee will be involved in that—about issues such as the removal of judges, for insanity for instance. There must be some way of getting rid of a judge.

Dr Brown: Article 41 of the Rome statute makes provision for the

"Excusing and disqualification of judges",

which is perhaps not quite as final as what Christine Grahame is contemplating, although I suppose an insane judge might be disqualified routinely.

Detailed draft rules of procedure and evidence have been prepared to supplement the Rome statute. Those have not yet been adopted, but they are in their final draft. They include material about the disqualification of a judge, requests for removal from office and removal from office. The short answer to your question is yes.

Christine Grahame: Scotland has a separate legal system—in particular, its criminal justice system is very distinct from the English criminal justice system. When recommendations are made on the appointment of judges, will the Scottish recommendations be distinct from the English ones or will a UK recommendation be put forward? A UK recommendation would not reflect the difference in the judicial systems that you said would be represented on the tribunal.

Dr Brown: I have to disappoint you on that.

Christine Grahame: I thought that you would.

Dr Brown: The court has only 18 judges. In the international law arena, the UK is a unitary state. Accordingly, the UK will have, I think—it will be a matter for the UK Government—only one nomination. That nominee could, of course, be a Scottish judge. We have experience of the UK judge in the Court of Justice of the European Communities being a Scottish judge—Judge Edward is there at the moment and there have been others in the past—and although the British judge at the European Court of Human Rights is English-qualified, Lord Reid from the High Court of Justiciary and Court of Session has sat as a temporary judge on occasion, when the usual British judge has not been able to take part.

We will have to rely on the general efforts to ensure fair representation of the different legal cultures in the world to ensure that Scotland is properly represented.

Christine Grahame: That is the point that I was making. Scotland has a distinctive tradition in its criminal system, which is divergent from the English system. My point was not a naked nationalistic point; it was about the Scottish legal system being represented. That concerns me. I accept that the judge could be English, Irish or whatever, but that would not reflect the seriously distinctive systems in Scotland and England.

Dr Brown: Yes, that is undoubtedly right. If one were to analyse Scots law, particularly Scots criminal law, one could probably make a case for saying that it is—much as Lord Cooper put it in the 1950s—a blend of the continental civilian tradition, some aspects of the English legal tradition, and what Lord Cooper referred to as flashes of native genius. Whether our native genius will be properly represented I do not know, but we can at least expect the bits that come from the continental civilian tradition and from the Anglo-American tradition to be properly represented. Scots law, and particularly Scots criminal law, faces the same issue repeatedly in international forums. At least in the Rome statute there is a requirement for broad representation, so that dealings in the international criminal court will command widespread global support.

Nobody's system will be fully reflected. There are real tensions between the inquisitorial and the adversarial approaches, which are reflected in the Rome statute by the creation of a prosecutor's office, which is under far more judicial control than there would be in an adversarial system, and by the pursuit of an adversarial approach to trials. There are issues, but an effort has been made to deal with them.

The Convener: Before we leave the topic of judges, I would like to exhaust the issue, because it is important. I have a few questions that lead on from Christine Grahame's questions. Do you have any idea how the figure of 18 judges with which to represent all the legal systems properly was arrived at?

Dr Brown: It was a matter for negotiation among the 100 or so states that took part in the Rome conference. I do not know how they came to the figure of 18. They needed enough judges to have trial and appeal chambers and to take care of the possibility of certain judges being disqualified from particular cases for particular reasons. They had in mind experiences from the Yugoslav and Rwandan tribunals and came to a figure.

The judges will be independent; they will not represent the member states from which they come. Otherwise, more than 100 states in the world would feel disfranchised, because only 18 would have nationals as judges. However, there will be an effort to ensure that the 18 judges have knowledge and experience of the main legal traditions of the world. I think that Hugh Dignon has something useful to add.

Hugh Dignon: It is important that we do not lose sight of the fact that, in almost all circumstances, we expect people who fall within the jurisdiction of the bill to be tried in Scotland under Scots law by Scots judges. The important point about complementarity is that by incorporating the ICC offences into domestic law, proceedings against a UK national or anyone else who is resident in Scotland who commits one of the crimes—such as war crimes or crimes against humanity—will usually be taken within Scotland and the person will be tried under Scots law by Scots judges. That

is the course that we expect to be pursued.

The Convener: That is useful. Is the situation similar to that regarding European Union law, in that Scottish courts are expected to be the point of first instance for European Union citizens? Is that the model?

Hugh Dignon: It is important to point out that the Rome statute says that the ICC will take action only where a state party is "unwilling or unable genuinely" to take proceedings against a person. It is envisaged that the ICC will step in only where a country's legal establishment has broken down and is unable to take the necessary action against individuals. We expect that in almost every conceivable circumstance, a UK national or a resident of the UK will fall within the terms either of the International Criminal Court Bill at Westminster or, if they are resident in Scotland, of the International Criminal Court (Scotland) Bill.

The Convener: That is helpful. Are there any other questions on judges?

Ms Margo MacDonald (Lothians) (SNP): My area of interest impacts on judges and the absolute necessity for their impartiality to be seen in an international context. Although we are talking about an international legal system, it will inevitably be crossed by the political requirements and parameters of the day.

I have two questions. First, has the timetable that you have given been updated since the advent of the new American presidency, given that both the majority in the Senate and the President have said that they are not minded to ratify the treaty? Secondly, there are to be only 18 judges. However, when the international criminal court will be needed most, as in Rwanda for example, there will be a heavy political perspective. In such instances, judges will have to be seen to be absolutely independent, which means independent of the great powers. Why, when the Rome statute was being compiled, did people not come down in favour of a greater balance of judges from smaller, unaligned countries, such as Scotland, with independent systems of jurisprudence and a history of administering justice fairly?

Hugh Dignon: On the first point, I am not aware that the timetable has been affected in any way by what the US may or may not do in relation to the court. The issue is the first 60 states to ratify. Whether the US is one of those does not enter into the timetable. Of course, we are aware of the US Government's position. The UK Government's position is that it urges the Americans to ratify the treaty. However, I do not think that the establishment of the ICC will be held up if the Americans choose not to ratify the treaty immediately.

Dr Brown is probably better qualified to talk about the independence of judges than I am. The judges have not yet been chosen. Where they will come from remains to be seen and will be a matter for a vote among the state parties.

10:30

Dr Brown: Articles 40 and 41 of the Rome statute spell out the independence of the judiciary. Article 40 states:

> "The judges shall be independent"

and

> "shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence."

Article 41 deals with disqualification and provides that:

> "A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground."

Pervading the Rome statute is an appeal to international human rights treaties, in particular the International Covenant on Civil and Political Rights, which is the United Nations' equivalent to the European convention on human rights.

The independence of the judiciary is set out clearly. As in the Yugoslav and Rwandan tribunals, we should expect the ICC, in dealing with such questions, to look to the case law of, for example, the European Court of Human Rights, which makes it clear not only that judges must be independent, but that they must be seen to be independent.

What considerations will motivate states in deciding precisely which judges will be selected, we do not, of course, yet know. It is by no means inconceivable that judges will be appointed from small or non-aligned states. Indeed, it was an initiative by Trinidad and Tobago that set off the procedure for negotiating the Rome statute after a long history of negotiations being stalled—although I understand that Trinidad and Tobago, for other reasons, is not a signatory to the statute.

It is quite possible that small states will be represented. Small and developing states are represented on the judiciary of the Yugoslav tribunal and there is no reason to suppose that they will not be represented in the international criminal court. However, it would have been somewhat difficult to write into the statute the inclusion of a legal system—such as the Scottish system—that, in international law terms, was part of a larger unitary state's system. That was not done.

Ms MacDonald: May I press you on that? There are not many states that are in the anomalous position of having a separate, internationally

recognised legal system, as Scotland has, inside a unitary state, are there?

Dr Brown: That is right. One could get into discussions about when a federal system that has different legal systems within the federal whole becomes analogous to our system. The obvious comparison is with Canada and the Quebec experience. You are right that there are not very many such states. However, the Rome statute is a treaty. As far as the international community is concerned, the treaty deals with states. On the international plain, the UK is a unitary state and the international community has to deal with the UK as a unit.

Ms MacDonald: I will press you further on the matter. The treaty has not been ratified. Amendments are being suggested. One of the reasons why Clinton signed the treaty before he left office was to allow for amendments, so that it could be signed by the incoming United States Administration. We are still in the melting pot, are we not? The treaty is not set in stone.

Dr Brown: With respect, I do not think that one can sensibly contemplate amendments to the Rome statute. One would have to reconvene the Rome conference and renegotiate the aspects of the Rome statute that one sought to amend.

I am fairly sure that there was some discussion of amending the Rome statute in the House of Lords during the Lords progress of the UK bill. The UK Government's position was that suggestions about amendments to the treaty were somewhat unrealistic. The American position has been much criticised by other states. It has been driven by considerations that the USA has had to determine for itself.

It is still possible to influence the content of the rules of procedure and evidence and of the elements of crimes, which are in final draft. However, to contemplate amending the treaty is not terribly realistic, simply because of the logistics: one would have to convene something like 120 states and get agreement. It took a long time to reach agreement on the Rome statute. The UK Government's position, as I understand it, is that the Rome statute is the treaty and that is all the treaty will be.

Christine Grahame: I have supplementary questions on something different—the impact of the bill, when it becomes an act, on existing Scots law, both statute and common. You mentioned some statutes on which there would be an impact—I managed to scribble down only a couple of them: the Criminal Procedure (Scotland) Act 1995 and the Bankruptcy (Scotland) Act 1985—which was interesting. What impact would there be on common law? I may be muddling my thinking. Are there any other statutes on which there will be an impact? We can ask the clerks to provide us with a list of any such statutes. I am interested in the impact of the bill on common law because most of the crimes in Scotland are common-law offences.

You also told us that most of the proceedings should take place in the native country—Scottish proceedings would take place under a Scottish judge, prosecution and so on. How does one address equality of standards in relation to trials, procedures and evidence if individual states take proceedings differently from how they might be taken if they went before the ICC? I do not understand that. I can understand that a case might go to the ICC for the convenience of witnesses, for example. There might be instances in which that would be more proper. I am just fishing here, really. I wonder about that conflict.

My first question is: how does the bill impact on common law as well as on statutes in Scotland? I am concerned that we take notice of things that the bill changes in Scots law. My second question is: how would the procedures that will be used in Scotland fit with proceedings elsewhere, whether in Trinidad and Tobago or wherever? How can one say that there is parity or any kind of level playing field?

Hugh Dignon: I have to say that I am not an expert on common law in Scotland.

Christine Grahame: Neither am I.

Hugh Dignon: After a quick word with Dr Brown and Jan Marshall, I can say that the answer is that we can see no real immediate impact on common law.

I mentioned some other statutes that the bill amends. Those are the Criminal Procedure (Scotland) Act 1995 and the Genocide Act 1969. The Genocide Act 1969 will be repealed because the jurisdiction under the bill if passed will be wider than that under the 1969 act. The Criminal Procedure (Scotland) Act 1995 will be amended so that the protection given to victims when they give evidence is extended to people who will be victims under the bill if passed. Those are the direct changes. I mentioned a couple of other statutes in my statement.

Christine Grahame: You mentioned the Bankruptcy (Scotland) Act 1985, which was interesting. It has to do with seizure.

Hugh Dignon: In setting out how a court in Scotland will give effect to freezing orders for the proceeds of ICC crime, we need to be aware of existing statute in the area and to ensure that the provisions in the legislation dovetail with it. That accounts for the reference to the Bankruptcy (Scotland) Act 1985. We followed the model provided by the Terrorism Act 2000, which set out

a way of freezing the proceeds of crime associated with terrorism. That accounts for my reference to that act.

On parity between different systems, I am not aware of any way in which one could compare what happens in one jurisdiction with what happens in another. We could start from the assumption that there is no question but that the Scottish legal system is considered to be among the best in the world and perfectly acceptable or that justice is correctly addressed in proceedings in the Scottish judicial system. That is the only basis on which we can answer that point.

What happens in other countries is a matter for the ICC, which will take a view on whether a country is "unwilling or unable" to proceed. If a country's legal system is best, there will be no reason, in the vast majority of cases, for the ICC to take a different view.

Christine Grahame: You said "unwilling or unable to proceed". I do not know what the mechanism for showing it will be, but the ICC might be unhappy about a trial taking place in a particular state for a particular reason at a particular political time—as Margo MacDonald said, that is an important point. Would the ICC be able to say, "We determine that this case should be heard by us, as we are not happy for it to be heard in that national jurisdiction"?

Hugh Dignon: No.

Christine Grahame: That is a shame.

Hugh Dignon: The Rome statute states that the ICC can take action only when a state party is "unwilling or unable" to do so. A further safeguard is that if the ICC prosecutor wished to initiate an investigation or prosecution, such proceedings would have to be cleared by a pre-trial chamber of judges within the ICC. The ICC prosecutor is otherwise unable to initiate prosecutions. In any event, the statute states that it is only where a state party is "unwilling or unable"—

Christine Grahame: That is a weakness.

Scott Barrie (Dunfermline West) (Lab): I want to address the point about a state being "unwilling or unable" to continue with a case. I got the wrong end of the stick from the policy memorandum, as I thought that the United Nations Security Council had something to do with that procedure.

Paragraph 6 of the policy memorandum talks about the Security Council and refers to a state being

"unable or unwilling genuinely to investigate and prosecute a crime".

The policy memorandum suggests that the ICC would take over proceedings in such circumstances. Could you elaborate on where the Security Council fits in, as I am now a bit confused?

Dr Brown: It would probably help if we avoided referring to the ICC taking over a prosecution, as it will not be in a position to call up a case—so to speak—from a national system.

Article 17 of the Rome statute provides that the ICC may determine that a case with which it is dealing is "inadmissible"—in other words, that it should stop dealing with that case—where

"The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution".

The purpose of that provision, as I understand it, is that proceedings are generally expected to take place in national courts. However, proceedings may be commenced in the ICC by the ICC prosecutor under the control of the pre-trial chamber if it appears that a show trial or a piece of window dressing is taking place in a state to give someone immunity by subjecting them to a trial that is intended not to achieve much. We can envisage without difficulty some states in the world about which there might be concerns about such trials. Therefore, it is possible for a prosecution to be commenced in the ICC. If a state that thinks that it is doing the job properly itself objects to the ICC continuing with a prosecution, or if the accused objects to the ICC continuing on the basis that the case is being dealt with properly in the national system, it will be for the ICC to examine what is going on in the national legal system. The ICC must determine whether proceedings reach the standard of justice required in cases of the most serious concern to the international community.

I hope that my answer makes the position a little clearer.

Ms MacDonald: I—

The Convener: Hold on, Margo. Members should indicate if they wish to speak. Do you wish to come back in, Scott?

10:45

Scott Barrie: Yes, although I want to raise a slightly different point.

In an ideal world, we would not have to prosecute any of those offences as they would not exist, but given that they do—there are recent examples of them—what is the ICC's expected work load? There seems to be a lot of emphasis on prosecutions taking place in individual states. A lot of time and effort is being spent on creating the ICC, but will it have a function?

Hugh Dignon: It is not possible to say anything

about the ICC's work load with any certainty, given that it will not deal with crimes retrospectively—it will deal only with crimes that take place after the court comes into existence. On the basis of experience, one would expect there to be some business for the ICC, but exactly how much will be determined by conflicts that arise and the sort of behaviour that takes place during them.

It is worth making the point that a key function of the ICC is to act as a deterrent. One would hope that the ICC's existence will lead to less criminality of the sort that the ICC is to deal with.

Ms MacDonald: I want to follow up the issue of proceedings being batted backwards and forwards between a national legal system and the ICC. Dr Brown said that the ICC could initiate proceedings. While the local system—the national system—could take up the prosecution, the ICC might believe that that system is falling down on the job, for whatever reason. Who will decide any disputes?

Dr Brown: I do not know whether I agree with the phrase "batted backwards and forwards", as we are talking about two sets of criminal proceedings: one in the ICC and the other in the national court. Ultimately, the question for the ICC will be whether it has jurisdiction to continue with the proceedings that have been commenced before it. The test will be whether a state that is party to the treaty is genuinely conducting its own proceedings. If the ICC considers that a state is genuinely doing so, it will require to take the view that it no longer has jurisdiction to continue with the case. Its decision will be amenable to appeal to the appeal chamber of the ICC. The ICC will decide about its proceedings and that decision will be subject to appeal.

It will be for the national authorities to decide whether to continue with a national court's proceedings. If the ICC carries on with its proceedings, questions of what we call, in Scots law, res judicata or tholed assize will arise. The fact that someone has already stood trial elsewhere on exactly the same charges and has been dealt with for those charges should bar them from further proceedings. It will be for both the national court and the ICC separately to decide whether their proceedings can continue.

A lot of effort has gone into ensuring that the ICC will be a court in which the international community, including the UK, can have a great deal of confidence. The tribunal will be a serious tribunal that will command substantial international respect—at least that is the intention. I understand that the UK is committed to ensuring that it will work in that way.

The Convener: The committee's aim is to scrutinise the bill and identify problem areas. We have probably stumbled across a few of those already. The details that you provide are important.

Given that the sort of things that must be looked out for are disputes over jurisdiction, is there a point in proceedings at which the ICC must claim its jurisdiction? If a country thinks that it has jurisdiction, how far can it go with a trial before the ICC can say that it should deal with the matter?

Dr Brown: The ICC can commence proceedings at any time. It is conceivable that ICC proceedings could start after national proceedings had taken place. However, the policy underlying the Rome statute and the UK's approach to it is that, where somebody is subject to the jurisdiction of a UK court—whether Scots, English or Northern Irish—that person will be prosecuted properly in the UK court in a way that fully meets international standards of justice.

Given the nature of the offences that we are talking about—crimes of the greatest gravity such as genocide, crimes against humanity and war crimes—it is extremely likely that the accused in Scotland will be in custody and the trial will be commenced within 110 days of full committal on petition. If there is a Scottish dimension, it is extremely likely that Scottish proceedings will have been commenced and completed well before there is any question of ICC proceedings. I would not expect the ICC even to contemplate the commencement of proceedings where a UK court is dealing with a case, unless there was some particular reason to think that the UK proceedings were in some sense not genuine. I cannot imagine that occurring.

The Convener: The committee has to imagine extraordinary situations. You used the term "UK court". Scottish courts are Scottish courts. "UK court" is meaningless in Scots law. The phrase "international standards of justice" is just a phrase.

Christine Grahame is drawing out the correct issues. We have to be satisfied that the signatories to the treaty have a common understanding as to what international justice is. A person may come before a Scottish court with Scottish laws of evidence and Scottish procedures and another country with different procedures might argue that two courts working under the same treaty might come to a different conclusion. In examining the bill we want to be satisfied that there are no obscurities under the treaty. Have the similarities between the legal systems of the countries that signed the treaty been examined? I do not ask you to go through a list of all the signatories today, but we would like to see that.

Dr Brown: I do not think that any comparative examination has been made of the legal systems of the states that signed the statute. In the

negotiation of the statute, a process went on whereby generally recognised principles of criminal justice were identified, and they are set out in part 3 of the Rome statute. An attempt has been made to reduce to a written form the common core of principles of justice that are recognised internationally.

You are right to say that international justice is an expression that does not have much meaning. I use the expression as shorthand for a collection of different concepts. However, an increasing consensus can be identified about what rules ought to apply in a proper criminal proceeding. The detailed rules that are set out in the Rome statute represent the latest word on what those are. One would expect that national proceedings might be measured against the general principles that are set out in the Rome statute. I am confident that Scots law would measure up to those principles.

Mrs Mary Mulligan (Linlithgow) (Lab): I want to pursue the issue a little bit further, because I am not totally clear about your response. You said that we want the international court to be of high standing and to have a high reputation, and you went on to give an example of how Scottish law would be affected. But is there a risk that the ICC will be undermined by not being able to resolve a difference between itself and a national country that was not seen to have the kind of standard of legal system that we would expect in Scotland? Margo MacDonald has given an example of that. If such a dispute could not be resolved, would that undermine people's confidence in the ICC?

Dr Brown: The test for the international criminal court will be whether what is going on in the national system is genuine. If the ICC takes the view that what is going on in the national system is not genuine, I have no doubt that the national system concerned will not be pleased. To that extent, confidence in the ICC might be undermined in that country or, at least, in the Government of that country. Paradoxically, that same decision might increase other countries' confidence in the ICC, if they took a similar view of what was going on. The test is whether what is going on in the national system is genuine. That is what the court will be concerned with.

The ICC will want to be seen to be acting properly and clearly. The court will have to give reasons for its decisions. It will give fully reasoned judgments. One can get an idea of what those will look like by looking at the judgments of the Yugoslav and Rwandan tribunals—which are available on the internet through the UN website—in which one finds enormously detailed and completely transparent consideration. That very transparency in the giving of detailed reasons is the kind of thing that makes for confidence. As we said earlier, the court's judgments will be subject to an appeal procedure, in which detailed consideration and reasons will be given as well.

How international confidence in the international criminal court will end up will be very much determined by the way that the court goes about its business. However, the structure is there to ensure that it has the best possible chance of commanding respect globally.

Mrs Mulligan: I was concerned about a country not acting genuinely. In such cases, does the ICC have the power to announce that it will take over? If the nation in question continued to hold the trial itself, could the ICC be challenged because the nation already had to answer an accusation?

Dr Brown: The ICC would not take over national proceedings; it would hold separate and distinct proceedings. If the national proceedings had been completed, the proceedings in the ICC would undoubtedly be subject to challenge. However, the fact that an accused person—or a lawyer acting on that person's behalf—makes a challenge to those proceedings does not necessarily mean that that challenge will be successful. That brings us back to the ICC considering whether the national proceedings on which the challenge is based were genuine proceedings at all. The word "genuinely", which appears in article 17.1(a) of the Rome statute, is of critical importance, and was included very deliberately, so that the ICC would take the decision on whether what was going on in a given nation was a real criminal proceeding or was simply a device to try to avoid ICC jurisdiction. It is a difficult question, which will have to be faced.

11:00

The Convener: I have two or three questions to finish off. I wish to follow up the question raised by Mary Mulligan and others. I asked you how far into the proceedings it might be before there might be a challenge.

Let us think about the accused for one minute. Presumably, one of the general principles of international law would still be that that person was innocent until proven guilty.

Dr Brown: Yes.

The Convener: If a nation is allowed to complete a trial and to make a decision, can an international court intervene and say that that nation had not conducted the trial in a genuine way and that it was therefore going to challenge it and make another decision?

Dr Brown: Yes.

The Convener: It can do that, can it?

Dr Brown: Yes.

The Convener: Where does that leave the accused person? They have already stood trial; justice may have been dispensed at that point, and they may have had no case to answer.

Dr Brown: That accused person will still be innocent until proved guilty before the ICC.

The Convener: But under Scots law, it is not possible to retry someone who has already stood trial. It would certainly be a contradiction of Scots law; it might be a contradiction of other national legal systems.

Dr Brown: That is why the word "genuinely" was included in the Rome statute. In order to establish the plea in bar of trial of tholed assize, it would be required to establish that the individual had been tried by a court of competent jurisdiction, and that the matter had been resolved by that court. That principle exists internationally, and is written into the ICC statute. However, it is subject to the qualification that the proceedings with which one is concerned have to have been real proceedings. That does not mean that they have to be proceedings with which everyone would agree in every respect, but they would have to have some real substance.

The question of the presumption of innocence arises in relation to the trial. With regard to what the European Court of Human Rights has said on the matter, the court that is dealing with the trial must not start with the assumption that the accused is guilty. It is up to the prosecution to prove that guilt to the required standard and by laying evidence before the court sufficient to justify such a conclusion. The fact that the accused may have been convicted or acquitted in a national court will not be of any relevance to the result in the ICC. The accused will still be entitled to the presumption of innocence during an ICC trial. I would not expect that the result in the national court would be regarded by the ICC as indicating anything about the accused's guilt or innocence when it comes to the ICC trial. In other words, the accused will start with a clean sheet.

About a year and a half ago, the High Court of Justiciary heard a case in which the court considered the effect on the trial of the accused of a conviction or an acquittal of the accused's associates in previous proceedings. The High Court made it clear that the conviction or acquittal of an associate in a separate case had nothing to do with whether the accused was to be convicted or acquitted in that particular case and that one had to start from scratch. I am conscious that members might want the name of that case, and I am sorry that I cannot remember it offhand. Should anyone want it, the clerk can contact me and I will look it up.

My point is that the accused will get a completely clean sheet in the ICC if he is being tried there. He also gets the presumption of innocence—that procedure is certainly demanded by the rules in the statute—and is to be given all the protections that are provided for by international human rights law.

The Convener: We will probably return to that point on many occasions.

Christine Grahame and Margo MacDonald have two quick questions.

Christine Grahame: I return to my point about parity of judgments, which would give the ICC clout at the same time as making the signatories to the statute feel secure that there is a level playing field for justice when individual national courts are trying cases.

I have examined the definitions in schedule 1 of the bill. New crimes have been created, and there is a list of crimes against humanity for which there are expansive further definitions. Will the decisions of national courts be reported and collated in a way that will allow monitoring of how, on the evidence, definitions have been interpreted by the courts? When the ICC hears trials and reports them, will those trials be reported fully and collated so that monitoring can take place of how justice, in humanitarian terms, operates? Will the ICC's decisions be merely persuasive in relation to the interpretation of the definitions or will they be ranked higher than that? They may not be binding, but—

The Convener: Christine, you were supposed to ask a short question.

Christine Grahame: That was it: I asked only one question, but I elaborated on it.

Dr Brown: My answer will be short, which is unusual for me. I do not know of any formal requirements for either national or ICC decisions to be reported. However, the Lauterpacht research centre for international law in Cambridge produces a series of publications called the International Law Reports. I think that the decisions will be reported and the ICC decisions will almost certainly go on the web in the same way as those from the Rwandan and Yugoslav tribunals were put on the web.

The ICC's decisions will be very persuasive. The expansion of the definitions that Christine Grahame referred to comes from existing international law instruments and from the International Law Commission's 1996 draft code of crimes against the peace and security of mankind, which the Rwandan tribunal said was highly persuasive and authoritative, but not binding. That is the sort of territory that we are in.

Ms MacDonald: Had the treaty been ratified three or four years ago, the ICC would be in

existence now. What difference would that have made to the prosecution of the Lockerbie case? Would the trial have been seen as a genuine attempt to deal with the situation?

Hugh Dignon: The short answer is that terrorism, such as was tried in the Lockerbie case, is not within the jurisdiction of the ICC.

Ms MacDonald: Would it not have been seen as a crime against humanity?

Hugh Dignon: I do not believe that that case would have fallen into that category.

Ms MacDonald: I ask because the Lockerbie trial was about law and about having to marry different legal systems. However, it was also about politics, and we should not close our eyes to that.

The ICC will be able to use crime against humanity as grounds for prosecution. Is that a catch-all provision, or is it specific? I would have thought that the Lockerbie incident might well have been a crime against humanity.

Hugh Dignon: A crime against humanity is defined in the Rome statute and that definition is replicated in the bill. Specific elements of a crime against humanity are defined, and terrorism does not generally fall within that definition.

The Convener: I thank the witnesses, whose evidence has been useful.

I suggest that we have a short break for coffee before we deal with the next agenda item. During the break, members will have a chance to examine some diagrams on our inquiry into the Crown Office and Procurator Fiscal Service. We will resume at 11:20.

11:11

Meeting adjourned.

11:26

On resuming—

Petition

The Convener: Item 2 is petition PE306. We are approximately 30 minutes behind schedule, so it would be useful if we could speed things up a wee bit.

Members have in front of them a note on the petition from the clerk. The petition concerns a request that all members of the judiciary declare whether they are freemasons. Members have quite a bit of material from the Public Petitions Committee: the petition, which is from Thomas Minogue; a letter from Jim Wallace's office; and correspondence from the Grand Lodge of Scotland. I hope members have had a chance to read the papers. You will notice at the back the suggestions from the clerks. It is open to members to suggest an option that is not in the paper. Are there any comments or questions on the petition?

Scott Barrie: The petition raises an interesting point but I am not sure where we want to go with it. We should take further action but we should not launch into a huge inquiry. One of the recommendations from the clerk is that we seek further information from court users groups and the Sheriffs Association. We could write to the Minister for Justice, who has already written to the clerk of the Public Petitions Committee. The final paragraph of the minister's letter says:

> "It is of course essential that all who appear before the Courts feel confident that the Sheriff or Judge will act with complete impartiality as required of them by the Judicial oath."

It might be useful to ask Jim Wallace why we are not following the route that the Lord Chancellor is taking in England and Wales of compiling a register. It is not a public register, and it is not much better than what we have, but it might be useful to ask why we are doing something slightly different.

Ms MacDonald: I thought that the Minister for Justice had said why he thinks we do not need such a register. I hope that nobody will be offended, but the Lord Chancellor's response was a result of questions about the quality of justice and the sentences that have been handed down in English courts. I do not think that that has happened in Scotland. If the Lord Chancellor's department had decided seriously to do something about the issue, the register would have been available for public scrutiny or there would have been an open declaration and so on. The register is irrelevant if the Lord Chancellor is the only person who knows that someone is a mason—he

might be one himself.

The Convener: To clarify, the letter from Jim Wallace's office simply states that it is felt that there is no need for steps to be taken at present, although no reasons are given.

11:30

Christine Grahame: I will try to make my questions short, although as you know I am very long-winded. First, as the independent judicial appointments system is about to be put in place, the issue might be raised when sheriffs are being interviewed.

Secondly, it might be useful—although it might be an absolute waste of time, a red herring and impractical—to find out how often sheriffs declare an interest and how often they withdraw from proceedings because they feel that they have an interest. It could be made plain that if a sheriff feels that it would be improper for him to continue with a case, he should make the appropriate declaration in court. It may be that he then withdraws and another sheriff takes over. It would be interesting to know how often that happens. That might come about because the sheriff knows a person who is involved in a case but was not initially aware of the fact. I am not sure whether that is ever recorded. That point could be raised with the minister.

To summarise, I would like to know, first—with regard to the appointments system—whether the issue could be raised at interview, and, secondly, if this is monitored, how often sheriffs have to make a declaration or withdraw from cases because of conflicts of interest, even if they are conflicts of interest only in their own view.

Ms MacDonald: If we want to cut to the chase, we could just ask sheriffs whether they feel that the existing convention and requirement of having to withdraw from a case if there is a conflict of interest encompasses membership of a masonic order or of any other society or club.

The Convener: We should ask another body whether there is a problem before we go on a fishing trip to everybody else. I think we agree about that. That relates to the options that are set out in the paper. We could write to the court users' organisations—the Scottish Consumer Council—or, as Margo MacDonald suggests, to the Sheriffs Association. Shall we write to both those organisations?

Christine Grahame: Yes.

The Convener: That means seeking more information, but the point is that we want to get a handle on whether anyone thinks that the matter raised is a particular problem. Do members still wish to write to the minister at this stage?

Christine Grahame: It would be quite useful to write to the minister. Then again, perhaps—

Ms MacDonald: I would wait until we have heard from the court users' organisations and from the sheriffs. We could then decide whether we need to go back to the minister, or whether we should go back to Mr Minogue. It may well be that the answers to the questions that we ask will satisfy Mr Minogue.

The Convener: Is it agreed that, in the first instance, we will seek more information from the Scottish Consumer Council and the Sheriffs Association? To add to a point made by Christine Grahame, I think that, if we embarked on any further inquiry, it would be right for our questions to relate to general issues about what sheriffs are asked to declare and not specifically to this issue. If we felt that further questions needed to be asked, we would ask them.

Is that course of action agreed?

Members *indicated agreement*.

Crown Office and Procurator Fiscal Service

The Convener: While the witnesses are being found, I will recap the stage that we have reached on this issue. At our meeting of 28 March, the committee agreed to take evidence from the Crown Agent on the structure and organisation of the Crown Office and Procurator Fiscal Service. I am aware that not all members were present for that, but I think that there was general agreement that, given that this will be a big inquiry, we would like to understand at an early stage how the various offices operate. We can have a discussion after questions about anything else that members would like to do to assist in the gathering of information in the inquiry.

Although we have not yet put together a report outlining the focus of our inquiry, I hope that the evidence that we take this morning and the visits that we make will give us some idea about that.

I welcome the witnesses to the meeting and ask Mr Normand to introduce his team.

Andrew Normand (Crown Office): Thank you, convener. I am accompanied by Len Higson, who is the regional procurator fiscal for Glasgow and was formerly the regional procurator fiscal for Grampian and Highlands and Islands at Aberdeen. Sitting beside him is Frank Crowe, who was the regional procurator fiscal for south Strathclyde and Dumfries and Galloway at Hamilton and is now the deputy Crown Agent. They have substantial experience of the Procurator Fiscal Service and the Crown Office. Our director of resources, Sandy Rosie, completes the team.

I understand that the committee has asked for an initial presentation containing factual information, which I am happy to provide. However, I shall look to my colleagues to assist in dealing with the committee's questions. We welcome the committee's interest in the work of the Crown Office and Procurator Fiscal Service and are interested to learn that it is considering undertaking an inquiry into the department. Indeed, it would be helpful if we could find out more about what the committee has in mind, as that would allow us to assist its work.

I hope that, in the time available this morning, we will succeed in providing enough useful information about the areas outlined in the clerk's letter of 11 April to give the committee a better understanding of our structure. We will be happy to try to provide any additional information that the committee needs after the meeting.

Information about the structure and functions of the department was supplied to MSPs shortly after devolution in the form of a booklet called "What does the Crown Office and Procurator Fiscal Service do?" Although members might have reminded themselves of its contents in preparation for this meeting, an updated version of the booklet will be published shortly and sent to members.

Our strategic plan for 2000-01 and our annual report for 1999-2000—both of which have been given to all MSPs—provide other sources of information about the department. However, as we are currently collecting, collating and analysing information for our annual report for 2000-01, some of the figures to which we refer today might be provisional.

The COPFS is a national prosecution and death investigation service that covers the whole of Scotland. The Crown Office is the head office, and the service is organised into six regions that correspond to the six sheriffdoms. Apart from Glasgow, each region has a network of procurator fiscal offices of varying sizes. Scotland has a total of 49 procurator fiscal offices, including regional offices.

The department operates a system of regional management, with each regional procurator fiscal having management responsibility for the resources and offices in the region. The Crown Office is organised on a divisional basis. Its main divisions are the operations division, which is headed by the deputy Crown Agent; the policy division, under the head of policy; and the management services group, which is headed by the director of resources. The regional procurators fiscal and the Crown Office divisional heads are the budget holders in the department for delegated budgets and make up the departmental management board, which I chair.

Table 1, which I have circulated, shows the structure of the service and the lines of management responsibility. In general, there are three types—or sizes—of procurator fiscal office. First, there are six regional offices—at Aberdeen, Dundee, Edinburgh, Glasgow, Paisley and Hamilton—which are headed by a regional procurator fiscal who combines regional management responsibilities with operational responsibilities as procurator fiscal of the regional office. Regional procurators fiscal are supported in their administrative role by regional administrative managers, and will generally have an assistant procurator fiscal or senior principal depute procurator fiscal as a second-in-command of their regional offices. In addition to that, as the table shows, there will be a number of principal procurator fiscal deputes, fiscal deputes and precognition officers. Table 2 shows the set-up of a typical regional office.

Table 3 shows the set-up of larger district offices, of which there are 13. They are located

mainly in the central belt, but they exist as far north as Inverness and as far south as Dumfries. They are headed by a fiscal who is a member of the senior civil service. Those offices will have a principal depute fiscal as second-in-command and will have a smaller number of deputes and precognition officers than regional offices do. In most of those offices, there will be four or five lawyers and one or two precognition officers.

Smaller district offices are located in the smaller towns, from Lerwick in the north to Stranraer in the south. There are 30 such offices, all of which are headed by non-senior civil service procurators fiscal. In the smaller rural offices, which have a lower case load, the fiscal is usually the only lawyer on the staff. In such offices, there will generally be only one or two administrative staff in support. In some of the larger rural offices with heavier case loads there is a fiscal depute as well as the procurator fiscal.

Each procurator fiscal is responsible for the management of his or her office, subject to the oversight of the regional procurator fiscal. Each fiscal holds a commission from the Lord Advocate and is accountable to the Lord Advocate for prosecution decisions in his or her jurisdiction. From their current or recent experience, my colleagues, Mr Higson and Mr Crowe, are well qualified to answer any questions on this area.

On staffing levels, experience and types of work, table 4 shows Crown Office and Procurator Fiscal Service staffing levels by region and table 5 gives information about levels of experience of legal staff in the Crown Office and Procurator Fiscal Service. Replacing staff who have retired and strengthening our legal staff numbers in recent years has resulted in a relatively high proportion of legal staff who are fairly inexperienced. However, they include a number of former trainee solicitors in the department who have spent a further two years of intensive training in the work of the department. Table 5 shows that we also retain a large number of experienced staff.

The main group of legal staff in the department is the procurator fiscal depute group. Procurator fiscal deputes cover a wide range of legal work in court and in the office. They deal, for example, with case marking, court work in the sheriff court and the district court and precognition work in the preparation of serious cases for trial on indictment in the High Court and in the sheriff and jury court. Generally, deputes are managed, often in teams, by principal procurator fiscal deputes. I have referred to the position of principal deputes in describing the types of office. Their role is also shown in the typical office structure diagrams that have been circulated. For completeness, I should mention that principal deputes fill some of the specialist posts in regional offices and in the Crown Office. Again, my colleagues are well placed to answer more detailed questions about those matters.

On work load, table 6 shows a three-year comparison of reports received by the service, principally from the police but also from a large number of non-police reporting agencies. The level of reports received has fallen slightly but there has been an increase in the amount of serious criminal case work, as the committee will be aware.

The committee will also know that serious or solemn cases begin their life on petition and that those are the cases that will be precognosed by fiscals, reported to the Crown Office and prosecuted on indictment before a sheriff and jury or in the High Court. They are, therefore, typically the most complex and time-consuming cases.

Tables 7, 8 and 9, which have been circulated, show three-year comparisons of precognition work, disposals of solemn cases and net petition cases that have been dealt with in the various regions. The figures illustrate a national increase in that type of work over the three-year period. That increase has been more dramatic in some areas, such as Glasgow. Tables 10 and 11 illustrate that in graph form.

11:45

The committee will be aware that our strategic plan states our commitment to prioritising the investigation and prosecution of serious crime. We have sought to strengthen our staff resources to deal with that type of work by appointing additional precognition officers as well as taking on extra lawyers, including Crown counsel.

Some indication of the work load of individual offices and of variations between offices was given in written answers by the Lord Advocate to questions from Richard Lochhead MSP on 22 November last year. Copies of those answers have been provided to the committee. Work load and variations depend on various factors such as the nature and size of the office, the mix of work or the system of organisation of work in the office as well as external factors, some of which may be unpredictable. It is difficult to generalise, but Len Higson and Frank Crowe can provide further explanation, including, perhaps, an indication of the typical work and work loads of individual staff and information about the management of resources within regions to deal with the peaks and troughs of work that occur.

I have mentioned external factors. It might be useful to refer to some examples. The first is the incorporation of the European convention on human rights. Although we have generally been successful in meeting the challenge that

incorporation presents, some changes to working practices have been necessary and a new dimension has been added to the consideration, preparation and processing of cases. We could say more about that, if the committee wishes.

Secondly, there are enforcement initiatives by the police and other enforcement agencies. Such initiatives may be local, area-wide or national, but they can lead to a sudden increase in certain types of report in a particular area or more widely.

Thirdly, there are unusual or major cases, which quite often seem to occur in the jurisdiction of some of the smaller offices, which require regional or national support.

Fourthly, there are criminal justice policy initiatives. An example is the proposal for drugs courts in Glasgow. Len Higson may be able to speak about that, if the committee wishes.

The clerk offered us the opportunity to address concerns that have been put to the committee about staff morale and lack of resources in the service. I am not aware just what concerns have been put to the committee or by whom. However, other senior managers in the department and I have concerns about morale. Those concerns result principally from the staff survey that we carried out last year and to which the Lord Advocate referred when he gave evidence to the Justice and Home Affairs Committee last September. We have taken the findings of that survey seriously and have set in hand action to address them.

We have previously provided members with a copy of our staff survey questionnaire, a summary of findings and our action plan. The action plan is due for review at the end of this month, and we have told staff that we will let them have a full progress report shortly. I expect that to be issued in May. We could let the committee have a copy of that, if it is interested.

On resources, I have mentioned that we have sought to strengthen legal resources and that we are engaged in recruiting more lawyers. I should also say that we have been making progress with investment in the important new initiatives announced by the Lord Advocate, for example in new technology, future office systems and services to victims, which I know are of interest to some members of the committee.

This is a time of major and challenging change in our department, as we aim to provide a modern, high-quality public prosecution service. It is unsurprising that there is some anxiety about that, but we are trying to address the uncertainty and anxiety about the change programme. We will say more about that if you wish.

I understand that the committee wishes to discuss funding and resources at a meeting in May with the Justice 1 Committee. It occurs to me that it may be sensible to defer discussion of funding and resources until then and to concentrate today on trying to give the committee a fuller understanding of the department's structure, but we are in the committee's hands.

I thank members for their attention. We are happy to answer any questions.

The Convener: Thank you for that statement, for the paperwork that you provided and for the useful diagrams, which will help those of us who are new to understanding the issue to get our heads round the structure.

Andrew Normand's last point concerned deferring our discussions about resources. The purpose of today's meeting is to try to understand from the outset how the Crown Office operates and the variety of grades of staff. We have just under an hour in which to do that, but I want to try to get that done today. Whatever the focus of the inquiry—that is still a matter for members to decide precisely—the inquiry will be lengthy. I am sure that I speak for all members when I ask the Crown Office representatives to attend future meetings. That will help us along the way in the inquiry.

It might be useful to start with the sections that Andrew Normand used—the structure of the offices, staffing and work load. That will allow members to ask questions as issues occur to them.

Ms MacDonald: First, I want to find out whether you share the initial impression that the committee formed, after its visit to Glasgow sheriff court, that the Procurator Fiscal Service was under some strain. I think you said that you were concerned about the level of morale throughout the service. Do you share our concern that resourcing—or perhaps another reason—is putting strain on the people who work in the service?

I am not necessarily cynical about the quality and practice review unit, but in other disciplines, we have heard people say that they must spend so much time on monitoring, self-evaluation and comparisons of outcome that their concentration on the job that they are employed to do is diluted.

Andrew Normand: I will ask Len Higson to deal with the question that arose from the visits to Glasgow. I felt that it would help the committee to have an opportunity to see the issues from the fiscal side as well as the Glasgow Bar Association side and the court side. I think that Mr Higson would welcome a visit, but I will leave him to deal with that.

Generally, it is evident to the organisation's senior management that people have felt under

pressure. I referred to some of the reasons for that, which included incorporation of the ECHR and the increase in serious crime. I also said that we tried to increase and strengthen our resources to meet those pressures. We also mentioned the staff survey, which provided evidence of a feeling of pressure. As I said, we are seeking to address that. The committee has a copy of our action plan.

On the quality and practice review unit, it seemed to the Lord Advocate, the senior management team of the department and me that the organisation needed to set up a separate unit, in the nature of an inspectorate, to check the quality of practice around the service to ensure, for example, that the Lord Advocate's policies were being implemented and whether they made sense or there was a need to revise them. That reassures me, as head of the department, and the Lord Advocate, as a member of the Executive, that the policies are appropriate for the purpose and are being implemented properly.

That is at one level. At another level, we took the view that there was a need not only to consider areas of policy and practice thematically, but to consider the way in which individual offices operate. Members will be aware that the unit has conducted thematic reviews of complaints against the police. It has also conducted a thematic review of the handling of cases resulting from fatal road accidents, such as prosecutions, fatal accident inquiries and more general cases. It is our intention to publish a summary of findings and recommendations from that inquiry within the next week or so.

I think that Ms MacDonald was suggesting that the operation of a unit such as the quality and practice review unit inappropriately diverts staff from mainstream work.

Ms MacDonald: I was not suggesting that, but trying to find out whether that has been suggested to you.

Andrew Normand: No, it has not, although the unit has been created using our increased resources over the past few years. I hope that in future we will be able to strengthen the unit further. For example, I would like the unit to have a faster cycle of office visits than is proposed at present, although we would need to consider carefully our ability to provide the resources for that. I mentioned a possible comment from Len Higson on the questions about Glasgow.

Len Higson (Procurator Fiscal Service): The criminal courts in Glasgow are the busiest in Scotland. It is a demanding place for a lawyer to work, whether they are a prosecutor or work for the defence. Apart from the statutory framework, there are tensions between the volume of work and the desire that is shared by the criminal justice agencies to bring cases to conclusion in a reasonable time. I see it as my job to ensure that, despite those tensions, the staff are not overly stressed. Some people thrive on stress and others suffer from it, but that is very much one of my responsibilities. The committee would be welcome to visit my office.

The Convener: Before I ask members whether they wish to ask questions, I ask them to bear in mind that we are dealing with the structures of the Crown Office and Procurator Fiscal Service at the moment. We will defer the discussion on resources to a later date.

Christine Grahame: I am mindful of that, but the perceptions that we are getting from the consumer—to use that awful expression—are that the Crown Office and Procurator Fiscal Service is overstretched and that, as a result, cases are sometimes not prosecuted properly, with major cases, such as Chhokar and Collie, failing. This might sound melodramatic, but in the lower courts the system would collapse if plea bargaining was not operating. I have concerns about that.

Mr Normand pointed out the experience of the procurators fiscal who currently work in the service. Table 5 shows that there are a substantial number whose experience is either less than one year or one to two years. There is then a falling-off in the middle of the table. The figures are for March 2001 only. If the falling-off trend continues, I presume that the number with over 10 years' experience will decrease. My constituents have brought to my attention the fact that fairly inexperienced procurators fiscal with heavy case loads will then be dealing with very sharp defence lawyers. That is not in the interests of justice. I do not wish to criticise individuals or attack the service, but such concerns are arriving on our desks. I would like to answer those concerns and want the committee to investigate them.

I also have a question on the general structure and the general handling of resources. I may have got this wrong, but I understand that each regional management has its own resources. I would like to know about the bids for those resources and how the resources are allocated. How does the allocation procedure work before managers are asked whether they have money, which I suspect that they do not? Should the committee investigate that?

12:00

Andrew Normand: I am not aware of the source of those consumer perceptions, but if members were receiving many representations from the public of the kind that Christine Grahame suggested, I would obviously be concerned. However, I am not sure that the perception about

experience is correct. We freely admit that there is a fairly high proportion of inexperienced prosecutors. That is inevitable when we are taking on more people. In September 2000, the Lord Advocate told the Justice and Home Affairs Committee that:

"fiscals do not grow on trees".—[*Official Report*, Justice and Home Affairs Committee, 27 September 2000; c 1773.]

They do not. They have to be trained. We select good people. There are a large number of candidates for advertised vacancies in the fiscal service and we get good-quality new recruits. We train people on the job and in training sessions that I attend. I speak to members of the new group.

I do not think that it is correct that the proportion or number of staff with greater experience will fall. If anything, experience has shown that people join us and stay with us, which suggests that the level of experience will increase. More junior deputes are with us now with one to two, or two to three, years' experience. They will remain with the organisation and there will be a larger and more experienced group of staff than we have currently. I am not sure whether my colleagues want to comment on that. Len Higson has such staff in his office. I think that there is potential unfairness. I know that the committee has sought only to comment on the issue, but there is an implicit criticism of the ability of those staff.

The Convener: Our view has been that we should investigate the issue, which has been put to the committee and to other MSPs and might be only a perception. We are trying to get behind that perception—that is why we invited you to the committee and why we would probably like you to come back. We want to get to the root of the matter. That is why the committee has asked such questions.

Len Higson: I will give an example from Glasgow. We deliberately place new deputes who have no previous procurator fiscal experience in either the justice of the peace courts in Glasgow or the stipendiary magistrate courts in Glasgow, because such environments are less threatening. The cases are perhaps less complex than may be encountered in the sheriff court. We have put in place a supportive structure to assist the new deputes to learn and to become experienced. They usually remain in those courts for four to six months before they move—graduate, if you like—to the sheriff court.

Frank Crowe (Crown Office): I conducted a fairly successful exercise to recruit new deputes last year. The committee must not get the perception that everyone we recruit is aged 23 or 24. We recruited a number of more experienced lawyers, some of whom had been partners or salaried partners in criminal defence firms. Those deputes were a useful addition to our numbers. They helped to boost the experience of staff. Table 5 does not give the whole picture.

As the Crown Agent said, many of us joined when the service doubled in size after we took over the district courts in the mid-1970s, and the majority have stayed. Perhaps there was a time of flux in the 1980s and 1990s when legal aid was more attractive and some staff went off to those apparently greener pastures. However, we are interested in recruiting new lawyers; we give them excellent training and good back-up, and those who choose to stay in the service can have an interesting, varied and valuable career.

The Convener: You referred to deputes. Do fiscals enter regional or district offices at the same grade? Are there a variety of grades after they enter?

Andrew Normand: In my introduction, I mentioned that the main legal staff grade is depute procurator fiscal. New staff enter at that grade, which covers a general, multi-purpose group of legal staff involved in court and office work. The higher staff grade is principal procurator fiscal depute. Staff at that grade, as some of the diagrams show, typically fill the role of second-in-command in an upper level office such as those in Perth, Inverness or Dumfries, or manage a team of deputes or precognition officers in some of the bigger offices. We can tell the committee a bit more about that if members are interested. Principal deputes also fill the more specialised posts in the Crown Office.

The Convener: What are your criteria when you embark on a recruitment exercise for new deputes?

Frank Crowe: We are obviously—but not exclusively—looking for candidates who have experience in criminal law or criminal law qualifications; for example, we have found good candidates with other court experience. Although someone who comes from a chambers legal environment might not have thought of themselves as a confident court practitioner, we offer an initial training course and advocacy skills training which can boost their experience and confidence. There are opportunities to do more chambers-type work such as investigation, but all the staff are attracted by the court-based nature of the work and the fact that it is a job worth doing.

Christine Grahame: It might be useful to leave this line of questioning for another day. After all, your table on the experience levels of your staff would be more helpful if it were more sophisticated. I would also be interested in trends, but the table covers only a year.

It might not be worthwhile to do so, but I want to

ask about resources. I had not understood that, for example, Barlinnie prison's different halls operated independently in financial terms with an overall umbrella. Does the Procurator Fiscal Service operate in a similar way? Is the overall budget allocated on the strength of the bids that are submitted by different regions?

Sandy Rosie (Crown Office): As the head of a Government department, the Crown Agent is the accountable officer for all the spend within the department. In that sense, the budget is not delegated. However, internally, the head of each of the six regions and the four units of the Crown Office marked on table 1 has a delegated budget within the department.

In an annual planning process, the head of each of those groups submits a draft management plan, which is considered by the senior management team. Based on that bidding approach, decisions are taken for the next 12 months to finalise budgets for each of those delegated areas. That is a sound and fairly typical business and resource planning process.

Christine Grahame: Is the quality and practice review unit independent? You said that it was an inspectorate but it seems to be somewhat in-house. Does the unit have lay members, such as victims and witnesses?

Andrew Normand: At present, there are no lay members. We are looking at introducing that element, which I agree is important. The quality and practice review unit is independent in the sense that it is directly accountable to myself and to the Lord Advocate and operates under our authority. It can therefore demand any information and make any findings that it wishes. It is not independent in the sense of sitting entirely outside the organisation.

Christine Grahame: Okay.

Ms MacDonald: It is under the budget heading.

Sandy Rosie: That is right.

The Convener: I want to return to the question of the staffing establishment. You spoke about the factors that had affected the work load in the service. Is there a formula for deciding what staffing is required?

Sandy Rosie: No.

The Convener: How then do you determine how many deputes you need or how many advocate deputes are required in the prosecution service?

Andrew Normand: There is no formula as such. The reference that I made to the uncertainties and unpredictabilities of pressures, both departmental and local, is relevant to that. Perhaps the director of resources would like to comment on that point.

Sandy Rosie: We are now asking each regional fiscal—following consultation with individual fiscals in their region—to present a management plan. That plan takes account of the history of the requirements that are needed by the department to respond to casework. The plan also enables us to look ahead objectively to indicators about changes in work load that we can anticipate, to some degree, with our knowledge of police initiatives and changes in policy. In determining staffing levels, we also take account of work load statistics. Our system is output-based in that we are trying to anticipate collectively what staffing levels are required. We try to anticipate all the resources that are needed, including IT and other support resources.

The Convener: What response has the service had to its work load over the last year? I know that there have been increases in staffing levels but, for the record, can you say what those are and how you have responded to the increase in work load?

Len Higson: As somebody who has to submit a management plan, I can give a concrete example of the increase in work load. Our strategic priority, as set out in our strategic plan, is to deal with serious crime. Almost 12 months ago, I took up my appointment in Glasgow. In June of last year, I realised that there were extremely heavy pressures on the Glasgow office arising from an increase in serious crime. That increase is shown quite clearly in table 7, which members have before them.

Members will note that, in the three-year period covered by table 7, the volume of precognition work—that is our name for the serious crime work that is in progress—rose from 1,900 to 2,400, which is an increase of around 22 per cent. In that three-year period, there was no real change in the resources available in the Glasgow office to deal with serious crime.

Having identified the pressure and the problem, I made an in-year resource bid for additional staff to deal with that pressure. The need was justified and accepted and, as a result, I received resources for two additional precognition teams in Glasgow. Does that give you an example of the dynamics—

The Convener: Are those additional teams up and running?

Len Higson: There were five precognition teams initially, so the increase has been from five to seven teams. A precognition team is headed by a principal depute and has two members of legal staff and five precognition paralegals. The first additional team was recruited in December 2000 and January 2001, and the second is almost in post now.

12:15

Mrs McIntosh: I want to revisit a point that Christine Grahame made about plea bargaining. My comments are not based on my perceptions but on my experience, before I became an MSP, of sitting on the bench in the district court. In my experience, if we did not have plea bargaining, the system would grind to a halt. If there were no break after cases call initially, nothing would be done on those cases that are listed. I am curious about one aspect of the listing of cases and the staffing levels that you identified. Might the increasing use of fiscal fines have an impact on staffing levels?

I have a further question about budgeting. What happens when you meet your budget? You might want to take this opportunity to be very clear in your response.

Len Higson: I will answer your question as a budget holder: no reward or incentive scheme is involved.

Mrs McIntosh: I am so glad that you took that opportunity to be clear.

Ms MacDonald: I am glad that you are not paid more for catching more—

Mrs McIntosh: Can we go back to my question about fiscal fines?

Andrew Normand: Members will be aware that most criminal justice systems in the world survive on some sort of plea negotiation or plea bargaining. That reflects the fact that, generally speaking, most systems correctly identify the accused persons who are alleged to have committed offences. However, it is clear that if plea negotiation were banned, or if problems were to develop with that system, our resources and those of the district and sheriff courts and of the High Court would need to be increased substantially.

Our figures suggest that the level of fiscal fines has not increased. I am not sure what influence those fines have had on the figures in the past year or two: there was an increase, but the level then flattened out. Policy on fiscal fines has not changed.

A lot of fiscal fines are imposed in Glasgow—perhaps Len Higson can say something about that.

Len Higson: A fiscal fine is a useful part of a prosecutor's armoury. My simple explanation is that if more options are available to a prosecutor, he or she will be better able to make decisions that are appropriate to the circumstances of individual cases.

Our colleagues are sometimes concerned about the take-up rate of fiscal fines, which varies across the country. However, those fines are a useful option for prosecutors.

Mrs McIntosh: Still on fiscal fines and their increasing popularity and increasing use, it was envisaged, as I understand it, that, because of the decreasing work load that the district courts would have, some of the lesser-end-of-the-scale work from the higher courts might come down. My information from colleagues still sitting on the bench is that that does not appear to be the case.

Andrew Normand: The position on that varies throughout the country. My understanding is that the district court in Glasgow could not accept any more business. That is by far the busiest district court.

Mrs McIntosh: Indeed it is. I am thinking further down the line to the one that was under Mr Crowe's jurisdiction when I worked out of Motherwell.

Andrew Normand: He is the ideal person to answer.

Mrs McIntosh: I thought that.

Frank Crowe: I certainly took steps to increase the use of the district court in, for example, East Kilbride. As a manager, I was conscious of the delay factor and the busyness of Hamilton sheriff court and the relative capacity that there was in East Kilbride district court. Motherwell district court was well organised and well run. To some extent, the change occurred after I left at the end of 1998. It is a matter of balancing and using resources.

With the increased use of fiscal fines when the legislation was last changed, it is not possible for us to put into the district court all the extra cases that we would like. There are some legislative difficulties. No-insurance cases are ideal cases for the district court. They are serious matters but they are relatively simple in that there are two facts that must be proved: whether the person was driving or using their car and whether they had insurance. I would be most happy for justices to deal with those matters and would have every confidence in them doing so, but it would require a legislative change that would probably need to come from the Westminster Government, as it is a road traffic matter. There are other cases of that type that lend themselves to being heard in a district court.

We also must consider with some recidivists, for example, whether prison should be an option. Prison is not always in the forefront of some justices' minds. In fairness to justices, the 60-day limit that a justice has does not give very much leeway for imposing a custodial sentence if that is appropriate disposal. They will probably impose the maximum sentence, 30 days or a non-custodial disposal. The appeal court has made

inroads into that.

I would always advocate the most balanced use of one's resources in a fiscal's area. That was always my approach.

Ms MacDonald: Before I ask my question, might I put that into straight layman's terms? Did you just suggest that some of the work load might be devolved from very busy sheriff courts to district courts if there were a legislative change to allow that, but that the barrier to that would be that the change would require to be made by Westminster because, in the case of a road traffic offence, it would be a reserved matter?

Frank Crowe: That is one example. In Glasgow—Len Higson can perhaps comment on this—I would say that the shrieval jurisdiction at summary level is about right in that they also have stipendiary magistrates. Stipendiary magistrates are only utilised in Glasgow. The local authority has the power to appoint them. From our perspective, other major conurbations could have taken that step. In that way, a number of the serious but less complicated sheriff summary cases could be dealt with through the district courts with the same level of punishment available as at the sheriff court.

In Glasgow, the sheriff's summary jurisdiction is about right. Other areas might consider that approach.

Ms MacDonald: The committee might want to bear that in mind.

It seems that the management plan will be central to the operation of the service. I am interested in the principles behind the production of the management plan. I am not getting at anyone; I am trying to discover exactly what the principles are.

Is it true to say that the introduction of a management plan to manage financial and human resources is quite a departure for the Crown Office and Procurator Fiscal Service and that it has not previously thought of organising its work load and personnel in that way? The only parallel that I can think of is the sort of management plan that might exist in a local area social work department where people work with case loads. If that is a parallel, how would the Crown Office and Procurator Fiscal Service determine what a reasonable case load would be? You have already said that, due to the change in the pattern of crime in Glasgow, you have had to take on another two precognition teams. What measurements are applied when you are putting together the management tool for the delivery of the service?

I have a final question: do you have the precognition teams to keep, or do you have them on approval?

Andrew Normand: I can say that Len Higson has them to keep. I can also say that the approach to management is not new; we have been using a management plan-based approach for some years. The approach is not perfect by any means but, as I mentioned earlier, the number of uncertainties and unpredictable factors make the situation difficult. I was the regional procurator fiscal in Glasgow for several years and I am aware that using a management plan is not an exact science and is not easy. However, through a combination of historical information and information about current trends and anticipated developments, it is possible to produce worthwhile and useful results. Len Higson can probably say more about that.

Len Higson: My plan is not only my plan, it is the office plan, which I hope that all staff accept and understand. It reflects what is expected of them, not just me, and it is not only about money but about people and the pressures affecting them. The staff survey from last year, which was mentioned in the introduction, is a key issue in relation to the management plan for the current 12 months.

The ingredients of the plan are based on our performance. We have departmental targets that show how quickly we have to do things and how quickly we would like to do things. A key part of the process is work load, which must be viewed together with the targets to enable us to determine what we need to do to support performance against that work load. That is not a perfect science, but we are able to make a good job of it because of our experience and our management information.

Ms MacDonald: That is my point. How does the fact that you are able to make a good job of it sit with your finding that morale is not particularly high in the service?

Len Higson: Sometimes our aspirations—namely, our conclusions in relation to resources—are limited by the resources that are available. I am sure that most senior civil servants who come to this committee will tell you that their first step is to ensure that they are best using the resources that they have before they seek additional resources. There is a transition.

The Convener: You talk about seeking additional resources. Would it be within the remit of the Crown Office to ask the Executive for more resources if it was felt that the work load had got to such a level that more resources were needed? How would that be done?

Sandy Rosie: Yes, we have done that. Our resources have increased considerably over the past three years. For illustration purposes, in 1997 the department's funding was about £47 million.

We are just starting a year in which it is £55 million. That figure will increase as a result of taking our case to the Treasury before devolution, and to the Executive since devolution, with regard to the Scottish block. We did that in last year's spending review, and we gained additional funding. One result of that is an increase in staff. Two years ago, our total staff numbered 1,087. As members can see from the figures that they have been given, the number is now 1,200. We have been successful and active in bringing our case, in getting more resources and in bringing in more staff. We accept the committee's interest in the question of how that increase is used internally. The business of predicting and tracking the use of resources within the department is not easy.

I will add a point about the planning system. We do not rest—having set out our stall for the year ahead—on the management plan bidding process. We monitor the situation actively every month, through the senior management team and we have a mid-year review. Len Higson has already given an example of how that review process has, in year, led to us altering our resources in Glasgow. It is an active, on-going process to monitor the resource situation and the workload, and to make the appropriate adjustments. It is not a static, annual exercise.

12:30

Christine Grahame: I have two questions, starting with one on resources. I am wondering about how the regions apply for resources through their management plans. Do they submit their plans to you? Are those assessed overall, and does the bid then go to the Executive?

Secondly, and in relation to what Mr Higson said about making a mid-term emergency bid—if I can loosely call it that—how often are such bids made? Is that very unusual, or is it fairly frequent among different regions that find that things are changing? What is the trend with resources?

Thirdly—although this was meant to be my second question—I want to ask more about the tables. You said that the information shown in table 7, which is headed "Precognition Workload: Case Reported plus Work in Hand", refers to serious crime—although I may have got that wrong. Could you make it plain to us what the table represents and what serious crime is? The lives of many members of the public are more affected by, and can be made miserable by, petty crime. I am referring to the wee burglaries, to car damage and to other such crimes. I would like to know something about those crimes. Could there be a table for them?

Sandy Rosie: Christine Grahame raises a number of points, but I will comment on timing. From last year's spending review exercise, we gained a three-year baseline. That is our position with regard to the Executive.

We have management plans that deal primarily with the first year budget head in great detail. They also set a horizon for the three-year planning situation. We review that through an annual exercise, which formally re-establishes the budgets for the following 12 months. Beyond that, we review the planning situation in the senior management team regularly.

Changes occur from time to time, notably at the half-year review that I mentioned. It is largely a question of tracking the actual experience of workload against the assumptions and estimates that were made at the beginning of the year. The management board discusses that and makes whatever adjustments are appropriate. Part of the process of adjustment can involve moving staff around the country, as members may already appreciate. It is not a static situation. We are actively engaged in dealing with the case situation and the staffing situation through the year.

Christine Grahame: My presumption—probably wrong—is that Mr Higson was asking for financial resources, rather than for human resources. That would allow him to take on more personnel. Am I wrong?

Len Higson: No, that is right. The money must be credited to my budget to pay for the increase in staff.

Christine Grahame: Perhaps you cannot answer my question today, but it would be useful to know about trends. Is that practice increasing and how often is it being undertaken? Your answer would allow us to consider whether the budgetary process is sufficiently stable. I appreciate that this is not a science and I did not know whether your bid was unusual.

Len Higson: I do not think that I could quantify the occasions on which that happens. Our planning process has sufficient flexibility to respond to changing demands. I am confident that it is soundly based. I will give another example of how such a situation was dealt with when I was in my previous post in Grampian, Highland and Islands region. That job was different, because the region has 15 procurator fiscal offices. The regional procurator fiscal's aim there is to smooth demand throughout the region. That involves distributing the people resource—as far as possible within the regional resource—among 15 offices, to alleviate pressures. That is a continuing, week-to-week process.

The Convener: There will be only a few final questions. It is 12.35 and time is getting on.

Ms MacDonald: I have a quick question.

The Convener: No other members have pressing questions that they would like to hear answers to, so Margo MacDonald will have the last word.

Ms MacDonald: I will ask about the smoothing of resources throughout the Highlands and Islands and Grampian. That smoothing means that, if you have just bought your nice wee house on the west coast, you would want to smooth it over to the east coast. My question returns to morale and the rate of drop-out of people from the service. I presume that they graduate, qualify, enter the service for a year or two and then start putting roots down. Is a practical human difficulty involved?

Len Higson: The Crown Agent and Mr Rosie will be able to give you their perspective. My view is that legal staff and support staff are less willing to move throughout the country to develop their careers than they were hitherto. That is because of domestic commitments, partners and jobs. That constrains managers and can lead to staleness. Some members of staff might have been in one place for too long and might have become too comfortable in their environment. That can lead to negativity.

Andrew Normand: We must deal with and manage that phenomenon. However, several of our most remote offices have vacancies and we have good candidates for those posts.

Ms MacDonald: I could give you some names of folk for remote postings, too.

The Convener: We will conclude there. I thank Mr Normand and the rest of his team for giving evidence. I hope that they will not mind if we must call them back.

Drugs and Driving

The Convener: I refer members to paper J2/01/7/3, which suggests how we could progress our initial inquiry. A decision must be made. I asked the clerks to write a note to remind us where our remit lies, given that the subject matter of the Road Traffic Act 1988 is reserved. We must ensure that our remit allows us to proceed in the direction in which we choose to go.

The background note suggests that the committee might like to hear from some other witnesses. Members will recall from our last meeting that one witness in particular felt very strongly that he should be called to give evidence. We should hear from him and from a few more witnesses before we decide which direction to take. Do we agree to take evidence from John Oliver from the University of Strathclyde? He has provided a written submission, but it would be useful to hear oral evidence, too. Is that agreed?

Members *indicated agreement.*

The Convener: It would be useful to hear from the Scottish Drugs Forum. The paper lists several organisations, all of which it would be useful to hear from. Do members agree that we should try to find a slot in which to hear evidence from those witnesses?

Ms MacDonald: We could hear from three witnesses in one meeting: Mr Oliver; the Scottish Drugs Forum; and the Scottish advisory committee on drug misuse.

The Convener: That would be sensible. If we hear evidence from the witnesses, that might give us a better idea of where we want to go—whether we want to draw up a report or make recommendations.

Members *indicated agreement.*

Ms MacDonald: I understand the difficulties that are involved but, at some point, we will have to address the business of the Road Traffic Act 1988. Why is the subject matter of the Road Traffic Act 1988 reserved?

The Convener: It just is—that is a fact.

Mrs McIntosh: There is an opportunity to state a different crime on different sides of the border.

The Convener: We are not going to have a discussion on that today. I am simply asking members whether we want to proceed. There is still scope for us to act on the issue of drug driving. Not much work has been done on the subject, so it would be useful for us to continue the inquiry. We have probably heard enough research evidence, but perhaps we could hear more on the road safety side.

Ms MacDonald: My point is that if we follow that through and come up with some ideas or suggestions for prototypes or experiments, we might not be able to carry them out because the subject matter of the Road Traffic Act 1988 would still be reserved. That might be an unnecessary barrier to progress. I would not have thought that the Road Traffic Act 1998 is an act on which this great and glorious union rests. I am giving notice that at some point in the future I might say "Just give us road traffic as well, and we won't do anything stupid".

The Convener: That is up to you. I suggest that we take the evidence as we have agreed. I am sure that there is something useful that we can do after that.

Adoption

The Convener: The final agenda item is on adoption. When we first discussed the subjects that we wanted to examine, we decided that we wanted to consider adoption from a justice point of view. Members will know that Jack McConnell, the Minister for Education, Europe and External Affairs, has made a statement in Parliament and is proposing to conduct a review. The Justice 2 Committee has been asked to comment on the review and its remit.

Christine Grahame: I have a question to which I do not know the answer, although that is probably my fault. I still do not know whether it is mandatory to intimate to the natural father—it usually is the father, although it could be the natural mother—that there is an application for adoption. If that is still not mandatory, I would like a change in primary legislation. Notification should not necessarily be mandatory in all cases. If the natural father is off the scene when the woman is eight months pregnant, it might not be appropriate to intimate any adoption application to him.

However, I would like the weight to fall the other way. I was astonished when dealing with a case to find out that it was not mandatory to intimate that information to the natural father. My client had lived for 10 years with a man. She then married someone else—together they set about adopting the three children of the first man, the natural father. I asked the sheriff whether I was required to intimate that fact to the natural father, with whom the woman had, after all, cohabited for 10 years. The answer was no and the fact was not intimated to him. I do not know whether it is still the case that intimation is not mandatory but, if it is, there is a huge gap. I would like that to be looked at.

Scott Barrie: My understanding is that the issue has to do with whether the father holds parental rights. That will be covered by the reform of family law, which will clarify the position. That is the difficulty with the case to which you refer.

Christine Grahame: I still think that, even if a father does not apply for parental rights, it would be just in many circumstances to intimate to him the major change in his child's status. The sheriff might decide that there is no point in that and that the father should not have a say. Nevertheless, we are talking about a major thing and I have always felt that it is unjust not to intimate the information. If other legislation will deal with the issue, let us investigate it.

Secondly, on the list of groups—given under point 9—that the remit of the review would be sent to, who and what are legal interests and

"Professionals close to, but not currently directly responsible for, adoption services"?

We cannot say, "You should also consult X, Y and Z" if we do not know who those groups are. Point 9 is not specific enough.

12:45

The Convener: I agree. It would be useful for the committee to put together a short report for the Education, Culture and Sport Committee covering all the points that have been made and crystallising our input. The report would primarily be on rights and responsibilities, particularly those of parents, as those of children are probably covered by the remit of the Education, Culture and Sport Committee and would not be a matter for us. However, it is clearly part of our remit to look at rights and responsibilities in adoption in terms of family law. We may wish to make that point.

On your previous point, Christine, we can ask the Executive for a legal note on whether there is an issue. I see no harm in flagging up to the minister that that is one of our areas of interest. I also concur with your view that we need to clarify what is meant in point 9 by "Legal interests", and whether that means the Law Society of Scotland or the Scottish Law Commission, for example. We can address all those points by saying that that is where our interest lies and that we would like the remit to reflect our interests in rights and responsibilities.

We can decide at a later date who, be it experts or organisations, should be called to give evidence on our areas of interest. Presumably, when the review is under way, the committee will agree formally to discuss those bits and pieces.

Christine Grahame: There is not a problem if the lead committee is the Education, Culture and Sport Committee. Our remit would be, for example, court procedures, intimation, the impact on other areas of family law—as Scott Barrie rightly said—and whether there are gaps that create injustice. Once we find out about the issue that I raised, we may find that I am barking up the wrong tree.

The Convener: Paragraph 13 says:

"The Committee is invited to note the objectives and process for the Review. Ministers will welcome any comments".

Do members object if we say that we have a role to play that is stronger than just commenting and that we feel that there is a particular focus for us that we would like to be recognised?

Members *indicated agreement.*

Committee Business

The Convener: I realise that I moved on quickly from our evidence session on the Crown Office and Procurator Fiscal Service, so I will return to the subject. We must consider our next steps soon, as we have yet to establish the terms of our inquiry. When I listened to the evidence today, I formed views about where we might want to go with the inquiry, but we do not have time to discuss that today. We must spend some time setting out the terms of our inquiry at our next meeting.

On the question of arranging visits, we decided at our previous meeting that we would like to visit a rural court and a busy court in Glasgow, because we cannot ignore Glasgow. I will circulate a letter that we received from the Lord Advocate, which contains his suggestions. We do not have time to go into the letter in detail, but members can have a look at it. Do those members who would like to go on court visits wish to comment on the time scale? Is it agreed in principle that members would find such visits useful?

Christine Grahame: I am losing track of our visits. Do not we have a visit to HM Prison and Young Offenders Institution Cornton Vale?

The Convener: That visit is on either 25 or 28 May.

Ms MacDonald: I volunteer to go to Dundee, provided that it does not rain.

Christine Grahame: What is wrong with Dundee in the rain?

The Convener: Would it be acceptable to members if we were to try to arrange those visits within the next month? We cannot arrange visits before we obtain the Parliamentary Bureau's permission.

Christine Grahame: The offer of a visit to a procurator fiscal's office was interesting. It would also be interesting to visit the Crown Office, although we are not dealing with that today. That would be fair to the Crown Office and the Procurator Fiscal Service.

Ms MacDonald: We would be welcome to go through to Glasgow, and it would be only fair to do that. There also seemed to be some sensitivity about the fact that we had spoken only to the Glasgow Bar Association.

The Convener: That was not true, as we were invited by the sheriff principal.

Mrs McIntosh: I have already set up a meeting in Hamilton.

The Convener: We agreed that members could

do their own thing as well, so that is fine. We will investigate the possibilities and the time scale and we will put suggestions to members by e-mail, as usual. Members can then reply and we will try to co-ordinate the situation in that way. It would be useful to hear members' suggestions about whom they would like to take evidence from next.

Christine Grahame: I want to return to the inquiry remit. Before we start to consider from whom we should take evidence, it would be useful to have a 45-minute slot, which the committee could hold in private, to discuss the remit's headlines. I do not think that that has been put on to the agenda.

The Convener: I suggested that we set aside time at the next meeting to discuss the terms of our inquiry. It is our normal practice to have that discussion in private and we will ensure that we have enough time to do that.

I want to ensure that all members of the committee who want to go to Cornton Vale have responded to the information about that visit. The two dates that have been circulated, which are different from the dates circulated previously, are the days on which the inspection team will be at Cornton Vale. Those of us who went on a previous visit to HM Prison Barlinnie found it useful to go round with the inspectors. I highly recommend the visit to Cornton Vale to those members who have not thought about going on it.

I remind members that the next meeting of the Justice 2 Committee will be tomorrow at midday, when we will have a joint meeting on the budget with the Justice 1 Committee. Thereafter, our next meeting will be on 1 May; it will be a short meeting to consider evidence on the International Criminal Court (Scotland) Bill.

Christine Grahame: I want to make two further points. How is the timetable for the visit to HM Prison Kilmarnock proceeding? I am keen to visit Scotland's only private prison.

We should also consider the crisis in the Scottish Prison Service. Given the e-mails and letters that we have received from serving officers, most of us have been well aware that the crisis has been on the cards for some time. I would like the Justice 2 Committee to consider that issue. I do not think that it is sufficient simply to say that we will leave it to the chief executive of the SPS. This is a serious matter—already there has been disorder at HMPYOI Glenochil—and this committee must examine the way in which the SPS operates.

The Convener: We are trying to get a date for the visit to Kilmarnock—I think that we were considering a date in June, although that date may slip, given everything else that we are trying to fit in. The problem is one of scheduling.

We do not have a discussion on industrial relations in the SPS on our schedule. We would have to decide in private whether members wanted to pursue that issue.

Christine Grahame: I ask that we put on the agenda for discussion in private at our meeting next week the issue of whether members want to pursue the matter. I believe that a justice committee of the Scottish Parliament should concern itself with the fact that every prison in Scotland, except Kilmarnock, had a walk-out.

Ms MacDonald: Will we discuss that issue among ourselves, convener, or will we get some information from the horse's mouth, including from the union?

The Convener: It would be courteous of me to discuss the matter first with Alasdair Morgan from the Justice 1 Committee, as that committee is considering the review of the prison estate. There is no reason why, in private session, members cannot discuss whether they want to do something.

We will leave matters there. I thank members for attending.

Meeting closed at 12:55.

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