JUSTICE 2 COMMITTEE

Wednesday 26 September 2001
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
24th Meeting 2001, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Bill Aitken (Glasgow) (Con)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Mrs Margaret Ewing (Moray) (SNP)
*George Lyon (Argyll and Bute) (LD)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Christine Grahame (Souith of Scotland) (SNP)

WITNESSES

Sandy Brindley (Scottish Rape Crisis Network)
Gerry Brown (Law Society of Scotland)
Michael Clancy (Law Society of Scotland)
Elaine Crawford (Public Defence Solicitors Office)
Alistair Duff (Law Society of Scotland)
Anne Keenan (Law Society of Scotland)
Alistair Watson (Public Defence Solicitors Office)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Fiona Groves

LOCATION

Committee Room 1

Scottish Parliament

Justice 2 Committee

Wednesday 26 September 2001

(*Morning*)

[THE CONVENER *opened the meeting in private at 09:49*]

10:08

Meeting continued in public.

The Convener (Pauline McNeill): I apologise for starting a wee bit late. I have received no apologies from any committee member.

Scott Barrie (Dunfermline West) (Lab): Unfortunately, I will have to leave before the end of the meeting today. If you see me disappearing, convener, you will know what it is about.

The Convener: I should add that Mary Mulligan will be joining us. I am aware that she is a bit late this morning, due to constituency business.

We have been notified of the Safeguarding Communities, Reducing Offending in Scotland—SACRO—annual conference, which is being held in association with Victim Support Scotland. It will take place on Wednesday 7 November. The topic is "Victims First – The Restorative Model". Is anyone interested in attending in their capacity as a committee member? If you are, you would be expected to report back to the committee.

Scott Barrie: What is the date?

The Convener: Wednesday 7 November. That week, the committee will meet on a Tuesday. I do not think that there are any other bids for that opportunity. Scott, will you let me know if you can make it on 7 November?

Scott Barrie: Yes.

The Convener: It would be good if a member of the committee could go along and bring a brief report back to us.

HM chief inspector of prisons for Scotland has indicated that he is making an intermediate inspection of HM Young Offenders Institution Polmont on Monday 3 December, and that there is room for two committee members to attend with his team. Some members have visited prisons along with the inspection team in the past, and it has been useful to see how the inspectors work. I recommend that Scott Barrie attend, as he doing a report for the committee on young offenders. If Scott is agreeable, that would be appropriate. There is another place if any other member wants to go.

Mrs Margaret Ewing (Moray) (SNP): Did you say it was on the 19th?

The Convener: It is on Monday 3 December. If any member feels inclined to fill that extra place, they should let the clerks know. We shall hear from Scott Barrie in due course.

Interests

The Convener: I take this opportunity to welcome George Lyon to the committee. I seem to welcome new members to the committee quite regularly. I invite George to declare any interests that he may have.

George Lyon (Argyll and Bute) (LD): I have nothing to declare.

The Convener: Thank you.

Item in Private

The Convener: Do members agree to take item 7 in private, and to discuss lines of questioning in private next week, as we have done this week?

Members *indicated agreement.*

Sexual Offences (Procedure and Evidence) (Scotland) Bill: Stage 1

The Convener: The committee will take evidence from a number of organisations this morning. We have told witnesses that they will be giving evidence for 30 to 35 minutes, as we have quite a lot to get through. All members have a copy of the written evidence that has been submitted.

I welcome Alistair Watson and Elaine Crawford from the Public Defence Solicitors Office. Thank you for the helpful paper that you submitted. If you do not mind, we shall go straight to questions, so that we can get through as much as possible. If there is anything that you want to emphasise, you can do so in answer to a question or in summary.

Stewart Stevenson (Banff and Buchan) (SNP): I would like to focus on situations in which the defendant has had a solicitor appointed for them, and on how it may be possible to allow that defendant, with legitimate cause, to dismiss that solicitor and allow another to be appointed for them, while at the same time preventing vexatious defendants perversely dismissing solicitors. How do we protect the interests of the defendant and the process of law?

Alistair Watson (Public Defence Solicitors Office): There are a couple of issues that concern me in relation to the bill in that regard. As I read the bill, there appears to be little provision for dismissal of the court-appointed solicitor. I have no doubt that, to an extent, that may be deliberate. Those who drafted the bill are concerned that it is not simply used as a vehicle to delay the inevitability of trial in due course. However, I am slightly concerned that there is nothing express in the bill regarding dismissal of the solicitor or the withdrawal of the solicitor at his own instance.

10:15

I am conscious that in a previous discussion, when Executive members addressed the committee, reference was made to the inherent power of the court to allow such matters. However, it seems to me that it would be beneficial if there was something express in the bill about that. My particular concern is the almost impossible position that a solicitor can sometimes be placed in—perhaps shortly before the start of the trial or even at the start—when he is given conflicting instructions by a client and feels that his position is impossibly compromised and that he must withdraw. It seems to me that that matter is not legislated for in the bill.

Stewart Stevenson: What would your suggestion be for dealing with that if you were drawing up the legislation?

Alistair Watson: An important point that is missing from the bill is that the court must have the power to reappoint a solicitor, if necessary, and to do so up to and including the commencement of the trial. At present the bill seems to envisage the appointment of a solicitor only at diets that predate the trial diet and specifically seems to omit the appointment of a solicitor at trial. I know that that matter cropped up in a previous discussion by this committee.

The issue seems to be a glaring omission from the bill, because if courts take the view that the bill—if it became an act in its present provision—meant what it said, then they might also take the view that they have no power to appoint a solicitor at trial. A saving provision would certainly be introduced into the bill if the court was given that power, particularly if the provision also specifically included the power to reappoint a solicitor.

Beyond that, I think that inherent powers are available to any court, which include an ability to take into account the wishes of the accused person in relation to the selection of a solicitor. That would not necessarily override the views of the court, but I have no doubt that the court would take it into consideration. I do not know if that fully answers the question.

Stewart Stevenson: Let me just play it back to you. Essentially, you are saying that you would rely on the good judgment of the court in circumstances where a solicitor was imposed upon the defendant and the defendant indicated a desire to dismiss that solicitor and have another appointment made. Is that the essence of what you are saying?

Alistair Watson: If the bill were passed in its present form, the court would be entitled to ignore the wishes of the accused person. However, I think that it would be inherently within the power of the court to take into account the wishes of the accused person. What concerns me is that, as the bill is presently drafted, the court could only do that at a diet predating the trial diet and not at a late stage in the case.

Stewart Stevenson: So the change that you would make, which you would guide us towards, would be to allow for a change of solicitor and another appointment by the court once the diet is commenced.

Alistair Watson: At any stage.

Stewart Stevenson: At any stage. Right. Thank you.

Mrs Ewing: If that is the case, how many changes of solicitors would you envisage?

Alistair Watson: I would not necessarily

envisage changes of solicitor, but one could see that situation happening. Clearly, Parliament has a right to be concerned that that should not be available as a delaying tactic to an accused person. Essentially, however, there must be a point at which the court becomes the master of the facts of a particular case. The court should have the responsibility of ensuring that the right to change solicitor is not used simply as a delaying tactic.

Mrs Ewing: If you were to lodge what you call a saving amendment—I think that that was your response to my colleague—do you envisage any restrictions being placed on that saving amendment to avoid further litigation?

Alistair Watson: All aspects of the criminal process as it stands almost invite potential further litigation. I do not have any specific proposal in that regard. It seems to me that if Parliament is going to leave matters to some extent to the discretion of the court then, ultimately, it has to be a matter for the court to decide on a basis of fairness and balancing the interests of all parties—the accused's interests as well as those of the complainer. One imagines that a court, if given good cause, might have no difficulty in making one replacement of a solicitor. However, if it started receiving multiple requests, then one would expect any court to want good reasons for those and one would expect most courts to reject such applications.

The Convener: You say in the first page of your submission:

> "In our experience, even the most truculent accused person who arrived in our office with an attitude of total non co-operation, did generally come round to participating in the preparation of their case."

Can you expand on the use of the word "generally"?

Alistair Watson: Our office had a unique, but not necessarily enviable, situation in which people were present who had not chosen to be there. We operated saving provisions. When someone could give a good and cogent reason why it made sense to relieve them of the necessity of coming to our office, we could remove that requirement.

With the benefit of that provision, we may have weeded out one or two cases with which we might have had insurmountable difficulties. We did not grant waivers for that reason, but that may have been an effect of granting waivers. We were left with a group that occasionally protested but was more likely to give instruction. The most difficult cases may have left us, even though their difficulty was not the reason why they left.

The Convener: At what stage is it necessary to ensure that a solicitor is appointed in the interests of the accused?

Alistair Watson: That is necessary as early as possible. The earlier a solicitor is appointed, the more that solicitor can do to prepare for the case. However, in practice, it may not become apparent to the court that no solicitor represents the accused until an intermediate or first diet. It may not be until two weeks before a trial that the presiding judge knows that no solicitor is involved.

It is common, particularly at summary level, for people to enter pleas on their own behalf and to consult a solicitor after the pleading diet. Often the court becomes aware of the lack of agency only two weeks before the trial and must act then. The earlier the better but, in reality, a solicitor is likely to be appointed at a fairly late stage in proceedings.

The Convener: Might that result in delays?

Alistair Watson: Yes. That is inevitable occasionally. Our experience is that that situation created delays. People often consulted their own solicitors initially and would learn only then that they had to approach us because of direction. Those people would take no steps on that until the intermediate diet came up. Suddenly, contact would be made with our office, perhaps through the guidance of the presiding sheriff.

Sometimes we received our first instruction at the intermediate diet. Often the first port of call then was to seek adjournment of the case, because the case would be two weeks from trial and we would have no precognitions, statements or indications of the evidence. To be prepared for trial in two weeks, even in a summary case, we often rely on the good offices of the prosecution to make evidence available quickly. In a more serious matter that has a jury trial, it would be extremely difficult to be fully prepared in two weeks.

Mrs Ewing: I have a question on that response, given that many people who may never have to go to a court do not have a solicitor. You said that, sometimes, the accused approached their own solicitor. Do you have statistics on how many accused already have solicitors rather than have them appointed?

Alistair Watson: No. The only evidence that I have is my knowledge of how often we received requests through other solicitors to waive the direction criteria. We received requests from other solicitors for waivers of direction in—off the top of my head—about one third of cases, or perhaps slightly more. However, I appreciate that that is a different statistic from that for which you asked.

Bill Aitken (Glasgow) (Con): You rightly highlight in your written evidence the fact that we are dealing with situations that, in practice, do not occur very frequently. Nevertheless, I would like to pursue the point that you make about the late

involvement of a solicitor. In summary matters, that can be dealt with; however, the average person with knowledge of the courts would take a less relaxed attitude towards the appearance of a High Court indictment than to a summary complaint in Glasgow district court for a breach of the peace, for example. Therefore, I do not think that the problem would arise often, would it?

Alistair Watson: No, it would occur rarely. Nonetheless, if it were to occur in a solemn matter, the situation would be all the more serious for the accused and for the administration of justice.

Bill Aitken: In a situation in which there had been very little time to prepare, counsel would ask for an adjournment that would almost certainly be granted, would it not?

Alistair Watson: Yes. The postponement need not be of great length. In solemn cases—jury cases in particular—it would be normal for the trial to be postponed for a matter of weeks in the first instance rather than for months, assuming that there was space in a future sitting.

Bill Aitken: Let us turn to the question of evidence that may be introduced. It could be argued—and this is part of your submission—that if a judge and a prosecutor were doing their respective jobs, a lot of the relevant evidence would not be introduced. Is that the case?

Alistair Watson: Yes.

Bill Aitken: However, you express concern that the trial-within-a-trial procedure could result in a complainer in a rape case having to face the distressing situation of giving evidence twice. That need not be the case. Were we to amend the bill so that, in a process not dissimilar to that of English committal proceedings, some indication could be given in court of what evidence was intended to be introduced, the judge could at that stage make a determination as to whether that would be appropriate. Would that not be the way forward?

Alistair Watson: There would be considerable practical difficulties in following that suggestion. Committal proceedings inevitably take place at the beginning, before the defence has the available evidence before them. It is therefore difficult for a representative at that stage to know precisely the line of cross-examination. He will know the basic line of defence that the accused has instructed him to take, but he will not know the evidence that he is going to meet from the prosecution. That makes it difficult for him to know what line of cross-examination he will have to pursue, until he has some evidence or can anticipate the evidence of the complainer.

In the old-style committal proceedings in England and Wales, it was not uncommon—and it is still not unheard of—for Crown witnesses to be called as witnesses at committal proceedings. Inevitably, that gave rise to a situation in which evidence was given twice by a complainer. I am therefore not sure that following the model of committal proceedings would get around the problem that you raise. There would also be a practical difficulty from the defence's point of view.

Bill Aitken: Let us suppose that an amendment was lodged, whereby at some stage of a trial the defence was required to give a narrative to the court regarding the evidence that they were seeking to lead. At that stage, it would be open to the depute to object on the basis that much of the evidence was irrelevant. The issue could then be debated. The complainer would not be involved at that stage. Would such a safeguard meet the requirements?

Alistair Watson: If one could guarantee that the complainer was not involved, it would be a safeguard. My concern is that, without finding out from the complainer what her—if it was a woman, as we assume that it probably would be—line and position was going to be in relation to certain preliminary points, one could not always rule out what would be necessary by way of follow-up. In other words, it would be difficult to rule out completely the possibility that the complainer would not be involved. Bill Aitken is right to say that many of the issues can be resolved by debate using precognitions or statements on an ex parte basis; however, one cannot say that that would always be the case.

It is likely that there will be such a requirement. It might be a rare event, but there exists the danger that a complainer might be required to have, in effect, a trial within a trial, whether at the trial diet or at a diet some weeks before the trial.

10:30

Mrs Mary Mulligan (Linlithgow) (Lab): At the end of your written submission you suggest that if the proposed legislation goes ahead, there are compelling arguments for solicitors to undertake more formal training, particularly in cross-examination of children. Will you expand on that and say what the results would be?

Elaine Crawford (Public Defence Solicitors Office): At the moment, solicitors and advocates have no formal training in dealing with vulnerable and child witnesses. Many people in other professions who deal with witnesses and children have proper training. It would be important to have such formal training—a certain number of hours per year could be incorporated into the continuing professional development that is required of solicitors. There could be advocacy workshops and experts in child psychology could speak to

solicitors.

Mrs Mulligan: What do you think the reaction would be of those who had to undertake that training as part of their professional development?

Elaine Crawford: When solicitors were required initially to undergo continuing professional development, concerns were voiced by older solicitors, but solicitors now generally accept that they must undergo continuing professional development. I think that solicitors who chose to put themselves forward for the appointments would accept such training.

Alistair Watson: A solicitor's normal annual training requirement—imposed by the Law Society of Scotland—is 20 hours, which is not much. Within that, there is a requirement for five hours of training on management issues, so there is a precedent for requiring solicitors to train in specific areas. A requirement for training in dealing with vulnerable witnesses would not be controversial nor would it be likely to cause difficulties to solicitors. If solicitors want to put themselves forward for inclusion on a list or panel of solicitors who are willing and able to undertake the work, there could be a requirement for five hours of training on that matter out of the 20 hours. That would be the equivalent of one day's training a year and would not impose a greater requirement on solicitors, but would simply focus training in a difficult area.

Elaine Crawford made a good point that, at the moment, we do not have specific requirements for training. We like to think that because we have been doing the job for many years we are good at it, but we have no empirical reason for assuming that. Perhaps we are guided by our egos.

Bill Aitken: Your written submission refers to the 1995 act and it mentions provisions in the bill relating to

"offences relating to the conduct of consenting males".

On the basis of the Lord Advocate's circular, which I recall was issued about 1990 and caused considerable excitement, that is not relevant because such cases are not being proceeded with.

Alistair Watson: I cannot remember when I last saw such a case in court, but if they are to be covered by the bill, they ought to be properly covered. As the bill is framed, there are three different homosexual offences under the 1995 act and two of them do not involve a complainer in the sense that is in the bill. Perhaps there has been an oversight and offences that do not involve a complainer should not be included.

The Convener: Are you saying that the 1995 act is also flawed?

Alistair Watson: I am sorry—I am talking not about the Criminal Procedure (Scotland) Act 1995, but about the Criminal Law (Consolidation) (Scotland) Act 1995, which relates to homosexual offences. It is still law that there are three categories of offence. The bill refers to those three categories and they are included within the bill's general provisions. The bill therefore includes two categories of offence that do not have a complainer, as we would recognise one. Only one of the three offences under the Criminal Law (Consolidation) (Scotland) Act 1995 has what we would recognise as a complainer, so only the subsection that deals with that type of offence should have any place in the bill. I am not suggesting that there is anything wrong with the drafting of the previous act.

The Convener: Before we leave the subject, I want to return to your view of the proposed new sections 274 and 275. Your submission says that you are unhappy with section 275, which is "poorly drafted", and that you are concerned by

"its assumption that issues require to be 'proved' by the accused at trial."

The submission goes on to say that

"the accused need prove nothing."

The committee accepts that we should adhere to the basic principle of innocence until proven guilty. Will you expand on those concerns? For the committee's benefit, will you indicate whether you are generally supportive of narrowing the scope of proposed new section 274, which deals with the evidence that can be admitted in a trial?

Alistair Watson: I can understand the concerns that have prompted that proposal, but I have grave concerns about the restrictions that the new proposals would put on cross-examination. It seems to me that if it is perceived—I am not sure that statistical evidence confirms it—that courts are not applying the law as it stands, that suggests that there is a problem with the courts rather than with the law. That problem could be resolved simply by appropriate guidance.

The danger with the provisions is that, although they are trying to protect vulnerable people—which is understandable—they could equally bring about miscarriages of justice. Accused people are also vulnerable and are sometimes innocent. Their innocence can be established only by a robust and fair trial.

I will be a little more specific, without rehearsing all the points in the submission, which I know have been read. I am concerned that, even within the saving provisions, the defence would not be able to cross-examine on the basis of a pattern of behaviour or a pattern of defending. Any of us can envisage a situation in which somebody close to us, such as a son or a brother, is accused of

something by an accuser who is known to be a serial liar, who has been lying for years and who has a number of convictions for that. The bill's saving provisions allow the defence to cross-examine only on specific matters, not on a generality. The accused might know only a generality, which is that the complainer has been in trouble for telling lies and for committing acts of dishonesty over a number of years. In every other type of case, the defence could put that to the complainer. It seems to me that, even within the bill's saving provisions, the defence would be restricted.

I am equally concerned that the defence could cross-examine only on matters that are described, I think, as being in reasonable proximity of time before or after the acts that form part of the subject matter of the charge. I cannot see any reason for introducing what seems to be an arbitrary restriction. If the defence can justify the relevance of the matter that it wants to put, why should the age of that matter be of concern? For example, if a sailor who is currently sailing towards the Gulf gets a letter from a girlfriend to say that marvellous things will happen when he gets home and, when he returns after six months, things do happen but she makes a complaint about that, will he be restricted from using the letter as evidence because the court feels that six months is too long a time?

The Convener: No. Under the bill's provisions, the defence could justify why the accused wished to present that evidence.

Alistair Watson: I do not have the exact wording in front of me, but my understanding of that saving provision is that the evidence must still come from a time that is "shortly before" or "shortly after" the offence. Courts will take a different view as to what constitutes shortly before or shortly after.

Bill Aitken: You have raised an important issue. However, would not a court almost inevitably allow the introduction of evidence that showed that the complainer was a serial liar?

Alistair Watson: At present it would, but I am not sure that it would be able to under the bill. The saving provision relates only to specific matters or occurrences. It might be Parliament's intention that introduction of evidence of the sort that we have been discussing should be allowed. Many courts might take the view that proposed new section 274 would prevent them from doing that and that it would allow only matters relating to a specific event to be put before them.

Bill Aitken: My interpretation of the provision differs from yours, but you have raised a very important issue that we must pursue.

Alistair Watson: I hope that my interpretation of proposed new section 274 is wrong, but I fear that it is not.

The Convener: You are talking about the difficulties for the defence, but many women who were vulnerable witnesses in rape cases have had their sexual history paraded before a court when that was not relevant to the charge of rape.

Alistair Watson: Yes.

The Convener: We have heard evidence that concerns us about the operation of the bill in practice, because it relies on judges and prosecutors stepping in when the defence has gone too far. Do you accept that one reason for narrowing the scope of the evidence that can be led is that evidence might not be directly relevant but designed to rattle the woman in the witness box?

Alistair Watson: I have no doubt that that happens and that on occasion the present provisions are departed from when they should not be, to the severe detriment of the complainer. Where that happens, it is the result of the court's failure to apply existing legislation. That is not to say that I have grave concerns about all aspects of the new bill. The requirement for applications to be made in writing is a good, cogent step. It would formalise the process and bring home to all parties the importance of what is being embarked on. However, I am concerned that the proposals go considerably beyond that. I fear that on occasion they might restrict the court's ability to run a fair trial.

The Convener: As members have no further questions, I thank our witnesses for their written and oral evidence, which has been very helpful.

Our next set of witnesses is from the Law Society of Scotland. We will hear from Alistair Duff, the society's convener; Gerry Brown, a member of the society's criminal law committee; Michael Clancy, the director of the society; and Anne Keenan, the deputy director of the society. Members have before them a paper that the society has helpfully submitted. It runs to nine pages and contains a great deal of material for questions.

Good morning and welcome back to the Justice 2 Committee. Could you give the committee a description of the differences that you see between the proposed new sections 274 and 275 as set out in the bill and the provisions of the 1995 legislation? It would be useful for us to hear the Law Society's view of the differences between the law now and the law as it would be if the bill were passed.

Anne Keenan (Law Society of Scotland): New section 274 is wider in its terms than the existing section, which prohibits the leading of evidence

relating to previous sexual history or sexual character. New section 274 would encompass that type of evidence but would go further and make prohibitions on the leading of evidence of behaviour "not being sexual behaviour". That is set out in new section 274(1)(c).

10:45

As I understand it, under existing law, an application has to be made to court to lead evidence of previous sexual history and character. That will still have to be done under the new provisions. In relation to non-sexual behaviour, if a defence solicitor or advocate attacked the character of a Crown witness, under the existing law notice would have to be given to the court of the intention to do that. That would leave the defence open to challenge on the previous convictions of the accused person. Therefore, under the current law, no step would be taken lightly. If the accused had previous convictions, the defence would step lightly before challenging the character of the complainer.

The existing provisions cover both those situations. The significant difference that arises in the bill is in consideration of the probative value of evidence. If the bill becomes an act, there will be a weighing of the relative interests. Previously, the judge would consider whether evidence was admissible and relevant and if it was, the jury would then decide. That is where we come to the distinction in criminal law between the function of the judge on the one hand and the jury on the other. In Scots criminal law, the judge is in a court as a master of the law and will determine what is relevant and admissible. Thereafter, the jury's function is to determine the facts of the case—the jury members are the masters of the facts. They determine what weight to place on the evidence that is placed before them and on the demeanour, credibility and reliability of the witnesses. They weigh all those factors as part of their determining process.

In my view, under the new procedures, there would be a departure in the function of the judge. In determining whether certain evidence would be led, the judge would be weighing the evidence and trying to determine whether it would interfere with the "proper administration of justice". We would then have to consider the definition of the proper administration of justice. New section 275(2)(b) gives two definitions. The first refers to the

"appropriate protection of a complainer's dignity and privacy".

The second considers whether the matter is "commensurate to the importance" that the jury would place on it. I accept that those are examples and might be regarded as illustrative only. However, in the Law Society of Scotland's view, some reference should be made to the importance of ensuring that the accused can lead evidence in a full and fair defence if the "proper administration of justice" provisions are to be regarded as truly balanced.

I notice that, in the policy memorandum and in the paper called "Redressing the Balance: Cross-examination in Rape and Sexual Offence Trials" that preceded the bill, reference is made to the fact that the provisions on the proper administration of justice were based largely on the Canadian criminal code. When one examines the Canadian provisions, it is interesting to note that in their equivalent of the definition of the proper administration of justice, the first item is the right of the accused to lead a full and fair defence and the second item is designed to allow complainers to ensure that the administration of justice is not hindered by complainers being prevented from coming forward. The Canadian code balances the two interests. If we are to go down the route of the bill, it is important that we also acknowledge that balance.

That, basically, is what we see as the difference between the provisions of the existing and the proposed legislation—the change in the role of the judge, and the need for some weighing provision. We also have some concerns about having a trial within a trial. If issues of probative value are being considered, a number of interests must be taken into account.

The questions of how a particular line of evidence fits into the context of the trial and what weight the jury might place on it would have to be considered. It might be that the procedure involving a trial within a trial would be invoked more often than it is at present, when there is usually a straight debate on relevance and admissibility.

I appreciate what Bill Aitken said about the English procedure, but there are different provisions in relation to disclosure, which we do not have in Scotland. Such differences would have to be taken into account.

We want the bill to ensure that victims are protected; we do not want to end up making them more vulnerable by having them give evidence on two or more occasions in relation to one aspect of the case.

Gerry Brown (Law Society of Scotland): The new section 275(3) refers to an application being considered by the court and says that the application must be in writing. It says that, unless there is good reason, the application should be made

"before the oath is administered to the jury"

or, in summary proceedings,

"before the first witness has been sworn."

However, we have identified a risk in relation to that. What happens if, during a trial and in response to an innocent question on the part of the Crown or the defence, a fact comes to light that could trigger the provisions that we are considering today? The bill does not seem to provide for dealing with evidence that comes out in court but which was not given in precognition or made available to the Crown. It would be bizarre to have everybody go away and prepare a submission in writing. It might be the intention that there should be an immediate debate in the court when any objection is made or evidence comes out, but that would be a cause for concern to us. In our system, there is not full disclosure in the early stages, which means that the defence prepares its case independently of the Crown and does not have access to all the information to which the Crown has access.

Stewart Stevenson: Examples help simple people such as me. If a female complainant has a conviction for shoplifting a significant quantity of male contraceptives from Boots the Chemists, would it be reasonable for that fact to be admitted? If she had ordered underwear by mail order from Ann Summers and had defaulted on the payment by claiming to be someone other than herself, would it be reasonable for that to be admitted?

The offences of shoplifting and defrauding a mail order company do not have a sexual aspect, but the detail of those two examples could mean that those particular cases could be considered to have a sexual aspect. Would it be reasonable to include them or exclude them, in general terms?

Anne Keenan: I am not trying to avoid the question, but the answer depends on the facts and circumstances of the case. We also have to take into account time factors.

Alistair Duff (Law Society of Scotland): I suggested to Anne that the answer to the question is "it depends".

That is part of the problem of trying to legislate for every conceivable scenario—there is no end to the possibilities. Like it or not—the draftsman of the bill appears not to like it—we have to trust the judges, prosecutors and lawyers to do their jobs properly. At the end of the day, if the bill comes into force, trust must be placed in those in the criminal court who are responsible for presenting the prosecution and defence cases and for judging them.

I can imagine a scenario in which the evidence that Stewart Stevenson described would be allowed, either as an attack on credibility or as some form of evidence of sexual inclination. I can also imagine a scenario in which it would not be allowed. It is a question of admissibility and relevance. Relevance does not exist in a vacuum. A piece of evidence can only be relevant vis-à-vis something else. The test that the court applies at the moment is whether the evidence is relevant to the issues that the jury is required to determine in reaching its decision. The difference between a judge deciding on relevance according to that test and being specifically directed to take probative value into account, as proposed in the bill, is a matter of semantics. It is difficult to imagine that, in assessing a question of relevance, the judge would not have regard to the potential effect of the evidence on the jury considering its verdict. Otherwise, what is the question of relevance? What difference will that aspect of the proposed legislation make to the current situation? It is hard to imagine a situation in which a court would decide that evidence could be admitted under the current legislation, but would decide that it was not admissible under the proposed legislation.

The bill introduces a rather peculiar effort to define the administration of justice. I accept that the two aspects of the administration of justice that are referred to are meant to be two of many—presumably a vast iceberg is lurking under the water that we are not being told about. However, it is odd that the accused's right to a fair trial and to test the evidence properly through presenting evidence and by the cross-examination of witnesses does not feature in a bill that seeks to identify the balancing act that is already meant to be taking place and tries to identify the important aspects of the administration of justice.

Stewart Stevenson: Taking the two examples that I posited, you contend that, as drafted, new section 274 would make it neither more nor less likely that such evidence would be allowed before the court. Are you suggesting that it would have no effect in practice?

Alistair Duff: Broadly, it would make no difference. However, that assumes that the lawyers present the right arguments and that the judge applies the right tests, which goes back to the point that Alistair Watson made. There is an argument that the current legislation is perfectly adequate to deal with the concerns that it is said that the public and politicians have. The question may be whether the rules have been properly applied. That is an issue of training and education.

The Convener: Is the Law Society of Scotland saying that there is no requirement to change the law, even though not just politicians, but many women's groups and other organisations say that there has been a failure to protect women in the witness box? This morning we are going to hear evidence from Rape Crisis Scotland, who say that there is never an instance in a crime of sexual offences that would require a woman's sexual character to be introduced as evidence.

Alistair Duff: To suggest that there is never a scenario in which the sexual history of a victim is relevant is, in my view, incorrect.

The Convener: Would you accept that there is concern about cases where women have been unduly questioned about their sexual history?

Alistair Duff: I accept that there is concern about that and I believe that the law as it is currently framed is adequate to deal with the issue. The question is whether the law has been applied properly.

11:00

The Convener: Has the Law Society made any representations in the past about the need for training to prevent women being unduly questioned about their sexual history?

Anne Keenan: We made representations last year and suggested that one possible way round the issue, in addition to training, was for guidance to be introduced. The committee may be aware that the Lord Justice General issued guidance on the conduct of trials with child witnesses, which deals with how the officers of the court should act in those cases and how judges in particular should deal with child witnesses—removing wigs and gowns and so on. In June last year we suggested that further guidance on the application of the law could be issued, in addition to training. We are currently involved with the Crown Office and Procurator Fiscal Service in trying to arrange training for prosecutors and defence solicitors on the cross-examination of vulnerable witnesses.

Alistair Duff: We also recently beefed up our code of conduct for criminal defence solicitors in relation to vulnerable witnesses and the strategies that should be used to minimise distress and trauma in the precognition process, which comes before the evidence-giving process.

Anne Keenan: It is not that the Law Society does not accept that there are concerns—we accept that there are concerns—it is that the proper application of the current law, with due guidance and training, may be sufficient to meet the concerns.

Mrs Ewing: As you will know, I am the one Ewing parliamentarian who is not a member of the legal profession, so I am examining the issue with great interest. In evidence that we had from the PDSO, there was talk of about 20 hours of training, of which probably five hours would be on vulnerable witnesses. What role would guidance have in those circumstances? What would be the status of guidance to solicitors and how would it relate to the retention of their practice certificates?

Anne Keenan: The guidance to which I referred was guidance to the judiciary on the conduct of cases, which is not a matter for regulation by the Law Society. On continuing professional development, if I may clarify, the five hours that were referred to were five hours of compulsory managerial study. How the remaining 15 hours are spent is up to the solicitor. Obviously, the time must be spent on an area that is relevant to their area of practice, so there would be no point in a criminal defence solicitor going to a seminar on crofting—[*Interruption.*]—despite what Michael Clancy thinks.

At the moment, the society provides a number of courses on criminal law. Gerry Brown would be able to give the committee more information on a course on evidence that recently took place.

Gerry Brown: An advanced course on evidence took place at the beginning of the year, the idea being to target solicitors—I think that Alistair Duff referred to me as an older solicitor—who do not want to deal with just the normal, mundane aspects, but who wish to go into the issue in more depth. That course, which lasted for a day and a half, dealt with the cross-examination of witnesses and examination-in-chief.

As for continuing professional development, any member of the profession who wants to involve themselves in a particular area of work would be foolhardy not to focus their CPD in that area. Already, solicitors who are registered for criminal work are obliged by statute to undertake a number of hours of CPD every two years. The profession and the society encourage all solicitors who become involved in the questioning of vulnerable witnesses to expand their knowledge and experience.

Mrs Ewing: Is there any evidence of female solicitors being more attracted to such courses, given that a larger number of female graduates are coming into the profession?

Gerry Brown: My two female partners and three female assistants are attracted to them. Obviously, as there are more females in the legal profession, more are involved in child-sensitive work and referral work with children both before the children's panel and before the sheriff under the Children (Scotland) Act 1995.

We assure the committee that we are aware of the situation and that we will take on board any perceived criticisms and develop the training aspects accordingly. The question is whether such training is made obligatory. I suspect that obligations are imposed on all of us, and we would trust individuals in the profession to deal properly with matters.

Michael Clancy (Law Society of Scotland): It is important to point out that it is obligatory to participate in continuing professional development courses—I almost said "compulsory professional

development courses". It is a disciplinary offence not to comply with the regulations, which are not just guidelines for the profession, but professional practice rules. A failure to comply with the rules can be interpreted as professional misconduct in certain circumstances. The society undertakes a monitoring process in which, each year, all solicitors must submit to the society the card that details the courses that they have attended. The card is then checked by society officials. Even those who are employees of the society—including the four of us—have to comply with those regulations.

The courses on criminal law practice that Gerry Brown alluded to stem from the Crime and Punishment (Scotland) Act 1997. Under that act, the Scottish Legal Aid Board introduced a registration system for criminal law practitioners, which also contains a system of compliance with a code of practice approved by Scottish ministers. The code requires attendance at criminal law courses. Such issues are not matters of volition; I would place them higher up the level of compulsitor.

Furthermore, there is increased sensitivity about vulnerable witnesses right across the board, from child witnesses to witnesses who are vulnerable because of age, infirmity or the nature of the crime involved. Although a few years ago it might have been proper to say that people's idea of vulnerable witnesses was seven-year-old boys and girls, nowadays the definition of the phrase has been expanded. That is something that the profession also appreciates.

Mrs Mulligan: Despite the fact that there are guidelines, we have heard evidence that there have been transgressions. Such instances have become somewhat apocryphal, and have led to fewer women reporting sexual crimes. We know that such reluctance exists. How do we then instil women with confidence in the system? Much of your evidence suggests that you are negative about the bill. However, I am sure that you would agree that we want to encourage women to have confidence in the system and to come forward. Apart from training—which may or may not work—and without using legislation, how do we change a system in which women involved in rape and sexual assault do not have faith and thus in which such cases do not reach prosecution?

Michael Clancy: The victim does not undertake prosecution—it is undertaken by the Crown. The question might therefore be directed to the Crown and the police. Making the system more comfortable for people is necessary, but is only part of the issue. Communicating enhanced comfortableness is a different matter.

I spoke about child witnesses. I think that Lord Hardie produced particular projects and promoted material to make child witnesses more comfortable when he was Lord Advocate. Perhaps there is room for the Crown Office to consider promotional material that is tailored for people who are victims of sexual offences and properly to fund projects that communicate changes in the law that are envisaged by the bill and changes in practice in peripheral matters surrounding the bill—suggested changes in guidance to the courts and the professions, for example. A properly funded promotional and educational project might be a way of meeting the concerns that Mary Mulligan mentioned.

Alistair Duff: If, on the day after the legislation came into force, a woman who claimed to be the victim of a rape attended a rape crisis centre, explained the situation to a worker there and indicated her willingness to report the matter to the police, but was reluctant to do so for fear that her previous sexual history might be gone into, that worker could not say to her, "Your sexual conduct will not be a matter of cross-examination at the trial." Such cross-examination can be done now and could be done if the legislation were in force. The court would have a differently worded test to apply, but in some situations previous sexual history is relevant and will continue to be so.

Mrs Mulligan: I am concerned that you should say that. I am not saying that previous sexual history is never relevant, but that it might prevent people coming forward.

Alistair Duff: I will pose a scenario. For the sake of argument, suppose that a man meets a woman through an internet chat room. In the course of discussion with that woman through the internet, it emerges that she makes a habit of contacting men through internet chat rooms and then meeting them for sexual relationships. Suppose that she does so with this man. Following their liaison, to his astonishment, she claims that the act was carried out without her consent. Would not evidence that, for the previous two or three weeks, she was contacting strangers regularly and meeting them for consensual sexual conduct be relevant?

Mrs Mulligan: I am not saying that previous sexual history is never relevant. I am saying that the fact that it can be used and has been used in inappropriate instances has resulted in women being reluctant to come forward. We are legislators and we can ask, "Are there current guidelines that allow the judicial system to perform as we want it to? If those guidelines are not strong enough, do we need legislation?" That is why we are considering the legislation proposed by the Executive—we want to ensure that it achieves what we are trying to achieve. I am concerned that you say that, even if the legislation comes into force, it will not produce the desired outcome.

Gerry Brown: Going to court is a traumatic experience for any witness. When I was on my way to the meeting, my godmother phoned me to say that she had received a citation to go to court as a witness. A car had been broken into. She had not seen the people involved, but she was concerned that she might be confronted with them. The crime was fairly low level, but she was alarmed to such an extent that she phoned me. She asked what to do with the citation and said that she was not too happy at having to go to court.

As I think I have said before another committee, major concerns have been addressed in a well-meaning fashion by other organisations. We are firmly of the view that with proper enforcement of the Criminal Procedure (Scotland) Act 1995 and proper training for all concerned—judicial training, training from the Crown Office and the Faculty of Advocates and continuing enhanced training of the defence—current legislation would work effectively.

We have tried to explain why the bill could be flawed and result in more trials within trials and more adjournments of cases. There is no way that I would proceed with a serious case if at the last minute—the day before the trial—I received notices bringing in new evidence that I did not have time to examine. It would be professionally irresponsible to proceed, so the trial would have to be put off.

11:15

The Convener: You make an important point about delay and the impact that it would have. The committee will have to pursue that.

As long as there is a disagreement in principle about whether sexual character evidence is ever relevant, all the training in the world will not change things. I happen to take the view that that evidence can sometimes be relevant. However, surely in the scenario that Alistair Duff has outlined, in which a crime has allegedly been committed, what requires to be proven is what happened at that point when one person says that there was consensual sex and the other says that the sex was not consensual. Of what relevance is the fact that a woman was offering services on the internet five years ago? Surely the Law Society could agree, at least, that what requires to be proved in court is what happened at the time, not before. That is the crux of the matter.

The Law Society suggests an alternative, which, to me, amounts to the same thing—that someone would step in at the appropriate point and prevent a question from being asked. As you say, the jury is the master of the facts and part of the problem is that, once evidence has been given, it is too late to take it back.

Drafting issues notwithstanding, will you reflect on what the bill is trying to achieve, which is to prevent that evidence from getting out as quickly as it does at the moment by tying some of the procedures a bit more tightly? That would be fairer, because at the moment the balance is often skewed against the woman who is the victim. Is not that the heart of the issue?

Anne Keenan: That has all been debated. The English, as members are aware, brought in the Youth Justice and Criminal Evidence Act 1999. Recently, there was a case in the House of Lords—Regina v A—in which the question of whether previous sexual history could ever be relevant in such a trial was discussed.

We all agree that the fact that someone has consented to a previous sexual act is not relevant to whether they consented to the act that is the subject of the charge. However, it might be relevant to whether the accused in a rape case believed honestly that he had consent—that is where the distinction lies. That material distinction must be examined. The House of Lords drew that distinction and said that, in cases where there is evidence that the accused believed honestly that he had consent in that act, that evidence could not be excluded. To do so would result in an unfair trial, which would be contrary to article 6 of the European convention on human rights.

For me, whether previous sexual history reflects on the accused's belief about consent answers the question. We are not saying that because the woman consented on one occasion she consented on another. That is not the case. The particular circumstances of the trial are what matter. I agree that it would be better to have procedures that focus matters more properly at an early stage.

We all agree that it is appropriate that the provisions should apply to the Crown as well. Sometimes evidence-in-chief can be led by the Crown, which will, through the back door, open up a line of cross-examination. That is quite proper because the Crown may have to rebut evidence. We agree that measures that deal with that in advance are appropriate and should be thought out. However, we are not sure that the bill represents the appropriate way of doing that. There might be a need for more guidance and training.

The other aspect that we have not touched on but that could get the message out to victims of such crimes—this is the point that Mary Mulligan raised—is extending the category of vulnerable witnesses. Under the Criminal Procedure (Scotland) Act 1995, we have a restricted view of what constitutes a vulnerable witness—a child or someone with a mental disorder. There is no

reference to an adult who has been the victim of a sexual offence, so those people cannot benefit from the use of closed-circuit television or screens. If those additional comforts are put in place in the context of the criminal trial, that might encourage people to go to court and it might help the rape crisis worker to convey the message that sufficient protections are in place.

We will not know how such measures work—how they apply and whether they make a difference—unless we monitor the bill when it is enacted. That is an important point. The issue should not be left in a vacuum.

The Convener: I will call Margaret Ewing, but I would like us to get on to court-appointed solicitors and other concerns before the representatives of the Law Society of Scotland go.

Mrs Ewing: Anne Keenan raised a series of issues in her response to Mary Mulligan's question. I would like to have pursued those a bit further, but that will no doubt be done.

One of the Law Society's proposals to overcome the difficulty of vulnerable witnesses going to court is the concept of an amicus curiae. How would that person be appointed? Will the vulnerable witness say that they want their pal to be their representative? What kind of support would be given to such a person? The representatives admitted in earlier evidence that many people are terrified by a court appearance, so how will such a person have the confidence to challenge issues in court?

Gerry Brown: I will be brief, which is an exceptional experience for me. The court will appoint an amicus curiae. That would probably have to be a solicitor or counsellor. The early appointment would allow the solicitor to familiarise himself with the details of the case. The Crown could and should provide the details of the case, which would allow the amicus curiae to know what the case is all about. In our response to the paper, we did not raise the issue of whether the defence would assist in any way. That would be a matter for the defence.

By appointing an amicus curiae, the court is putting in position someone who can object to a line of questioning, not allow the answer to come out and ask about the relevance, competency and admissibility of that line of questioning.

Alistair Duff: The proposal would put into the courtroom a form of protection for the vulnerable witness. At the moment, no one in the courtroom has the exclusive function of protecting the witness. The judge does not have the function, although his duties involve it. The role of the prosecutor is not specifically to protect the witness, nor is that of the defence solicitor. The proposal puts right into the well of the court someone whose only function is to protect the witness. The bill inevitably relies on the judge, prosecutor and defence lawyer to apply the rules properly, but the notion of an amicus curiae provides concrete protection for the witness.

The Convener: What is that model based on? Is it based on another country's system?

Gerry Brown: It is based on sheer brilliance.

Alistair Duff: The idea of an amicus curiae is not conjured out of thin air—we are not all fluent in Latin.

Gerry Brown: The idea has been used before. It was used recently in a Lord Advocate's reference appeal, involving the Campaign for Nuclear Disarmament and Trident. One of the individuals concerned was not represented and did not want representation, so the court appointed a counsel as amicus curiae in order to protect her legal interests—although she was very capable of dealing with the issues herself.

Mrs Ewing: Who pays for that?

Gerry Brown: It was the court in the case that I am thinking of.

Michael Clancy: Yes, it would be the court. There is precedent in England and Wales for what is known as a MacKenzie friend to be brought along. We thought that "MacKenzie" was probably not the right word to use—and indeed that "friend" was also not the right word to use—and that it would be much more fitting to use a name that acknowledged that the person was separate from the representatives of any of the parties involved. The concept of an amicus curiae stretches back to Roman times—I believe that Cicero might have been described as such.

Bill Aitken: I am concerned about how the idea would impact on the jury. If the jury sees someone constantly intervening on behalf of the witness, the witness's credibility might come under increased scrutiny from the jury.

Michael Clancy: That would depend on the jury.

Gerry Brown: We do not know that that would happen. However, if the question was one of protection and of stopping harassing or inappropriate questions, it would obviously be dealt with outwith the presence of the jury, as it would be a question of law.

Alistair Duff: I imagine that the situation would be explained to the jury by the presiding judge or sheriff. There is a presumption in our law that jurors abide by directions that they are given by the judge or sheriff. That would no doubt include a direction to the effect that the jury should not place any significance on the presence of that person in court and an explanation of the purpose of the lawyer being there. I am sure that members of the

public would recognise the value of that presence to the vulnerable witness.

The Convener: Before we wind up this section of evidence taking, I think that you would appreciate an opportunity to talk about your concerns about the court-appointed solicitor. We note from your written submission that you have some concerns about the relationship between client and solicitor and about what would happen if a solicitor was forced on an accused person who was not willing to co-operate.

I think that you sat in on the evidence from the Public Defence Solicitors Office. Could you address its view on the matter? The PDSO stated that, in its experience, people generally do not like having a court-appointed solicitor but eventually realise that having one is in their best interests and get down to business.

Alistair Duff: I have been practising for about 24 years—four years as a prosecutor and 20 years as a criminal defence solicitor. My experience is that the vast majority of people accused of criminal offences want to be represented by a solicitor. They will consult solicitors and the representation proceeds, usually without too many hiccups.

The situation in which an accused person ends up unrepresented usually arises either in relation to people who are, frankly, psychologically disordered in some way—I am not going quite so far as to say that someone has to be daft not to want a lawyer—or in relation to people who are highly principled and do not trust lawyers. Such people would not dream of being represented by a solicitor and, no matter how serious the charges, will press on without one. Finally, there are those who start off with a solicitor or counsel but whose relationship with their representative breaks down before or during the trial. They then either want to be represented by someone else or they turn into the sort of principled, motivated individual who does not want a solicitor at all.

11:30

I have concerns about the relationship between such a person and the court-appointed solicitor. The court-appointed solicitor will often find that the individual that he or she is dealing with does not want a lawyer and will not co-operate in providing any details that will allow the court-appointed solicitor to present any defence. In any event, the bill would then require the court-appointed solicitor to act in the best interests of the accused. Solicitors in that situation would presumably just have to do their best to identify the best interests of the accused. I do not suppose that they could guess at the defence, but they would have to figure out for themselves whether the defence is consent, or "I wasn't there", or that the crime was committed by someone else. It is hard to see how the court-appointed solicitor or advocate could work that out.

I am slowly but surely coming back to the concerns about the relationship between accused persons and their representatives. If the accused is convicted, the principled, motivated accused will look for any way of twisting the criminal justice system into knots thereafter. One of their ways of doing that is to complain about their representation at the trial, saying that their solicitor or counsel did not advance their defence. There is therefore the potential for so-called Anderson appeals, based on misrepresentation, and the possibility of civil action against the solicitor or counsel who tried to do his or her best for the accused. There is also the possibility of complaints to the Law Society of Scotland and the threat of disciplinary action. Like it or not, the Law Society cannot, by dint of self-regulation, remove the possibility of civil liability.

The explanatory memorandum points out that lawyers' groups have indicated that they are not concerned about a statutory code and feel that self-regulation would be sufficient. However, the Faculty of Advocates is immune from civil action in criminal cases anyway, so advocates already have protection under the law, which solicitors do not have. Apart from anything else, we would want statutory protection from civil action for court-appointed solicitors in such cases.

The Convener: Is it the case that, in rape cases that have been indicted in the High Court, where an advocate would be the master of the instance, that would not be an issue, because the contractual relationship between the client and the advocate does not exist?

Alistair Duff: It would not be an issue for the advocate, but it would be for the solicitor.

The Convener: So the problem might arise in the sheriff court.

Alistair Duff: Or between the accused and the solicitor in the High Court. Only the advocate has immunity, not the solicitor.

Michael Clancy: It is important to acknowledge that an advocate is in a different situation from the one that a solicitor is in. An advocate is not in a contractual relationship with a client. He or she is fulfilling—to bring up another Latin tag—a munus publicum, or public office. Because of that, the relationship between the client and the advocate is quite different from that between the client and the solicitor. There is a contractual relationship between a solicitor and a client, and the bill seeks to create a novel method of bringing such a relationship into being.

We were not consulted on the precise terms of

the bill before it was introduced. Had we been consulted, we would have emphasised to the Executive that we thought that that was not the way to go. Alistair Duff has referred to the problems that arise from having what looks like a contractual relationship. In the explanatory memorandum, the Executive states that the relationship between the solicitor and the client will, in all other respects, be the same as if it was contractual. However, there is some difficulty with that position, as it opens up the prospect of an action for breach of contract or negligence, a complaint to the Law Society of Scotland, a complaint to the Scottish Legal Aid Board, as the regulator of criminal legal assistance, or—most important from the point of view of the victim—the possibility of an appeal on the basis of Her Majesty's Advocate v Anderson. All those possibilities, taken cumulatively, provide the context for a retrial. We are trying to protect the victim from having yet again to face the issues that have been interpelled from being raised in the original trial, but the bill may not satisfy that objective.

A solution was found in England and Wales, whereby the court-appointed solicitor has no relationship with a client. If the court-appointed solicitor is to be given the freedom that is necessary to act in an untrammelled way, that would be the preferred solution. You may think that that is a cop-out; however, it is a cop-out that we would be prepared to accept to protect the interests of the victim.

The Convener: The committee has noted the point that you make, and we will consider it. I simply wanted to clarify whether the contractual relationship would apply also to solicitors who give instructions to advocates in the High Court, not just to solicitors in the sheriff courts.

Michael Clancy: Yes.

The Convener: That concludes our questioning. That was an exhausting session.

Alistair Duff: At the risk of increasing the exhaustion, I would like to mention another issue that the bill does not address and on which we did not comment in our submission—the requirement to intimate a defence of consent.

You will be familiar with the provision that requires that, in an indictment case before the jury is sworn in or in a summary case before the first witness is sworn in, the accused should intimate a defence of consent if he may rely on such a defence. However, it is odd to describe consent as a defence. In most cases of a sexual nature, especially rape, it is part of the Crown case to establish lack of consent. In other words, it is part of the proof of the charge and there is no onus on the accused to establish whether consent existed; it is for the Crown to establish that consent did not exist.

In other cases of a sexual nature, consent is not a defence under any circumstances. It seems a little illogical to require the accused to give notice that he may take the line that the Crown has failed to establish one of the essentials of the charge. When the bill was introduced, only one justification seemed to be presented for that change in the law, which was to give the complainer notice of the likely line of questioning at the trial. However, that is misguided. Apart from anything else, the complainer should not get notice of the likely line of questioning in advance of their giving evidence. In any event, by intimating a defence of consent, the defence would give notice to the court and the Crown only of a line that may be taken during the trial. The defence may end up not raising the question of consent, even if notice was given; and if no notice was given, the question of consent would inevitably be investigated in taking evidence in many cases, as the Crown would have to establish a lack of consent.

For example, if the defence intimated that it might rely on a defence of consent, would that mean that there was no question of the identification of the accused having to be established? That could not be the case—the Crown must always establish the identification of the accused. What would be the value to the complainer of telling her that the defence might rely on a defence of consent? In my view, that should not be done. If the evidence was insufficient to establish the identification of the accused as the alleged culprit, the defence could still argue that the accused was not identified as the culprit and should be acquitted.

In our view, the provision is unnecessary and potentially misleading. It cannot alter the burden of proof or rule out the possibility of the accused making submissions on issues other than the question of consent. For many of the offences to which the provision would apply, consent is not an issue. There is no defence of consent in incest cases. There is no defence of consent to the charge of intercourse with girls under the age of 13. Reference has been made to homosexual offences. Homosexual acts may still be prosecuted if they do not take place in private. It is part and parcel of such offences that the participants are consenting.

The proposal is misguided and an effort is being made to apply it to offences for which it is not appropriate. For all we know, someone may argue that the bill introduces a defence of consent to an offence for which it did not previously exist.

The Convener: You have opened up another can of worms.

Bill Aitken: If I understand Mr Duff correctly, he is saying that the defence of consent might preclude other defences.

Alistair Duff: Imagine a situation in which a girl and a boy who are total strangers meet at a discotheque. They leave and it is alleged that in the hour or two thereafter an act of rape occurred. At issue in a criminal trial relating to that incident might be the identification of the culprit. In other words, is the person whom the police have arrested the boy whom the girl met at the disco and with whom she left?

The court would also want to consider whether the act that eventually occurred was consensual. The accused might instruct his counsel to the effect that he met a girl at a discotheque, that they left together and that they had sex, but that that sex was consensual. If, under the bill, the accused were required prior to the commencement of the trial to give notice of a defence of consent, would he be unable to test the identification of him as the person who met the girl at the discotheque and left with her? There might be insufficient evidence to establish that fact; in those circumstances, the accused would be entitled to be acquitted.

Bill Aitken: In the instance that you cite, a boy and girl leave a discotheque together and something happens. Surely it would be inconsistent for the accused to rely on a defence of consent and to question his identification with the alleged culprit. If he is saying that he did not commit the offence, where does consent come into it?

Alistair Duff: The accused might sit with me in my office and tell me that he met the girl at the discotheque, that they left and that they had sexual intercourse, which was consenting. The court and the prosecutor do not know what the defence is. If it were to be intimated that a defence of consent was to be relied on, it could not be argued that that relieved the Crown of the obligation to establish all aspects of the charge: that the crime occurred, that there was no consent and that the accused was the person involved.

I will give the committee an example from a case that did not relate to sexual matters. I represented a helicopter pilot who was accused of flying underneath power lines and frightening cattle. The Crown got itself tied up in knots trying to establish by leading expert evidence and other methods whether the flying was right or wrong, whether flying under power lines was allowed in some situations, how high a helicopter had to be flown and other matters.

The Crown failed to establish that my client was flying the helicopter at the time, notwithstanding the fact that my client had told me that he was flying the helicopter. He tried to justify the way in which he flew it by reference to his job and circumstances at the time. Therefore, although the accused's position to his legal team is that the events occurred in a particular way, the Crown may nevertheless fail to establish an essential aspect of the charge.

11:45

Bill Aitken: Perhaps I am being characteristically obtuse, but I do not understand how such a situation could occur in a rape case. If the accused says, "It was not me. We went out, walked along the road, held hands and kissed goodnight. I went my way and she went hers. If she was then raped, it was not by me," it is clear that the Crown must identify him. Therefore, the question of consent is not involved. The accused's sole defence must be, "It was not me." That requires the Crown to identify him.

Anne Keenan: We may be getting sidetracked by using a particular example, but if there were two instances of sexual intercourse on the night involved and the accused was mistaken as to which complainer, or partner as it were, was involved, that could create the situation to which Alistair Duff referred. The accused might say, "Sorry, I have got the wrong girl. It was not me," but he would already have lodged a notice saying that there was consent. The complainer would have thought, "That is fine. I know that the defence will be consent."

When those involved go into the courtroom and the accused says "Oh no, that was the second girl I had intercourse with that night," he introduces another line of defence that is not consent. If he says "I have never seen this girl before and I do not know who she is," that is another scenario. That does not detract from the fact that it is not for the defence to prove that aspect, which is an essential criterion of the offence of rape. In the same way, it would be ludicrous to say that in the proof of an incest case, consent could be a defence. That applies to offences listed in proposed section 288C of the 1995 act.

Bill Aitken: The accused would have to be very virile.

The Convener: Is what Anne Keenan described not the case with other special defences? Why have special defences if you are concerned that the Crown will have notice of what the defence will argue?

Anne Keenan: We are not concerned about the Crown. The Crown is given notice. In my experience, the complainer is not told what the special defence will be, because that is a matter for the Crown. The purpose of a special defence is to put the Crown on notice that the defence may lead evidence of that type, so that the Crown can

investigate it. That is why special defences are restricted to alibi, incrimination, insanity and self-defence, to allow the Crown to make investigations on those matters. In a rape case, establishing whether consent was given will be part of the Crown's investigations, because it can be proof of the crime.

Stewart Stevenson: Is the essence of what we are talking about that we do not require the defendant to choose at the outset whether they say, "It wisnae me, guv," or "She said yes"?

Alistair Duff: The accused always has the opportunity to keep those options open.

Stewart Stevenson: Is the essence of what we are trying to do in changing the law to remove from the defendant that right to change from one defence to another, because in removing that choice, we are increasing the fairness to the complainer?

Alistair Duff: The bill will not remove the choice. There is a misunderstanding here, but I am not sure whether I am putting my finger on it. The Crown must establish some essentials. If it fails to establish them, the accused is acquitted. It does not matter what the accused has told his—

The Convener: I think that we understand that bit, but how would the Crown know what it had to prove if it did not even know whether consent would be a defence?

Alistair Duff: The Crown always has to establish lack of consent. It will have to whether the accused lodges a notice or not and whether he gives evidence or not. The Crown will have to lead evidence within the body of the Crown case from which the jury would be entitled to infer that there was a lack of consent, otherwise the accused will fall to be acquitted at the close of the Crown case.

The Crown will also have to lead sufficient evidence that the accused is the person who committed the crime, otherwise—whatever his defence—he will fall to be acquitted at the conclusion of the Crown case. The accused would fall to be acquitted if he lodged a defence of consent and the evidence that the girl left the disco with the accused was the evidence of the girl and her pal, yet one of them could not identify the accused in the court. The accused would fall to be acquitted despite the fact that he left the disco with the girl and was not intending to rely on a defence that it was not him.

The Convener: Is it that scenario that concerns you, or are you saying that, in general, the arrangement would be prejudicial to the accused?

Alistair Duff: My concern is pricked by the idea that, somehow or other, it makes a difference to the complainer that a defence of consent has been intimated in advance. How can it make a difference to him or her? In the first case, he or she should not be told that kind of thing in advance of giving evidence and, secondly, it will not remove the necessity to investigate the question of consent. It would be wrong to lull someone into thinking that such issues would not be investigated. I would not like it to be thought that, by intimating a defence of consent, the accused is being disentitled to rely on deficiencies in the Crown case. I assume that that is not the intention.

At present, if I lodge a defence of self-defence and say that I stabbed someone because he attacked me and the Crown fails to establish that I stabbed someone, it does not matter that I have lodged a defence that apparently shows that I have given instructions to my lawyer to the effect that I was there and was involved. It would be different if the accused changed horses in the course of the trial and, having lodged a defence of consent, said that he had not done anything. In that case, he could be cross-examined about why he instructed his lawyer to lodge a defence of consent if he did not do anything.

The Convener: I thank the witnesses and propose that we have a short break.

11:52

Meeting adjourned.

12:06

On resuming—

The Convener: I welcome Sandy Brindley from the Scottish Rape Crisis Network, who will also be answering questions on the evidence from Scottish Women's Aid, whose representatives have not been able to attend. Sandy, I think that you have heard at least some of this morning's evidence, and it would be useful to hear your views on some of our questions to the Law Society of Scotland and the PDSO.

We will use your very helpful submission to guide us through the discussion. I will kick off by asking you our last question to the Law Society of Scotland. Why should notice of the defence of consent be given?

Sandy Brindley (Scottish Rape Crisis Network): In our submission to the consultation on "Redressing the Balance: Cross-examination in Rape and Sexual Offence Trials" and to the committee, we support the introduction of a special defence of consent for sexual offence trials. It will not change the burden of proof in rape trials, which is another issue.

The issue centres on a technicality about whether the Crown knows in advance when consent will be a defence or not. As our response

to the bill makes clear, we do not believe that that will make a significant difference to the process of rape trials or to complainers; however, it might make a slight difference in that complainers might know in advance whether the defence will be one of consent or mistaken identity.

I am not clear why there should be opposition to women knowing in advance what a defence will be, because at least a woman could then slightly prepare herself for possible lines of questioning. Although the majority of rape trials focus on consent, a small minority can rest on the defence of mistaken identity. It seems to us that it would be helpful to have some clarity prior to the trial's start. However, we do not envisage the notice of defence of consent significantly improving women's experience during the course of a rape trial.

The Convener: Does anyone wish to ask a question on that point?

I noticed in your submission that you welcome many of the provisions in the bill. We had a question-and-answer session with the Law Society of Scotland about the provisions in proposed new sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 on restrictions of evidence. Can you outline what difference you think the proposed new law might make? I know that your view is that there should be a complete ban on sexual character evidence being introduced in court. Do you think that the current provisions in the bill would make any significant difference in trials?

Sandy Brindley: They would make a significant difference. There has been much debate this morning about whether there is a need for legislative change, or whether amending the current provisions or looking at improving the implementation of them would assist in addressing concerns. In our view, improvements could be made in the current legislation—the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985—by considering training and monitoring the implementation of the legislation. However, when the bill was introduced the rape crisis network was critical of the provisions. One criticism—raised, I think, in evidence that the committee heard last week—is still relevant to the current legislation, which does not address the need to control more subtle character attacks.

We welcome the proposals in the new Sexual Offences (Procedure and Evidence) (Scotland) Bill to make the scope broader and to address concerns about the subtle innuendo that a defence can often use to allude to a woman's sexual character. The existing provisions do not directly cover that issue. We also welcome the weighing-up aspects of the proposals—the weighing-up of the relevance of evidence and the risk of potential prejudice to the jury—which are not contained in the existing legislation. The current legislation's exception clauses in relation to sexual history and sexual character evidence were problematic and too broad and open-ended in our view. We feel that the new bill's approach is much better and more likely to lead to the exclusion of evidence that is not relevant and is prejudicial to the woman.

The Convener: Before I bring in George Lyon, will you say briefly why there should be a complete ban on questions about sexual character? Why do you think that there are no circumstances in which it would be appropriate to ask the court to consider a woman's sexual character?

Sandy Brindley: Our view is that sexual history and sexual character evidence is not relevant unless it has forensic significance. The examples that have been given this morning are useful, because we would not consider any of those examples to be relevant in any way to the issues that are at stake during a rape or sexual offence trial. Ideas about why sexual history might be considered relevant are based on dubious notions about a woman's sexuality in relation to the likelihood of consent and her previous sexual behaviour, and whether that was with the same person or various people. It might even include, as in the earlier example, a matter such as ordering underwear from Ann Summers. I struggle to see how that could ever be considered relevant as to whether or not a woman has consented to sexual intercourse or whether there was a rape or sexual assault.

George Lyon: We heard in the Law Society of Scotland's submission about amicus curiae, in which a lawyer is appointed to safeguard the interests of vulnerable witnesses. What do you think of that proposal? Do you think that it has any value? Would it be of use?

Sandy Brindley: I have not seen the paper that the Law Society for Scotland submitted, so I do not know the detail of what they propose. We would consider or be open to such a proposal, but from our perspective there are other priorities that we need to examine. If what is being considered is monitored and does not work, perhaps we will need to examine other options. However, that is not a priority for us.

12:15

George Lyon: In its evidence, the Law Society stated that the workings of the court are a large part of the problem because no one in the well of the court is there to look after the interests of witnesses. Even the judge is not there to do that, although I mistakenly thought that that was part of his role. Therefore, even if the bill is passed and some of the definitions are tightened up, that problem will still exist. Must the issue that the Law

Society raised be pursued alongside the introduction of the new legislation?

Sandy Brindley: We do not necessarily agree with the Law Society that the problem is only with the implementation of existing legislation. As I said, we believe that there are problems with the legislation. As our written submission states, no matter how good the legislation is, if people who work in the legal profession do not support the aims of the legislation or have an agreed consensus about when sexual history evidence might be relevant, it will be difficult to achieve the aims of the legislation.

The proposed legislation, by removing the Crown exemption, will make clearer the judge's role in court. The research identified that, when sexual history and sexual character evidence is introduced, there is a lack of clarity about whose role it is to intervene if evidence is introduced in a way that is contrary to the aims of the legislation. The bill would remove that lack of clarity because it would remove the Crown exemption.

Stewart Stevenson: The Law Society highlighted that in law there are a limited number of categories of vulnerable witness. Do you think that—as the Law Society was suggesting indirectly—it would be useful to extend the definition of a vulnerable witness to include at least some of those who have complaints on the matter?

Sandy Brindley: The Scottish Rape Crisis Network and Scottish Women's Aid fully support the extension of the definition of vulnerable witnesses.

Bill Aitken: At the end of the day, we might be left with the same problem. There is considerable and genuine sympathy for those who must give evidence in harrowing circumstances, but do you agree that if everybody in the court did their job, we would not have that difficulty?

Sandy Brindley: I do not agree fully. I have some sympathy with that view and the only research that we have on sexual history and sexual character evidence shows that there are problems with the implementation of the legislation. There is a lack of clarity about whose role it is to intervene. As I stated, the problem is not only with implementation but with the legislation itself, which does not protect women fully from the introduction of that type of evidence when it has no relevance.

Bill Aitken: It is a question of balance. The allegations we are talking about are serious and they should be tested robustly. At the same time, witnesses should not be put under unnecessary distress. Would additional training and advice notes to judges and prosecutors fill the gap in procedures?

Sandy Brindley: Training would be of assistance and would go some way to addressing the concerns about the use of sexual history and sexual character evidence in sexual offence trials. However, it would not deal with more subtle character attacks, which are not covered by the existing legislation—there would still be no requirement for the defence or the prosecution to prove the relevance of the evidence and there would be no weighing exercise. In our view, that is the huge improvement that the bill would produce.

Mrs Ewing: Sandy Brindley and her colleagues work at the sharp end of the issue and she has given a broad welcome to the bill. I am interested in the part of the submission that speaks about monitoring legislation. You have heard our debates this morning, so you will be aware that we do not know exactly what the legislation will be. As it stands, will the bill encourage more women to report rape? If you could make one amendment, how would you strengthen the bill? What do you mean by monitoring and within what time scale would that take place?

Sandy Brindley: Scottish Rape Crisis Network views the bill as having the potential to improve women's confidence in and experience of the justice system. Ultimately, that must have a knock-on effect on women's confidence in reporting incidents in the first place. We get feedback from women that the reason that they do not report is fear of not being believed, but there is also increased awareness of what women go through when they give evidence in a rape trial. What women say is, "I know that if I report it, I will be ripped to shreds. I cannot face it. I am just not in a position where I am able to do that."

If the Parliament legislates and implements clear criteria on sexual history evidence to protect women from being ripped to pieces, that would have a knock-on effect. Women would feel more confident about how the legal system might respond to them.

Our submission states that, although the bill would not address all our concerns or fully address the very low conviction rate in sexual offence trials, it would make a significant start and would be a significant improvement on the current system. That answers the first part of Mrs Ewing's question.

On monitoring, our submission highlights our concern that the research that was carried out soon after the implementation of the existing legislation found clear problems both with the legislation and its implementation. That research was published in 1992, but only now are we starting to address some of the concerns. For us, that is not acceptable. We want, as a matter of good practice, any new legislation to be monitored and evaluation structures to be built in from the

moment of implementation.

Without knowing exactly what the wording of the legislation will be, it is difficult to consider how it should be monitored. However, it is important that research is done into women's experience of giving evidence in rape and sexual offence trials. Research also needs to be done on whether the bill's aims are matched with what is happening in courtrooms. Monitoring procedures would need to consider whether the evidence that we are aiming to exclude was being excluded, whether women were still being asked irrelevant questions and whether women were still going through the same ordeal. We need to monitor whether the bill's aims have the desired effect.

The Convener: I have a few questions before we wind up. Your submission states:

"Rape Crisis fully supports the removal of the Crown exemption regarding the introduction of sexual history and sexual character evidence."

I do not understand why the Crown exemption is a problem. Can you explain?

Sandy Brindley: Over the years, there have been various examples of the Crown introducing sexual history evidence without necessarily being aware of its possible impact. For example, the Crown might introduce evidence about a woman's sexuality if the woman is a lesbian, without being aware that that could potentially open her up to a very damaging line of questioning. That is where we are coming from. The same standard should apply to the prosecution and the defence. Both should go through the same weighing exercise and the same determination of relevance before such evidence is introduced.

The Convener: This will be my last question. We heard quite a bit from the Law Society of Scotland about trials within trials, about the matter of judges deciding the probative value of evidence and about whether evidence is relevant to the case. The Law Society is concerned that that might delay or put off trials for whatever reason. If trials were delayed, that would also be a concern for the victims. Do you have similar concerns?

Sandy Brindley: We would be concerned about the idea of a trial within a trial because giving evidence twice might cause distress to the complainer. Any further delays would cause us grave concern. The level of delays in rape and sexual offence trials that complainers go through is unacceptable, given the distress that those delays cause. The numerous delays and different court dates have practical consequences for women.

I will make a broader point. We must consider prioritising rape and sexual offence trials within the justice system to alleviate the distress that is being caused by delays in the system. We would be concerned if the bill worsened that situation or increased the delays experienced by women who are witnesses in rape trials.

The Convener: Delays could be an unintended consequence of the bill. For example, a delay could be caused by having to appoint another solicitor if there were difficulties with the first solicitor. People might not know that a trial is going to be delayed until the trial diet is reached. I am concerned about that. Although the aim of the legislation is to give further protection to victims, more stringent procedures on the introduction of evidence might give the defence more reasons to call for a delay in a trial.

Sandy Brindley: During your consideration of the bill, it would be useful to examine broader issues in the justice system, such as how it responds to sexual offences. It would also be useful to examine the procedural issues that surround the delays that already occur in rape trials. We should try to deal with those issues, because I hope that doing so would complement the bill's provisions. Even if the bill has the potential to increase delays, we should ensure that such delays are kept to a minimum.

Mrs Mulligan: The Law Society suggested that if a solicitor is appointed for the accused, there is a higher probability that the accused might appeal on the ground that they believed that their solicitor had not worked for them or whatever. How would you weigh the appointment of a solicitor for an accused against the limited number of times in which an accused defends themselves? Do you still want the bill to proceed as drafted?

Sandy Brindley: I find the argument about the number of times an accused person has personally cross-examined the complainer to be quite frustrating. The fact that it has happened three times only in no way invalidates the huge distress caused to the individuals involved in those cases. The possibility of being personally cross-examined by the alleged attacker might also deter women from reporting a rape or a sexual assault. The provisions that will stop cross-examination by the accused must be implemented.

The Convener: As there are no further questions, I thank Sandy Brindley for her evidence and for representing the Scottish Rape Crisis Network and Scottish Women's Aid.

Petition

The Convener: Item 5 is on petition PE306, which we have dealt with before. The note from the clerk—paper J2/01/24/2—sets out the committee's previous consideration of the petition and summarises the response that we received from the Minister for Justice. Members have now received all the information that we requested.

The subject of the petition is whether the members of the judiciary should be required to declare membership of the freemasons. We also have unsolicited correspondence from the Grand Lodge of Scotland of Ancient, Free and Accepted Masons. The note suggests three options on where we should go with the petition. We could do nothing, we could take up the suggestion made in Jim Wallace's letter of raising the matter with him at a later date, or we could take any further action that the committee wishes to take.

I invite members to make comments or suggestions.

Mrs Ewing: I suggest that we take up the second option.

12:30

The Convener: For the record, the second option would be to note the minister's response and to make a commitment to revisit the possibility of declarations of interest by the judiciary as part of consideration of the new judicial appointments procedures that are due to be introduced. The committee has discussed the possibility of examining the issue of judicial appointments. We must decide whether we want to do that.

I am happy to take the second option because I think that we should pursue the issue. I am not suggesting that members of the judiciary are not impartial when they administer justice, but I believe that the public perception that there is a problem in relation to the freemasons must be dealt with. However, if a declaration that one is not involved with the freemasons is required, why stop with judges? Members of a jury or anybody else who is involved in the administration of justice might also have to make a declaration. Any decision that was made would have to be consistent.

Are we agreed to follow the second option?

Members *indicated agreement.*

Visit (HMP Kilmarnock)

The Convener: I welcome Christine Grahame from the Justice 1 Committee, who has just joined us. She was a member of this committee when we decided to go to Kilmarnock prison and she joined us on the visit. In the early stages of discussions about our future work plan, we decided that we wanted to find out more about Kilmarnock prison.

Members have a note that outlines briefly the facts that we established during the visit to Kilmarnock prison.

It is already 12.30 and I am conscious of the time. I do not want to curtail discussion on the matter, but I think that after we have heard a brief report on the visit, we should return to the subject at another time. Do members agree?

Members *indicated agreement.*

The Convener: Mary Mulligan, Bill Aitken, Christine Grahame and I went to the prison. Does anybody wish to give general impressions of the visit?

Bill Aitken: I was impressed and encouraged by what we saw. Clearly, the fact that Kilmarnock is a new building gives it an unfair advantage over other prisons and allows it to do things that would not be possible in some of the older institutions.

The accommodation was satisfactory and allowed prisoners to live their everyday lives with some dignity. The workshops were a positive move. They provide the opportunity for prisoners—some of whom have not worked a day in their lives—to receive some basic training. I hope that that training will help them to gain employment when they leave prison. It is appropriate that they should be able to earn more money than they could in other prisons. Their income allows them to buy things for personal consumption and makes it easier for them to maintain contact with their friends and family in the outside world.

The fact that the building was purpose-built was also useful in terms of security. The camera system is of great assistance in stopping drugs from getting in. The regime appeared to be fairly satisfactory.

I—and, I suspect, other members—were concerned by the fact that there were contradictions between what we saw and what was in the inspector's report. We might want to follow up that matter.

Given that being deprived of one's liberty is no one's idea of an ideal lifestyle, the prisoners seemed to respect the regime in the prison and felt that it was quite positive. Time will tell whether

that has a positive influence when they are released, if they stop reoffending.

Mrs Mulligan: I will not repeat what Bill Aitken said. Kilmarnock prison starts with the advantage of being a new building and so being able to incorporate new technology, which provides a better atmosphere in the prison.

On all visits, we feel that we do not enough time and thoughts come to us after we have left. I want to pursue two matters. There have been reports of discontent among the staff, but the staff to whom I spoke seemed relatively happy in their jobs. The staff seemed to be young and new to prisons. I am concerned that there may still be a suggestion that there is a heavy turnover of staff. I do not know whether that is because staff are unhappy or because they are new and are seeking posts in the Scottish Prison Service. We need to pursue that matter.

The other matter that I want to pursue is the health centre. Although we went to the centre for a little while, I felt that we did not really get to speak to the prisoners who were using it. Obviously, the health centre is an important part of the prison set-up.

The Convener: The visit to Kilmarnock prison was the most interesting visit that I have been on so far. The meetings that we had before and after the visit made it clear that there were many tensions, such as between our desire to know what was going on in the prison and the staff's desire to show us that what was going on was good. The Scottish Prison Service was well represented at the meetings. We had a chance to have real exchanges of concerns and information.

We were able to put to Premier Prison Services our concern about the self-harm rate, which Clive Fairweather's inspection team identified as being four times that of other prisons. It was explained to us that the way in which assaults are counted in Kilmarnock prison is different from how they are counted in the Scottish Prison Service—an assault involving two prisoners in Kilmarnock prison counts as two, but in the Scottish Prison Service, it counts as one. There is a bit of double counting, but that still does not explain the high levels of self-harm at Kilmarnock.

I do not feel that we got under the skin on issues such as rates of pay, sick-pay, and how schemes compared to those in the Scottish Prison Service. I thought that we would not gain access to that information, but the director said that we could have it. We need to pursue that information.

I also held the view that Kilmarnock was an impressive set-up in that it is a new prison, there are closed-circuit television cameras all over the place and the line of sight is clear—that was the explanation that was given for having fewer staff in the prison. Quite a few members of the management team have come from the Scottish Prison Service. The transfer of skills from the public sector into the private management of Kilmarnock prison is considerable.

It is becoming a bit clearer that the performance indicators for the contract are different from performance indicators that apply generally. We were given a brief summary of the issue and are beginning to get our heads round it. We were told that the contract did not give Premier Prison Services the kind of flexibility that it wanted. Premier Prison Services also pointed out that the contract was drawn up in 1997 and was not designed to be compared like with like.

There are still many unanswered questions, but the visit was good and useful. The decision that we have to take now is whether to take the matter any further.

Christine Grahame (South of Scotland) (SNP): I endorse much of what has been said about the building. However, I got the feeling that the visit was stage-managed. I am noting the paragraph on transition in the note. Perhaps I am wearing my cynical specs, but I note that it says:

> "The introductory section of the programme had lasted longer than expected so members were unable to see inmates at work".

We never saw what it is like to have 22 men in a woodwork shed under the supervision of one officer and a camera. There was one time that I got close to an officer without an SPS guy at my shoulder—they were always there. I asked the officer whether he felt that that was sufficient supervision and he said no. Immediately, the SPS man started to write something down and I said jokingly, "I hope it's not his P45," but I meant it. I got the feeling that we were not getting under the skin of the prison. It was the same with the staff on that shift. The report says that 92 per cent of staff had not worked in a prison before and everybody I spoke to had worked in shops or in some other line of work. I got the feeling that if we had visited at a different time, perhaps different personnel would have been there. I do not know—that is just a hunch.

We did not see prisoners moving about. There are about 519 prisoners, but I must have seen only about 10 of them. A wee group walked past us. I saw two remand prisoners, but I saw nobody else to speak to throughout the visit. When we went to Barlinnie, we saw it warts and all and everybody was walking about. Cornton Vale was much the same, but at Kilmarnock I wondered where all the people were.

I plan to take up the prison's offer to call unannounced. I will write to the prison to make sure that there is no trouble at the security gate

and I will say that I will turn up at some time, but it will not be in the near future because the staff will be waiting. On our visit, the prison was too neat and tidy and everything was too in place.

Bill Aitken: In fact, we did see quite a lot of the prisoners because as I was waiting for about seven or eight minutes I remember seeing about 150 guys walk past with their cards to check out to go for lunch—it was in the long hall.

Christine Grahame: I am obliged to you for saying that, but I must have been somewhere else at that point because I missed them. I am concerned that we did not see the workshops in full flow.

Bill Aitken: We certainly did not see the workshops in full flow.

Christine Grahame: I am also concerned about the level of experience of staff. I accept that the senior management had come from the SPS, as you said, convener, but nearly all the prison officers I spoke to had a lot of experience, apart from those in the visitors centre. That does not tally with the information that we have. As you have already mentioned, convener, we did not appear to get right under the skin. Our experience did not tally with what was in Clive Fairweather's report and that gives me concern.

The Convener: Both accounts are true. Bill Aitken and I saw floods of prisoners coming out for lunch. There seemed to be respect for the prisoners in allowing them to have their lunch. However, on the couple of occasions when I tried to speak to the prisoners I wanted to speak to, I was told that I could not because they were having their lunch and I should not interfere. I accepted that because it was a fair point. The prison is not a zoo, but by the same token, I would have liked a bit more freedom to speak to the prisoners I chose and not those whom the staff chose.

Stewart Stevenson: In paragraph 15 of the report, Christine Grahame makes the point that it would be useful to invite people from the Premier Prison Services to give evidence to the committee. I concur with that strongly.

In answer to a parliamentary question to Jim Wallace, I was told that he intends to hold consultation after the prison estates review. As Peterhead prison is in my constituency, I have an interest in the review. I am not sure that I know yet—I will be asking the minister what he means by consultation—whether that matter will come to this committee or to the Justice 1 Committee. That might be an opportunity to take evidence.

In relation to paragraph 13, I would like to know the original breakdown of staff by background and where those who left went and why. I would also like to know about the current mix of staff.

I note in paragraph 12 that the clerks are uncertain as to whether the staff receive PRP—perhaps it was RRP, but I suspect that profit-related pay is what is referred to. I am interested in knowing about that and having a better understanding of the structure and merit awards that are open to staff so that we can understand and compare what is happening in the PPS and in the SPS.

George Lyon: Although I did not take part in the visit and I was not a member of the Justice 1 Committee at the time, I have two close friends who work in HMP Kilmarnock. One of them happened to be staying with us this weekend, so I took the opportunity to ask her some of the questions that the report raises.

There is no doubt that starting levels of pay at Kilmarnock are lower than those in the SPS, although there is more scope to rise up through the system. However, I am not sure how the remuneration package allows people to progress. It is probably linked to experience and the amount of training that people have done. The working week is 37 hours in the SPS, as against 45 hours at Kilmarnock.

Because most of the staff who were recruited at the beginning had no previous involvement in prisons—my friends came from a completely different background—many of them failed to adapt to a prison regime, which can be tough. Many of them also moved on to the SPS, because of the slightly different pay scales in the service. That is just anecdotal evidence, which the committee should treat as such. However, I would like at some stage to look round Kilmarnock prison.

12:45

The Convener: That is the crux of the matter. We are not at all clear about the situation. As Christine Grahame said, during the visit to Kilmarnock a general invitation was issued to the committee. There is no reason why members should not visit the prison—the more the merrier.

The report is complete to the extent that it contains all the information that we received when we were at Kilmarnock, but other information is required. It would be above board for us to ask Premier Prison Services for information about pay, performance indicators and conditions of employment, as well as for any other information that members would like to have.

Christine Grahame: Could you ask about the staffing level in the woodshed? It was put to me that the man in charge thought that there should be at least one more member of staff there. At the moment, one man and a central camera are responsible for supervising 22 inmates in a place

where there are piles of wood, hammers and saws. Even a secondary school technical department would not put one teacher in charge of 22 pupils working in such circumstances. I do not have any other information, but I would like to know whether additional staff are being taken on for the woodshed. We have information on self-harm, bullying and all the other matters to which Clive Fairweather alluded. I am concerned that workshops give prisoners the tools to get on with that.

The Convener: We will seek the information that Christine Grahame has requested, as well as information on staffing levels generally. Stewart Stevenson also asked for information on staff turnover and on the previous experience of staff. Once we have received that information, we can produce a further report. At that point, we can decide whether we want to invite in representatives of the prison for members to question further. If any other questions occur to members, they should inform the clerk.

Christine Grahame: Representatives of Premier Prison Services are due to give evidence to the Justice 1 Committee on the report by the chief inspector of prisons. Perhaps we can discuss at that meeting the issues that have been raised here. There is no point in inviting the same witnesses to two separate meetings. It would make sense for the Justice 1 and Justice 2 Committees to take evidence from Premier Prison Services together.

The Convener: We can discuss how that could be done. We will complete the report that we have started and discuss how it might be appropriate to take any additional evidence that is needed.

Mrs Mulligan: Christine Grahame has suggested that the Justice 1 and Justice 2 Committees meet jointly, but I am not sure what we are trying to achieve. The Justice 2 Committee has been on a visit, whereas the Justice 1 Committee is considering the report by the chief inspector of prisons. I am happy to hear evidence from representatives of Premier Prison Services if they have already been invited to appear before the Justice 1 Committee, but I would like to have some guidance on the structure of our inquiries.

Christine Grahame: We have not formally invited representatives of Premier Prison Services to appear before the Justice 1 Committee, but we intend to do that. We have received evidence from Clive Fairweather about Kilmarnock prison, and we are bound to invite representatives of Premier Prison Services, along with representatives of trade unions and so on, to speak to his report. Pauline McNeill and I plan to have a meeting later today, at which we can discuss this matter. I am suggesting only that we need not invite Premier Prison Services to give evidence twice.

George Lyon: At some stage, there will be a decision on the prison estates review, which would be the appropriate place to fit in some of the work that has already been done. Some of the debates about how the estates review will proceed fit into the discussions that have already taken place.

The Convener: The Justice 1 Committee is dealing with the prison estates review and has already questioned Clive Fairweather on his report on Kilmarnock prison. This committee had picked out a few issues such as women's offending and Kilmarnock prison that it wanted to pursue. We had decided only to visit Kilmarnock and now we have a report that we need to complete. The question is whether the report will form part of the prison estates review. However, now that the Justice 2 Committee has visited the prison, I am clear that it should be allowed to complete its report independently of the Justice 1 Committee.

Christine Grahame: The report will be very useful to the Justice 1 Committee. I am simply pointing out the practicalities of not calling the same witnesses for overlapping reasons. The Justice 1 Committee will have the Justice 2 Committee's report and I am not fussy who takes evidence from Premier Prison Services.

The Convener: I think that we would be fussy about completing the report.

Christine Grahame: Certainly. It is your report.

The Convener: Right. The last item on the agenda is our inquiry into the Crown Office and Procurator Fiscal Service, which the committee has agreed to take in private.

12:51

Meeting continued in private until 13:04.

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