JUSTICE 2 COMMITTEE

Wednesday 24 October 2001
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
27th 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:

Mr Duncan McNeil (Greenock and Inverclyde) (Lab)

WITNESSES

Peter Beaton (Scottish Executive Justice Department)
Mrs Susan Burns (Crown Office)
Mrs Alison Di Rollo (Crown Office)
Stuart Foubister (Office of the Solicitor to the Scottish Executive)
Professor Christopher Gane (University of Aberdeen)
Iain Gray (Deputy Minister for Justice)
Frank Mulholland (Procurator Fiscal Service)

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 24 October 2001

(*Morning*)

[THE CONVENER *opened the meeting in private at 09:47*]

10:08

Meeting continued in public.

Petition

Asbestos (PE336)

The Convener (Pauline McNeill): I welcome Duncan McNeil MSP, who has come along for item 2, which concerns petition PE336.

The petition is from Frank Maguire on behalf of Clydeside Action on Asbestos and relates to civil justice for asbestos victims. As the committee membership has changed since we first considered the petition, I will establish the key points again so that new members can consider their positions. The clerk has prepared an extensive note—paper J2/01/27/1—to help to guide members on the key issues.

It might be helpful if I summarise the main issues. Some urgency surrounds the cases that are waiting for court hearings because claimants are literally dying. The petitioner has informed us that one of the patients that he has been representing has died while waiting for his court case to be heard. The petition says that the issues of disagreement between the two parties are not identified at an early enough stage. It also points out that, as a result of the number of delays in the cases, there is not the number of jury trials that there should be. The written pleadings in the system seem to count against the pursuer because the defender need use only the skeletal defence of denying the basic facts. In one case that has been highlighted, a company denied that it had been named as the company in the case.

We have corresponded with the Lord Justice Clerk. Lord Coulsfield is preparing a report which, it is claimed, will address some of those issues. We have not had a specific reply to our query; we have received only a copy of a letter from the Minister for Justice. I feel that that is inadequate because it leaves the committee unsure about precisely which recommendations will be implemented and which will not. Whatever else, the committee is owed a specific explanation of what the report will recommend.

Scott Barrie (Dunfermline West) (Lab): That is an important point. When the committee discussed the petition on 26 June, we said that we would continue our consideration of it when we had received further information from the Lord President. I am not sure whether we have received that, but what we have is a written copy of what we were told on 26 June. We hoped to receive an indication of what was likely to come out of the report and what was likely to be implemented. Without some indication of what is likely to be implemented, it is difficult for the committee to decide whether the matter is being dealt with appropriately.

Stewart Stevenson (Banff and Buchan) (SNP): I congratulate the petitioners on the energy that they have put into pursuing the petition. They took the trouble to brief Bill Aitken and me, who are new to the committee, and I believe that they have also spoken to Margaret Ewing. Having read the papers, I believe that the case is broadly well made and that we should respond to it. In the absence of a related item in the legislative programme and given the concerns about communication between the committee and the Lord President, we should consider inviting the Lord President to attend the committee to allow us to take evidence from him on the subject.

10:15

Mrs Mary Mulligan (Linlithgow) (Lab): I agree with Scott Barrie and Stewart Stevenson. The response that we received is not clear about what might be implemented. The committee cannot therefore be sure whether the requests in the petition have been answered.

For that reason, we must pursue the matter. We are all concerned by the delays that the petitioners have faced in the past and we want such delays to be stopped to ensure that cases are dealt with as quickly and efficiently as possible. However, we do not have the information that would enable us to say that that will happen, even after the Lord President's working party has reported. If the matter would be advanced by having the Lord President give evidence to the committee, that would be welcome. However, it is for the committee to decide how to take the petition forward.

Mr Duncan McNeil (Greenock and Inverclyde) (Lab): As somebody who has for some time been involved with Clydeside Action on Asbestos—along with other colleagues—I am relieved that committee members are saying that we need to pursue the matter. As individuals, we have tried to find out what the Coulsfield report actually means.

We welcomed the report's warm words and we wanted to believe that the issue was finally being taken seriously. However, when we asked what proposals had been accepted, what impact those proposals would have on the problem, what outcomes could be expected to improve the situation, what recommendations had been rejected and why those recommendations were rejected, we did not get any answers. If the committee agrees this morning to pursue the matter, that will assist those of us who have been trying individually to get answers. I hope that the committee decides to take that action.

Bill Aitken (Glasgow) (Con): There is universal sympathy for the petition, but at issue is how we should proceed with it. I accept that there will be a temporary hiatus, because at the moment we do not have a Lord President and Lord Justice General. Nevertheless, the unanimous view of the committee is that we should pursue the matter with the Lord President as quickly as possible. I suggest that, when we question the Lord President, we concentrate on the terms of Lord Coulsfield's report. It is not clear what action has already been taken on the basis of that report and what action is proposed. There is also some uncertainty about the effectiveness of the implementation of a number of Lord Coulsfield's recommendations. At the moment we are confronted with a totally unacceptable situation and a genuine injustice is being done to the petitioners.

Mrs Margaret Ewing (Moray) (SNP): It is important that the committee takes action on the petition. I have been involved with cases of asbestos poisoning since 1974 and have a substantial file on the matter. The committee should not provide the petitioners with tea and sympathy and send them away saying that it has considered the matter, but that there is nothing that it can do. This morning *The Herald* has a story entitled "Damning verdict on Scottish judges". According to that story, in surveys seven out of 10 Scots say that judges are out of touch. Cases of asbestos poisoning provide Scottish judges with an opportunity to show that they are in touch with Scottish society. That is a crucial factor.

I endorse the idea that we should pursue the matter with the Lord President's office. However, I recommend to the committee that that should be only a first step. Depending on what the Lord President and his office say in response to the committee, we should consider further steps to remedy the situation, if necessary. The current situation cannot continue. As the convener said, people are dying while we try to deal with the problem. The Scottish Parliament has high expectations of the legal system and this is an area in which we could take a distinctive lead.

The Convener: I would like to add a couple of points. I refer members to Frank Maguire's letter of 20 September. He rightly points out that

"The Lord President and the Deputy Minister for Justice have failed to address"

the issue of written pleadings. That is one of the key parts of the petition. In common with most of the committee, I have a basic understanding of the issue, but I now understand that pleadings are among of the main reasons for delays. However, none of the letters that have been put before us has addressed that point, which seems to be a glaring and obvious omission.

A number of suggestions have been made about the way forward. It is clear that committee members wish to progress the matter. We must now set out in a manner that is crystal clear the steps that we wish to take.

Scott Barrie: I referred to the point in Mr Maguire's letter that the convener highlighted. The committee seems to be of one mind on how to progress the matter. I agree that we need to take further evidence from the Lord President. However, to expedite matters, perhaps we should appoint a reporter, as we have done in the past?

That suggestion follows the point that was made by Margaret Ewing and would allow detailed work to be done. The reporter could give the committee concrete recommendations on how we should progress the matter. Rather than only taking evidence from the Lord President and deciding after that what to do, we could have somebody doing detailed work in tandem with that. We might otherwise seem to be stopping and starting—something that might have seemed to be the case since June.

Mrs Mulligan: Bill Aitken referred to the fact that there is not, at present, a Lord President for us to call before the committee. Do we know when that will change?

The Convener: No, but we understand that the appointment will be made soon. If that does not happen, we could take evidence from the Lord Justice Clerk. However, if we decide to hear evidence from the Lord President, I do not expect a problem, because when time is found for the meeting following my writing to make the request, an appointment should have been made.

Scott Barrie made a point about the appointment of a reporter. Given the committee's work load, it might be useful to do that. It would push things on a bit. We need to iron out the outstanding issues. Until now, we have not spoken to anybody; we have dealt only with correspondence. It is also important that we to reply to Jim Wallace's correspondence, because that might establish exactly what the recommendations are and

whether proposals are to be implemented. To do so would allow us to make preparations to call witnesses.

If we call the Lord President at some stage, I suggest that we also call the petitioner. Are we agreed?

Members *indicated agreement*.

The Convener: Do members feel that it would be useful to appoint a reporter?

Bill Aitken: I can see merit in the idea, but in the interests of getting the matter moving quickly, might not it be helpful for the clerk to write a paper that would encapsulate the outstanding issues? That would allow us to move the matter forward more quickly than we would if a reporter were carrying out individual research.

Scott Barrie: The note that we have from the clerk sets out clearly the outstanding issues. That work has been done.

Bill Aitken: I accept that, but what concerns Scott Barrie—as it concerns us all—are issues such as the implementation of some of Lord Coulsfield's recommendations and their timing and effect. To me, those questions scream out for answers. The clerk is in a position to provide them.

Mrs Mulligan: I hear what the convener says about the committee's work load. For that reason, among others, and because committee members seem to agree that we should progress the matter as quickly as possible, it would be a good idea to appoint a reporter. My previous experience is that the clerks have fully supported the work of reporters. Therefore, to appoint a reporter could encompass Bill Aitken's suggestion.

Mrs Ewing: What time scale do you envisage for a report from the reporter? It is important that the committee know that.

Mrs Mulligan: It is for the committee to decide how quickly it wants a report. I am sure that we all realise that the issue is urgent and that we want to make progress on it quickly.

The Convener: It is important to identify which proposals are already in the pipeline for implementation and that is not clear from the correspondence. We need to ask why the problems with the written pleadings system have not been addressed. We need to dig a wee bit deeper as a matter of urgency in case something is missing from the correspondence and something is happening about which we do not know.

We can do that through correspondence. The clerks cannot do any more than that until we get more information. They can easily pull all the information together again to show the differences between the issues that the petitioner raises and the recommendations in Lord Coulsfield's report. We will then be able to see where the gap lies and that will allow us to take the matter further.

Our work load affects the point at which we will be able to invite the Lord President and the petitioner to give evidence. We will do our best to try to find a slot for that. It is worth considering meeting some people in between times to pull together more evidence in preparation for the committee's taking oral evidence.

Stewart Stevenson: As long as the reporter is able to bring clarity where there is confusion and speed where there is delay, it would be a good idea to appoint one.

I will make a general point. Although the petition is on behalf of Clydeside Action on Asbestos, the problem pervades Scotland. My predecessor asked a question earlier this year that indicated that six people in Banff and Buchan had died as a result of asbestos. The situation will be similar throughout Scotland.

People from elsewhere who are aware that the problem is Scotland-wide will be listening. I congratulate Clydeside Action on Asbestos on taking the lead on the matter, the urgency of which cannot be overstated.

The Convener: I thank Stewart Stevenson for making that point. It is now on the record.

If, at some stage, we call the petitioner before the committee—which we have agreed to do—we will merely raise the issues and allow the petitioner to reply. However, Stewart Stevenson is absolutely correct: to do a thorough job, we must recognise that the problem goes beyond one geographical area and affects all Scotland.

Do members feel that we should appoint a reporter, or should we delay that until next week?

Mrs Mulligan: We should not delay. We need to take action today—or at least decide how to progress.

The Convener: Are you volunteering?

Mrs Mulligan: I am happy to be the reporter if that is what the committee wishes.

The Convener: Is the committee happy to appoint Mary Mulligan as the reporter?

Members *indicated agreement*.

Mrs Ewing: I am willing to assist.

The Convener: That allows Mary Mulligan and Margaret Ewing to consider the available information. If they agree to the committee corresponding further with the Minister for Justice, they will be able to have some meetings and report back to the committee in due course.

If Duncan McNeil, who has come along specially, does not want to say anything further, we will move on. I thank him for attending.

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

The Convener: We move on to our final session of oral evidence for the Sexual Offences (Procedure and Evidence) (Scotland) Bill before the preparation of the stage 1 report.

I apologise to the witnesses for the delay. As you have heard, we have been considering an important petition. I welcome Mrs Alison Di Rollo, Mrs Susan Burns and Frank Mulholland.

Do you wish to make a short statement before the committee asks questions? We would appreciate your keeping any statement short—we are a bit stuck for time.

10:30

Mrs Alison Di Rollo (Crown Office): Good morning convener and committee members. I thank you for inviting us to the committee. I have a brief introductory statement to make.

First, I will introduce the team from the Crown Office and Procurator Fiscal Service. On my left is Susan Burns, our principal depute in the policy group at the Crown Office. Her portfolio includes victims and sexual offences in general. She has been working closely with colleagues in the Scottish Executive on the bill with which we are concerned today.

On my right is Frank Mulholland, who is the assistant procurator fiscal in Edinburgh. His responsibilities in the Edinburgh office cover all the solemn work in that jurisdiction, which includes case preparation and the conduct of sheriff and jury trials in Edinburgh. I am Alison Di Rollo. I am another principal depute in the policy group. My portfolio covers children's interests and I am working on the departmental response to the Justice 2 Committee's inquiry into the Crown Office and Procurator Fiscal Service.

Between the three of us, we have about 42 years' experience in the service of prosecuting crime. We have all worked in the High Court unit at the Crown Office and in regional and upper level offices in the field. Frank Mulholland is in the unique position of having been a procurator fiscal and advocate depute and he prosecuted in the High Court between 1997 and 1999.

We were invited by the committee to give evidence on the general principles of the bill. We are happy to do that on the basis of our practical experience of the prosecution of serious sexual offences in Scotland under the current statutory regime. If the committee wishes, we will also assist with aspects of the practical application of the bill.

Dr Alastair Brown pointed out to the committee—on 13 June last year, I think—that the policy behind the bill is entirely for our colleagues in the Scottish Executive justice department. We have no comment to make on that. However, to assist the discussions that we will have, I will state briefly the Crown Office's policy and practice in relation to the two main areas that the bill covers.

As prosecutors in Scotland, we are alive to the possibility—however statistically unlikely it might be—that the accused might elect to defend himself and personally cross-examine the victim. If a victim asks us about that, we will confirm to her that the possibility exists. If it becomes evident in the course of preparing the case that the accused wishes to defend himself, our policy is that arrangements must be made to inform the victim of that. At that point, we remind the victim that the prosecutor and the judge have a duty to protect witnesses from aggressive cross-examination or from examination that is abusive in any other way. Our element of that duty is to object to such questioning. The court's duty is to regulate cross-examination by allowing or disallowing questioning. In that matter, as in all others, the court is the arbiter.

We recognise that the issue of questioning a victim about her sexual history and character is a matter of great concern to victims. Procurators fiscal and advocate deputes are aware of the relevant provisions in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 and our departmental guidance reminds prosecutors in the plainest terms that if the criteria are not met, an application must be opposed. We also remind procurators fiscal and advocate deputes that, as the court has discretion to limit the extent of questioning at any time, prosecutors must remain alert to the scope of the exemptions and to our duty to object to a line of questioning if necessary. When the court permits questioning about sexual history or character, there remains a duty on the prosecutor and the judge to ensure that, within the confines of that questioning, the victim is not subjected to aggressive or abusive cross-examination. The Crown's duty is to object; the court's duty is to rule.

I need hardly add that fresh guidance will be issued to prosecutors in the light of any new statutory arrangements that are made.

The Convener: It will reassure members to know that the witnesses have 42 years' experience between them—they will certainly need it in the next half hour.

We want methodically to go through some of the main provisions in the bill, starting with the prohibition of the personal conduct of defence by the alleged sex offender.

One of the suggestions that was put to the committee in previous evidence was that the person bringing the accusation could be protected from cross-examination by the accused through the role of an amicus curiae. I am interested to know your response to that. Do you think that that suggestion is valid?

Mrs Di Rollo: I leave it to Susan Burns to comment on that in detail, in the light of her experience of the bill. Our general view is that the role of amicus curiae might produce an unnecessary complication in the context of a trial. We would prefer the rules of criminal evidence and procedure and the jurisdiction of the court to protect the witness.

I have set out a reasonable set of policy and practice guidelines in which it is our stated duty to object when examination is abusive or aggressive. We are moving away from the possibility of such abuse. However, if an accused was cross-examining a victim, I am not sure that the presence of an amicus curiae would sufficiently diminish the stress and anxiety that that position would cause the witness. Susan Burns may have more to say on the subject.

Mrs Susan Burns (Crown Office): It is difficult to see what function an amicus curiae could fulfil in the court. One of the roles of the prosecutor is to ensure that the witness is not subjected to unnecessary cross-examination. That is also a function of the judge in the court. It is difficult to see how an amicus curiae could usefully interject in a way that would not already be open to other participants in the court.

Stewart Stevenson: Might the existence of an amicus curiae carry with it the risk that the witness would be accorded special status in the eyes of the jury, which might not be helpful to the aims of justice?

Mrs Burns: That is always a possibility.

The Convener: Let us move on to the question of restrictions on evidence.

Mrs Ewing: I would be interested to know when you believe that the evidence of a person's sexual history or character, or other evidence that is used to suggest bad character, should be allowed to be used in sex offence trials. When should such evidence be admitted?

Mrs Di Rollo: It is impossible to give a paragraph that sets out specific circumstances in which such evidence would be appropriate. Clearly, an element of judgment and discretion is involved, with reference to the specific facts and circumstances of a case. Frank Mulholland has experience of dealing with such matters as they occur in the live dynamic of a trial, and he may be able to assist the committee.

Frank Mulholland (Procurator Fiscal Service): It would be difficult to state in a paragraph the circumstances in which such evidence would or would not be relevant. However, I shall cite an example of its use in a case that I dealt with. The case involved an allegation of rape and the evidence was that the woman had had sexual intercourse with her boyfriend an hour after she was alleged to have been raped. The vaginal swabs were taken after that and, when they were examined at the forensic laboratory, they were found to contain a mixture that identified two separate persons. In such circumstances, the Crown would be under a duty to provide evidence to explain the identification of two separate persons in the tests for semen on the vaginal swabs. The defence would know about the double identification, as the results of the tests would appear in the forensic science report.

Mrs Ewing: So forensic evidence is a vital part of such a case. Nonetheless, do you think that, as the victim's sexual character or background is usually investigated, similar requirements should be placed on the accused?

Frank Mulholland: Yes. I shall cite another practical example of the problems in this area. I prosecuted a trial in Glasgow that involved the sexual abuse of a young lad and his brother and sister. The lad gave detailed evidence in a closed court, in which he stated that a friend of the family had abused them. A motion was submitted to cross-examine the young lad on a so-called sexual relationship that he had with his social worker.

The relevance to the court of the application to cross-examine the lad was that that would demonstrate that he got terminology from a sexual relationship that he had with his social worker. I considered that irrelevant so I opposed the motion to cross-examine him on that specific point. The judge backed up the Crown. However, I was dismayed to learn that the appeal court held that the judge had erred in refusing the motion. A retrial was granted and the young lad had to give evidence again.

It is all very well to consider issues in committee rooms—that is where they must be considered. However, in the dynamics of a trial, events are fast-moving, unanticipated things happen and it is difficult to make split-second decisions.

Mrs Ewing: Are you saying that it is impossible to legislate on this and that Scots law on sexual offences will be based on case law that will be quoted time after time in individual cases?

Frank Mulholland: No. I am not dealing with policy. However, I believe that certainty and a statutory framework from which courts must consider rules and how matters are regulated would be good. Issues in trials can be difficult and legislation would assist courts.

Mrs Di Rollo: The greater clarity and focus that the bill would provide as a framework for courts to take discretionary decisions would greatly assist in focusing their minds on the relevance and fairness of admitting evidence.

When I read the evidence that the committee took from Alison Paterson of Victim Support Scotland, I was struck by her mention of

"women's rights to assert their sexuality and to say no".——[*Official Report*, *Justice and Home Affairs Committee*, 7 June 2000; c 1379.]

That leaped off the page. Fundamental cultural perceptions and attitudes in Scottish society are the backcloth to the legislation.

On the technical matter of proceeding with cases in court and the combination of judicial discretion and legislation, the criteria set out in the bill will greatly assist in achieving fairness and relevance. The bottom line must be that it is proper in some cases to admit the type of evidence in question. There are questions of control and making the exercise of discretion properly informed.

The Convener: I was going to ask about that, but I want to follow up what Margaret Ewing said about the use of sexual history and bad character evidence. In your experience, do defence advocates abuse the system? To what extent are current provisions breached?

Mrs Di Rollo: It would be wrong for us to say that the situation is perfect from the complainer's point of view. It is impossible to achieve uniformity where discretion is exercised. Consistency is the best that can be achieved and perhaps even that has not been achieved. Frank Mulholland and Susan Burns are probably better placed to talk about recent experience in the High Court.

Later today, I will take part in the Judicial Studies Committee induction course for new senators and sheriffs, where I am delighted that I will have the opportunity to discuss child witnesses. Dr Jamieson, from whom the committee has heard evidence, will speak before I do. I am sure that the committee welcomes the fact that, before new senators and sheriffs go on the bench, they will have the benefit of a lengthy discussion with her. I am sure that such issues will be explored.

Frank Mulholland: The committee should know that guidelines or a statutory framework for questioning on sexual character will not necessarily prevent such evidence from being used. I will give a live example, although such occurrences, I am glad to say, are few and far between. I was involved in the prosecution of a man who was charged with rape, in what is

commonly referred to as a date-rape case. The defence was consent. When interviewed, the accused had said that the woman consented to sexual intercourse.

The forensic scientist was cross-examined. There was no need to cross-examine the forensic scientist on the presence of semen, but he was asked to look at the garments that the lady involved wore at the discotheque that night and to hold them up to the jury. The only reason for that was to show what she wore. At 11 o'clock on a Tuesday morning during a criminal trial, one does not appreciate the nightclub context, for which her clothing was perfectly acceptable. The proposals will not necessarily prevent what I described from happening.

10:45

The Convener: The committee appreciates that. We are trying to put on record your experience of defence advocates using aggressive tactics—as they are perceived—and attacking an alleged victim's sexual history or bad character to portray them as an unreliable witness, rather than relying on the story itself. In your experience, have defence lawyers breached the current provisions by not asking for permission to raise some evidence?

Frank Mulholland: No. If the defence wants to cross-examine on sexual character, it must make a motion. Otherwise, I would object as soon as the defence tried to carry out such cross-examination. However, the example that I gave was not cross-examination. It was another way of introducing such evidence.

Mrs Di Rollo: "Aggressive" is not the only adjective for behaviour about which the committee should be concerned. As I suggested, there are subtle ways of appealing to the attitudes and perceptions in the jury without being overtly hostile to a complainer.

Bill Aitken: We are in the happy position of having an experienced team to question. I ask Mr Mulholland how many times during the conduct of a sexual assault trial he has raised objection to the defence's questioning.

Frank Mulholland: It is hard to be entirely accurate.

Bill Aitken: I accept that.

Frank Mulholland: I have probably objected twice.

Bill Aitken: Out of approximately how many cases?

Frank Mulholland: Last night, I counted how many rape or sexual abuse trials I have participated in; I reckon that I have done about 25 in the High Court.

Bill Aitken: Were your objections upheld?

Frank Mulholland: Yes. In the case that I mentioned, it turned out that my objection was wrongly upheld.

Bill Aitken: That is a matter of opinion.

Frank Mulholland: I still think that I was right and that the judge was right to take the view that we did, but the appeal court thought otherwise.

Bill Aitken: That is a fair and reasonable position.

Some people have the perception that a problem exists whereby a complainer can be subjected to aggressive and intrusive cross-examination. We are anxious to establish from you whether the problem is as great as those people think or whether the emotive nature of the cases means that that perception may be wrong.

Frank Mulholland: Such cross-examination is a problem, but I would not overly emphasise it.

Mrs Di Rollo: An analogy might be drawn with conviction rates. My colleague Janet Cameron gave the committee information that showed that conviction rates were slightly higher in the recent past than has been suggested. A problem may exist, but the committee may be seeing a more focused and concentrated perception of what is happening than is actually the case.

Bill Aitken: There is concern that the acquittal rate in the cases under discussion is much higher than that for other offences. Does the Crown think that prosecutions should be pursued because of the nature of the offences, even when the evidence is not as firm as that required for other cases?

Mrs Di Rollo: Given the history of prosecuting that type of offence, which is such a gross breach of the physical integrity of the woman, there is a presumption that, where a sufficiency of evidence exists, it must be in the public interest to ventilate that in court and pursue a prosecution.

Bill Aitken: That may be why there is a higher acquittal rate.

Mrs Di Rollo: It may be one factor in a complex broth of factors. Janet Cameron touched on the fact that there are specific problems in cases where consent is an issue. Although we cannot inquire into their reasoning, juries appear more reluctant to convict where consent is the issue, as in date-rape cases.

Mrs Mulligan: What factors would you expect the courts to take into account when they are determining what is meant by the term "proper administration of justice"?

Mrs Burns: I would expect them to consider the relevance and significance of the evidence that the defence seeks to adduce. They should also consider the ultimate question of fairness to the accused, balanced with the right of the victims not to have their privacy invaded and their sexual history laid before the court unnecessarily.

Mrs Mulligan: Do you think that that balance can be achieved by the proposed changes?

Mrs Burns: The bill will certainly be of great assistance from the victim's point of view. It is not a disincentive to the accused, but it would certainly focus his mind. It also makes it clearer to the court that evidence must be relevant to the specific circumstances of the case, rather than simply offering another angle that could be taken.

Mrs Di Rollo: It is important to keep the legislation in perspective and in context. It will not achieve change on its own. Susan Burns has been busy organising judicial training and training for prosecutors. We now routinely invite groups such as Scottish Women's Aid and the Scottish Rape Crisis Network to inform our legal discipline and the way in which we approach the task of prosecuting a case in court. Those wider considerations enable us to understand and take into account the victim's perspective. We cannot consider the legislation in isolation. We must have regard to what is fair and what the jury should have before them to try a case fairly and properly. The issue is no more complicated than that.

The Convener: Is not there a similar provision—a kind of catch-all clause—in the 1995 act?

Mrs Di Rollo: In section 275? I do not recollect there being a definition of the "proper administration of justice" in that act.

The Convener: That is not the term that is used, but there is a way of dealing with situations in which there has not been an application in advance to raise sexual history or bad character evidence. Some legal writers have described that as a loophole in the provisions. Depending on how it is applied by the courts, the new legislation could be another loophole in the provisions if it is not used properly.

Mrs Di Rollo: I do not know whether Frank Mulholland would agree that the court has inherent discretion to admit evidence where it is in the interests of justice to do so. The bill seems relatively strict in setting out the precise requirements that the accused has to go through to apply to have such evidence admitted. We are quite satisfied that the provisions could be applied rigorously to avoid loopholes of the kind that you describe.

The Convener: Do you not see the need for more codification of what is meant by "proper administration of justice"?

Frank Mulholland: That is an extremely difficult thing to codify. Given the dynamics of a trial, one does not know what the issues are or how they will impact on the evidence. It would be extremely difficult to define that concept further.

Mrs Di Rollo: As I recollect, the bill goes quite a lot further than previous legislation. This afternoon, I shall mention to the judges that, if the bill is passed, it will be the first act of Parliament to recognise the victim's dignity and right to privacy. That would be a great step forward in focusing the court's mind on the need to exercise discretion.

Scott Barrie: Previous witnesses have talked about the trial within a trial. Under the bill, could that procedure be used more frequently? If so, do you see any difficulties in that?

Mrs Di Rollo: Do you mean that the procedure will be more frequently used by the accused?

Scott Barrie: Yes.

Mrs Burns: The current position is that the defence must give notice that it intends to use such a procedure. The bill builds in a requirement for the defence to give notice in advance of the jury being empanelled. We envisage that that will work partly in accordance with the current procedure for preliminary diets. We are discussing with the Executive the best way of implementing the bill so that it has the least impact on the operation of courts and sittings. We anticipate that, once matters have been fully discussed, the way forward will be to use the current procedure that allows such matters to be resolved in advance of trial diets. The question is not necessarily whether there will be a greater number of applications; the applications will be addressed slightly differently.

Mrs Di Rollo: The bill does not offer the accused more scope for attempting to have sexual history and character explored. If anything, the reverse is the case.

Scott Barrie: That is reassuring. In the past, procedures have often been put in place with the intention of helping, but people have found a way round them with the result that things are made more complicated. Do you feel reasonably reassured that that will not become a major difficulty?

Mrs Di Rollo: On the basis of what we have seen in the bill, we do not anticipate that there will be either a flood of applications to use sexual character in evidence or insurmountable procedural difficulties.

The Convener: We are running out of time. Do members have any final questions to put to the Crown Office witnesses?

George Lyon (Argyll and Bute) (LD): In reply to one of the earlier questions, it was mentioned that, even once the bill is passed, training to ensure that the proper procedures are followed will still be key. What work is being done to ensure that proper training is carried out and that proper instructions are given to judges, prosecutors and defence lawyers?

Mrs Di Rollo: She is sitting to my left and her name is Susan Burns. I can confirm that she is working hard and is examining the precise and detailed implications of the bill. In practice, what will happen first is that a stonking great bit of written guidance will go out to every prosecutor in the country to explain what the legislation contains and how it should be applied in practice. The guidance will then be built into future training, on which Susan Burns will elaborate.

Mrs Burns: It is important to realise that the prosecution in Scotland takes the rights of victims very seriously. We have on-going training on the rights of victims and their needs in relation to the prosecution. As Alison Di Rollo mentioned, she is involved in judicial training and, early next year, I will be involved in training sheriffs on the rights of victims.

The Crown Office and Procurator Fiscal Service has undertaken a number of on-going projects. On Friday, the issue of customer needs will be addressed. We appreciate that we come into contact with a huge number of customers, so we will focus particularly on our victim-type customers. Presentations will be given by Scottish Women's Aid, the Scottish Rape Crisis Network and the victim liaison office, which is under the Crown Office umbrella. There will also be the opportunity for a discussion on the way forward and on how the service wants to address the needs of victims in the criminal justice system. The needs of victims is a live issue, which is constantly being considered.

Mrs Di Rollo: On a very practical matter, one of the benefits of e-mail and technology is that we have started producing learning packs. Although we might have 40 or 50 prosecutors at an individual event, we are trying to disseminate the training to as many people as possible. That has worked well.

11:00

George Lyon: Has such training been a recent development or has it been going on for some time?

Mrs Burns: It has been going on for quite some time. However, as people become more aware and practitioners, procurators fiscal and precognition officers and offices become more alive to the needs of victims in the criminal justice system, an increasing number of people express an interest in such training. As a result, the training starts snowballing and is disseminated throughout the service. The good thing is that people are actively showing an interest in the rights of victims, which represents a bit of a shift in the criminal justice system.

Mrs Di Rollo: I think that your course is oversubscribed.

Mrs Burns: It is.

Mrs Di Rollo: Just to give the committee some context, I can remember doing a similar course eight years ago. This work has been going on for at least a decade; there is no doubt that it is increasing in profile and importance as the years go on.

Mrs Ewing: My point has already been picked up. However, in light of the damning verdict in *The Herald* today that, according to a survey, seven out of 10 people think that judges are out of touch, are you convinced that all your work with defence lawyers and solicitors is moving up through the system to ensure that such headlines are obviated in future?

Mrs Di Rollo: We hope so. Judicial studies are a matter for the director of judicial studies and the judiciary, and I think that it is really helpful and constructive that we should have been invited to participate in that work. Such opportunities are relatively few and far between, which is possibly a result of the independence of the judiciary. Although we take up any opportunity to feed into judicial awareness—an issue that the committee is no doubt interested in—we cannot take on that responsibility as well.

The Convener: That is a very big issue for us. I thank the three witnesses for their very valuable evidence.

I invite Professor Christopher Gane of the University of Aberdeen to the table. Professor, I thank you for travelling from Aberdeen to speak to the committee this morning. I apologise for being behind time. If you do not mind, we will go straight to questions.

Professor Christopher Gane (University of Aberdeen): That is perfectly acceptable.

The Convener: If you think that some issues have not been covered, we will give you a chance to raise them at the end of the session.

Mrs Ewing: Professor, I know that travelling back and forth between Aberdeen or Inverness and Edinburgh is always a pleasure. I am quite sure that you enjoyed your trip.

Are the bill's proposals on the personal conduct of defence by the alleged sex offender perhaps beyond the level of necessity? Do you think that

we could tackle the problem by other means? If so, could you describe what those other means might be?

Professor Gane: If we based an answer to the question whether the bill is an overreaction or is disproportionate on the number of instances in Scotland in which a complainer has been subjected to such a distressing experience, history suggests that, in practice, it has not been a substantial problem up to now. As far as I am aware, it has been an issue in one case in the High Court and in one case in the sheriff court.

However, the more important question concerns the impact of the possibility of such an experience on potential complainers rather than the impact on those who have unfortunately been subjected to it. Although we have no way of judging this, there is a perception among people who deal with victims of rape and other sexual assault that the possibility of facing the offender in such an environment and in such circumstances is likely to have a chilling effect on the willingness to make complaints and pursue what is in the interests of the whole community, which is that offenders be brought to justice.

As to alternative methods, I was struck by Stewart Stevenson's question on the possibility of using a third party—an amicus—to defend the interests of the complainer. As I understand it, that policy has recently been adopted in Ireland, where the Sex Offenders Act 2001 provides that, at the point in a criminal trial at which the accused applies to the court for permission to cross-examine the complainer with respect to previous history, the complainer is entitled to be represented and supported by independent counsel—there is a right to legal aid—who can intervene and raise appropriate objections to the nature and purpose of the questioning.

I heard what the representatives of the Crown Office said, and undoubtedly it is the responsibility of the court and the Crown in Scottish procedure to ensure that the complainer is not subjected to inappropriate questioning and that the questioning is conducted within the limits of the existing law. However, occasionally there might be a perception that it is a judgment issue for the Crown as to how actively it intervenes. After all, the Crown has a responsibility to remain impartial in criminal proceedings. In a sense, that problem is avoided by allowing the complainer to have someone who is there very clearly to represent her, or occasionally his, interests. As I understand it, the Irish procedures kick in when the application is made for the right to cross-examine, so the issue would not be manifest in front of the jury, because it would be dealt with outside the hearing of the jury.

Mrs Ewing: It would be appropriate to hand you on to Stewart Stevenson, because he is dealing with the amicus curiae.

Stewart Stevenson: I will develop the last point that Professor Gane made, because much of the ground has been covered. In what way is it not apparent to the jury that the witness is being treated specially? By what mechanism is that achieved? I understand your point that the appointment of an amicus curiae and the circumstances that lead to the appointment will not necessarily be visible to the jury. However, the operation of that person clearly will be.

Professor Gane: As I understand it—I claim no particular expertise in Irish law—this is a recent introduction into Irish law. The amicus has a responsibility at the point when the accused applies to the court for permission to cross-examine the complainer in a certain way. Whether that line of questioning is to be permitted is dealt with as a trial within a trial. The jury is excluded and representations may be made on behalf of the complainer by his or her counsel.

I am not aware of how the Irish intend to deal with the possibility of the representative playing a more proactive role during the trial. The relevant provisions do not seem to indicate that the representative of the complainer would have a role to play during the rest of the trial, but of course, if they did, there would be a question about alleged imbalance. It is difficult to see how jurors would perceive that.

Stewart Stevenson: So the Irish legislation simply provides for an amicus curiae during the trial within a trial, not within the trial itself.

Professor Gane: As I understand it, yes.

Stewart Stevenson: As I understand it, the Law Society suggests that the amicus curiae should be present during the trial. Therefore, we are perhaps dealing with a rather different situation from the one that the Irish have proceeded with. Are you aware whether that has actually happened in Ireland?

Professor Gane: I do not know whether that has happened.

Stewart Stevenson: More critically, how would you react to the amicus curiae being visible within the trial itself?

Professor Gane: I am not sure that there is any strong objection to that. It is not clear to me how juries would perceive such things—it is difficult to assess that. Nor indeed does the measure seem to be necessarily adverse to the interests of the accused. It is the right of the accused to have appropriate legal representation and to have the evidence of the Crown properly tested in the trial. I am not sure that the presence of someone representing the interests of the complainer would

adversely affect the interests of the accused.

Scott Barrie: In what circumstances would you envisage a court using its power to apply the provisions of the bill to other alleged offences of a substantial sexual nature? In your opinion, does the bill provide the courts with adequate guidance on when that power should be used? In written evidence it was suggested that it did not.

Professor Gane: The bill certainly provides much greater guidance to the courts on how to exercise their discretion than the current provisions do. I am not sure whether the committee is aware of some rather elderly research—it was published eight years ago—on the operation of the current law. Two leading conclusions from that research were that in a substantial number of cases the law was simply not applied and that, even where it was being applied, it did not achieve its intended functions.

One reason for that is that the current law does not give adequate guidance to the courts on how to exercise their discretion. For example, in the current legislation there is an overriding provision about the interests of justice—the court can admit questioning if it would be contrary to the interests of justice not to allow that to happen.

As I understand it, the bill gives a greater degree of guidance by interpreting

"the proper administration of justice"

to include certain matters, including the

"protection of a complainer's dignity and privacy"

and ensuring that the questioning is relevant to the facts at issue.

It is extremely difficult to set down in greater detail factors that should guide judicial discretion in such areas. The experience in a number of other jurisdictions, notably in the United States, has been that restrictive rules tend to provoke repeated challenges to the fairness of the procedure and—in the United States—the constitutionality of the procedure.

I would be concerned if, in an attempt to protect the interests of the complainer, we went too far and consistently received the complaint that the system had become biased against the accused. I do not think that the bill is open to that accusation at the moment.

Mrs Mulligan: On the fairness of the proposals as they affect both the accused and the complainer, what is your opinion on the compatibility of the bill with the European convention on human rights?

Professor Gane: That involves two separate questions. First is a view that has been more widely held than it should have been. It has been suggested that the proposal that the accused should not have the right to conduct his—or, exceptionally, her—defence personally is somehow contrary to article 6 of the European convention on human rights. In my view, it is not, for two reasons. First, although article 6 refers to the accused's right to represent themselves in person, it does not mean what it says. Article 6 has not been interpreted in that way by the convention institutions—there is ample case law to back that up.

Secondly, if there were a personal right to question witnesses, the European Court of Human Rights has made it very clear that any such right should be balanced against the interests of the witness and the interests of the administration of justice more generally. In one case, the European Commission on Human Rights referred specifically to the difficult and distressing nature of the questioning that may arise in sexual offence cases and emphasised the need to protect the privacy and dignity of the complainers in such cases.

I believe that the first aspect of the bill is beyond any reasonable prospect of challenge. In so far as the bill seeks to balance the interests of the accused with those of the complainers in restricting questioning, it contains very little that would be open to challenge on the basis of the convention. Indeed, in the case of R v A, in which rather more restrictive provisions than those contained in this bill were being discussed, the House of Lords took the view that the Youth Justice and Criminal Evidence Act 1999 was compatible with the convention. I imagine that any Scottish court would take the same view of the provisions set out in the bill.

11:15

Bill Aitken: The provisions concerning restrictions on evidence are likely to be the most controversial aspect of the bill. In what circumstances, if any, do you believe that the sexual history and character of the complainer should be admissible evidence in a trial for sexual assault?

Professor Gane: I am inclined to take the view that, so long as a fair trial can be achieved for the accused, the prior history and character of the complainer should be regarded as irrelevant. It may be relevant in some instances where it can be established that the complainer is likely to be lying. The question whether the complainer consented is much more difficult. In the past, questioning about a complainer's prior sexual history has roamed far and wide and has usually been based on the assumption that women are rather indiscriminate about who they have sex with. That cannot be acceptable. In most instances, it is not even

relevant to the question of consent. The bill manages to achieve the appropriate balance in this respect. I am not convinced that the occasions on which, as an exception to the general rule, the court should allow questioning about the complainer's prior sexual history are likely to be frequent. I am not sure whether that answers Bill Aitken's question.

Bill Aitken: I notice that, for perfectly understandable reasons, you have not cited any specific examples. However, let me present you with an example. If the defence wanted to introduce evidence to the effect that, over a period of some months, a woman had made allegations of rape against a number of men, would that evidence be relevant and acceptable?

Professor Gane: It would be relevant to the credibility of the complainer. At issue is whether that evidence can be introduced in such a way that its probative value outweighs its prejudicial effects, that the complainer's dignity is not impugned and that their privacy is not invaded beyond what is necessary to explore the question of credibility. However, such evidence would not necessarily be excluded in cases of the sort to which Bill Aitken refers. The bill would allow it to be introduced.

Bill Aitken: We all accept that giving evidence of the type that many complainers have to give in cases of this nature is distressing and evokes memories. Do you think that if the prosecutors and judges had been doing their job properly, there might not be a need for us to legislate?

Professor Gane: There is some support for that view in the study that was conducted some time ago. The research indicated that in a substantial number of cases the law was not being applied and cross-examination was being permitted in circumstances in which it should have been subject to regulation and control. We should treat that research with caution—it is eight years old and we do not have more detailed or recent research—but it provides an objective foundation for the view that the law has not been applied in the way in which Parliament intended it should be and has not achieved the intended results.

Bill Aitken: Bearing in mind the fact that that determinations in cases of this type will almost invariably be the result of the deliberations of a jury, do you feel that the jury is able to accept or reject evidence that it might feel is unnecessary or irrelevant?

Professor Gane: It is difficult to answer that question, given that we have no way of knowing how juries work and we are not allowed to ask. We have to accept that juries approach their task seriously and that an appropriately directed jury should be able to accept or reject evidence that it feels is unnecessary or irrelevant. However, we have no way of excluding the possibility that jurors continue to be influenced by their personal views about what is appropriate behaviour, particularly in a sexual context.

Mrs Mulligan: In its evidence, the Law Society of Scotland said that the definition of the proper administration of justice needed to be amended and suggested that it should include

"the importance of ensuring that the accused can lead evidence in a full and fair defence".—[*Official Report*, *Justice 2 Committee*, 26 September 2001; c 424.]

What is your view on that?

Professor Gane: That is stating the obvious—it is a fundamental and implied principle in our criminal procedure and is backed up by the rights that are secured by the European convention on human rights. The point about the proper administration of justice is that the bill directs the court's thoughts to matters that might not have been immediately apparent or an automatic line of thinking—that is particularly true of the emphasis on the protection of the complainer's dignity and privacy. The bill also re-emphasises the important issue of relevance.

I am not concerned about the absence of an exhortation to be good as I believe it to be implicit.

The Convener: Would that provision be similar to the existing provision that the court must be satisfied that it

"would be contrary to the interests of justice to exclude the questioning or evidence referred to"?

Professor Gane: There is a difference. First of all, the phrase "interests of justice" is very broad and not particularly helpful. It might be argued that the phrase "interests of justice" seeks to draw a balance between the interests of the complainer, the accused and the community in ensuring that justice is done, whereas the proposed provision places more emphasis on respect for the situation of the complainer. That is not necessarily a bad shift in emphasis, if that is what is intended. Secondly, there is a great deal of importance in the emphasis on relevance in that provision, which goes to the interests of justice.

The Convener: I asked that question because, in a Scots law text book—I think that it is by Field and Rait—it is stated that that provision was potentially an enormous loophole in the law. I suppose that all the provisions could lead to enormous loopholes if they are not applied properly by the courts because, in effect, they are catch-all phrases. If all else fails, the defence can have a go at using the provision, and we rely on the court to be stringent.

I accept what you say about there being an additional emphasis on protecting the complainer's privacy. The Crown Office has pointed out that

that is an important provision; nonetheless, I was worried that it could provide a loophole.

Professor Gane: If it is a loophole, it is a much narrower one than the provisions of section 275 of the 1995 act. That section has a curious structure. The preceding section sets out the general principle: we do not go down this road. However, if I remember rightly, section 275 begins with the words "Notwithstanding that principle," and then all the other things come in, including the broad statement about the administration of justice and the interests of justice. That suggests that Parliament states the principle and then says, "We are not really serious about that principle." Perhaps we should not put too much emphasis on the wording, but when a provision in an act starts by saying "Notwithstanding what we have already said, you can go on and do the following things that are not wholly consistent with that", that suggests that the exception becomes wider than the rule.

It is important that the structure of the new sections 274 and 275 maintains the same relationship, but with a narrower range of exceptions and a greater restriction of discretion. They are not introduced by the idea that, notwithstanding what has already been said, you can do something rather different.

Scott Barrie: Do you agree with the evidence that the committee has received from the Crown Office, regarding the issue of the trial-within-a-trial procedure? It feels that the provisions in the bill would not make that procedure more likely. Would you concur with that view?

Professor Gane: That is probably a fair judgment on the balance of the bill. The opportunities for legitimately pursuing that line will be more limited under the bill than they are at present. I understand the concern, which is the repeated questioning of the complainer, but the bill will not make the procedures any worse in that respect. It may make them better.

Mrs Ewing: As legislators, we want to put the best possible statute on to the statute book. Can you suggest how we might best monitor and measure the effectiveness of the legislation that we are trying to introduce?

Professor Gane: As a member of the academic community, I am bound to say that there is no substitute for good quality, properly informed scientific research. The study that was conducted by Beverley Brown, Michele Burman and Lynn Jamieson some years ago is of a high quality and very objective, and it comes to reasonable conclusions. That kind of research is precisely what much of the criminal justice system in Scotland needs. There are many excellent academic institutions that can pursue that research, but there must also be follow-up.

The Convener: Are there any final points that you would like to make to the committee?

11:30

Professor Gane: Without delaying the committee long, I disagree with one issue of principle in the bill. That is the question of the notice of the so-called defence of consent, as it reveals a serious confusion of principle. The bill proposes to put advanced notice of consent on the same footing as advanced notice of so-called special defences in related matters such as self-defence, alibi and impeachment. The consequence of that is that, if the accused does not give notice, the accused will not be able to run with the so-called defence of consent.

I have two reasons for being worried about that. First, it confuses responsibility for establishing what is a particularly important question. In a sexual assault case, it is not the responsibility of the accused to establish consent. It is the responsibility of the Crown to exclude consent. The Crown has to show that what happened took place without the consent of the complainer.

The implication is that we are moving in the direction that some kind of onus may be put on the accused to establish consent. If that is what we wish to achieve, we should have a straightforward debate about how we want the crime of rape to be established. Do we want to define it as the accused having sexual intercourse with the complainer? In that case, in order to avoid responsibility, it is up to the accused to show that the complainer consented. If not, do we want to maintain the existing principle of a rape having been committed? In that case, the Crown has to show that the complainer did not consent.

That shows confusion of thought as, after all, the notice provisions for special defences relate to matters that are not necessarily within the advance notice of the Crown. They are there to prevent the Crown being ambushed by surprise defences. In a rape case, the Crown will always have to consider consent and prove that there was no consent. I am not sure that I accept the argument about advance notice.

In some of my previous evidence, I suggested that, if the real purpose of the provisions is to give proper and fair notice to the complainer, the Crown can achieve that by advising the complainer that the defence may well seek to claim that consent was given. That was also suggested in the Executive's response to the consultation. In the present situation, I would be surprised if that message does not get across.

In passing, I noticed that, if members look at the

proposed new section 275, it contains a reference to

"the issues falling to be proved by the prosecutor or the accused in the trial".

So far as I understand the procedures that apply in all sexual offence cases, I cannot see what falls to be proved by the accused, although the new section 275 contains that provision. It might be useful to seek clarification from those who are putting forward the bill.

I have one final comment, which arose out of a question that was raised earlier, about the questioning of the accused as to his previous record. One of the curious things is that, if the accused chooses to conduct his case in such a way as to put the prosecution witness's character at issue, the accused can be questioned about his prior history.

It is interesting to note that, although that rule has been around since 1898, it has never been interpreted as applying in sexual offence cases. If a police officer who appears for the prosecution is called a liar, that is seen as an attack on the character of a prosecution witness. If it is said that he concocted a story with his colleagues, the accused will expose himself to the possibility of cross-examination about his prior record.

However, if a similar attack is made on the complainer in a sexual offence case, the law has never regarded that as being something that exposes the accused to cross-examination on his previous record. I have always found that to be somewhat anomalous, although I am sure that there is a historical explanation for that to be the case.

The Convener: We will put that question to the Executive.

I want to spin back quickly to the point that you made about notice of the defence of consent. Surely there can be no question but that the burden of proof does not change, as it is for the prosecution to prove that beyond reasonable doubt?

Professor Gane: Yes.

The Convener: That is also the case with other special defences where the Crown is given prior notice. We have considered that question before, as the Law Society of Scotland put that to us—you may have read the evidence.

Having looked at the question again, I cannot see what difference would be made if it was included as a special defence, as the prosecution has to prove its case. The vast majority of cases are based on consent.

Professor Gane: As I said, that is the case in the context of something that has to be proved by the accused in a criminal trial and it is set out in proposed new section 275. That is also the case in references to the so-called defence of consent—risks are presented, which are unnecessary. If the true purpose, and I accept that that may be the case, is to give fair warning to the complainer that that line of questioning may be pursued, there are other ways of doing that. As I said earlier, it would be unusual for the Crown not to make that line of questioning clear to the complainer.

The Convener: One of the objections that the Law Society of Scotland raised in its evidence to us was that that would deny the defence the right to rely on the failure of the prosecution to make its case. Do you agree with that?

Professor Gane: It is certainly a possible interpretation of the legislation and it would seem to be a consequence. If you do not say that the complainer consented, what implications does that have for the responsibility of the Crown to exclude consent?

The Convener: We shall consider what you have said.

As there are no more questions, I thank Professor Gane for coming to give what has been valuable and clear evidence.

Professor Gane: Thank you.

Mrs Ewing: Can we have a comfort break?

The Convener: A plea has been made for a comfort break. As we are behind time, I suggest that we keep the break to three minutes.

11:36

Meeting adjourned.

11:41

On resuming—

The Convener: I welcome the Deputy Minister for Justice, Iain Gray, and his team to the Justice 2 Committee. We are running a bit short of time. Do you wish to make an introductory statement, minister?

The Deputy Minister for Justice (Iain Gray): No, I am happy simply to answer questions.

The Convener: That is helpful. We move straight to questions.

I begin by asking you to go over the basic reasons behind the need for the Sexual Offences (Procedure and Evidence) (Scotland) Bill in the light of the small number of cases of the kind to which it would apply. It is important to allow you to get that on the record.

Iain Gray: The essence of the policy intention of the bill is to remove fear of and to increase

confidence in the judicial process. The intention is to remove fear on the part of the complainers and to increase their confidence that they will be treated fairly and with dignity. The two sides to that, as the committee is aware, are to remove the possibility of the complainer being directly questioned by the accused and to increase the assurance and broaden the scope of the provisions so that character and sexual history evidence are only introduced when relevant and necessary.

Relatively few cases are known in which the complainer has been directly questioned by the accused. One reason for that is that we would only know of that happening if it came to the attention of the public through the media, as has happened in—I think—three recent cases in Scotland.

However, the bill is much more about the confidence that complainers can have in the process that they might have to face. If somebody who had suffered the kind of offence that the bill covers were to ask, "If I go to court, will I be confronted by the person whom I am accusing and will they be able to question me?" the answer at the moment would have to be that that could happen. What they feel about the possibility of that happening rather than the likelihood of it happening is important for such complainers. We believe that it should not happen in Scottish courts, and the bill is designed to stop it.

The Convener: Before committee members ask questions, I refer them to the paper "Memorandum From the Scottish Executive on the Sexual Offences (Procedure And Evidence) (Scotland) Bill", which clarifies a number of issues that have been raised in the evidence that we have heard. I thank the minister for the paper. It cuts out time in the committee's gaining an understanding of his response to some of the issues that have been raised.

Stewart Stevenson: Minister, one of the things that you have not responded to is the Law Society of Scotland's suggestion that the interests of the complainer could be represented through the appointment of an amicus curiae who would intervene during cross-examination. What is your attitude to that?

11:45

Iain Gray: I am aware of the amicus curiae proposal. Such an approach might have a general role to play in how we deal with vulnerable witnesses, not just those in sexual offence cases.

The policy purpose of the bill is to deal with direct confrontation between the complainer and the accused, whom the complainer believes to be their attacker in most cases. The use of an amicus curiae might provide some assistance and support, but it would not prevent that confrontation if we made no other changes. The bill is not the right place in which to make such a suggestion.

Stewart Stevenson: Do you also feel that the existence of an amicus curiae would give special status to a specific witness—the complainer—which might influence the jury one way or another?

Iain Gray: There is no doubt that, if such a facility were to be made available, it would give special status to certain types of witness, based on their vulnerability. However, that is an issue for broader discussions about how we deal with witnesses who might be vulnerable. The specific fear that the bill addresses is direct confrontation.

The Convener: The Law Society raised issues in relation to the role of the solicitor, particularly when there might be perverse instructions or when grounds for appeal might open up. You should have the opportunity to respond to the Law Society's concerns in those areas. The Law Society mentions a possible code of practice and I have noted your response to that. However, it is important that you address that concern.

Iain Gray: The Executive's memorandum makes clear our view that there is not a significant difference, because it is possible for a case to be appealed on the basis of poor legal representation. However, we acknowledge that the Law Society's evidence to the committee mentioned serious concerns about that particular instance.

My officials have held dialogue with the Law Society about that and other concerns. For example, we note that the bill sets out the solicitor's duty when receiving inadequate or perverse instructions. The Law Society feels that better protection would be provided if the bill were to set out the solicitor's duty in the absence of proper instructions. That expression relates to the Law Society's code of conduct and is well understood by the legal profession. We would therefore be willing to consider such changes if the Law Society feels they would make clearer the position of solicitors.

There is case law relating to the requirement on the legal representative to take account of the instructions that they receive from the client. In that case law, however, there is also an indication of the latitude that solicitors have to present a defence that they believe is in the best interests of their client.

The Convener: In your memorandum, you accept the Law Society's point in relation to appointment by the court during a trial and state that you will propose an amendment at stage 2 to remedy that.

Iain Gray: That is the case.

The Convener: Section 5 of the bill would prohibit an alleged sex offender who has been released on bail from personally seeking a statement from the complainer. However, an alleged sex offender who is allowed to remain at liberty without being on bail is not covered by that provision. Is there a reason for that difference in treatment?

Iain Gray: That is a matter of detail that is new to me. Perhaps I may consider it and come back to the committee.

The Convener: I confess that the committee spotted that detail only recently, so there are confessions all round. However, the matter is important and it must be cleared up before the committee's stage 1 report.

Iain Gray: The provision is clearly intended as protection, so that the complainer is not confronted by the accused outside the trial. If the bill contains a loophole, we will have to consider it.

Mrs Mulligan: The minister said that one of the reasons for drawing up the bill was to ensure that victims feel that they have some protection. It has been suggested to the committee in evidence from, I think, the Law Society of Scotland, that the protection already exists and that if the existing protection was used properly, or if proper training was given, we would not need the bill. Do you agree, or do you feel that the bill is required? Further to that, will you comment on the suggestion that the bill will not give the protection that we seek for the witness or victim?

Iain Gray: The bill provides two kinds of protection for victims or complainers. The first is to remove the possibility of the accused presenting his case and therefore conducting cross-examination. Of course, if inappropriate questioning is undertaken in a trial, the court should intervene and stop it. The evidence from the small number of cases—three—in which the accused has conducted the cross-examination shows that inappropriate questioning took place in only one of those cases. In the two other cases, the questioning was not inappropriate or inadmissible in court. However, that misses the point. Given the nature of the offences with which we are dealing, it is the fact that the complainer might be confronted and questioned by someone who has committed an intimate offence on her that leads to the fear. There is no current provision to prevent confrontations that happen within the bounds of propriety in the courtroom. We believe that no complainer in those circumstances should have to face such confrontation. That is why that aspect of the bill is required.

The current provisions restrict the use of sexual history evidence about the complainer; the judge must consider whether such evidence is admissible. The provisions in the bill are wider, in that they will place restrictions on character evidence that is not sexual character evidence. That is an extension of the current protection. An example would be evidence that relates to medical history or to a history of heavy drinking, which is not directly related to sexual behaviour, but is an attempt to undermine the character of the complainer or to present them as immoral.

Mary Mulligan asked whether the current provisions and protections are applied properly. Although much of the concern about the issue is anecdotal, the committee will be well aware of one significant piece of research entitled "Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials", known as the Jamieson report. I think that the committee has heard evidence from the authors of that report, which found clear evidence that evidence was sometimes admitted after an application had been made and then used in an unpredictable or undesirable way. The report also found that such evidence was sometimes slipped in without an application for its admission being made because the rules were not being enforced. Although we must acknowledge that the research for the Jamieson report was conducted some time ago, there is no evidence to suggest that there has been any change since then. As a result, we believe that there is a requirement to make the protection broader and perhaps more explicit, which is why this legislation is necessary.

Mrs Mulligan: Are you confident that the bill's proposals will mean that witnesses and victims will be more confident in proceeding with their cases?

Iain Gray: We certainly think that they should be. For people who are afraid that they will be confronted and cross-examined by the accused, we are removing that possibility. However, there is still the possibility that sexual history and character evidence could be admitted. The new legislation will introduce the higher test that the information must be relevant and significant in a probative sense. That test will be a decision that the judge will have to make.

That said, it is incumbent upon us—and it is our intention—to monitor the effect of the new legislation, if it is passed by Parliament. We intend to establish some baseline figures now, and then to monitor how those figures change over time as the legislation is enacted.

The Convener: We had not intended to ask about notice of defence of consent until about 10 minutes ago, when we heard some evidence from Professor Gane that we would like to put to you.

Bill Aitken: Given that the definition of rape is sexual intercourse with a woman without her

consent and that, in a case of rape, the Crown would require to demonstrate that such consent was not present, is there really a requirement for the special defence of consent to be notified?

Iain Gray: The purpose of introducing a requirement for prior notification of a defence of consent is to give fair warning to the complainer. Such notification will allow the complainer to be as well prepared as possible—not in a legal sense, but emotionally and personally—for what they are likely to face in a criminal court.

If I understand Bill Aitken, the question then is whether the complainer should understand that the defence of consent will be part of the trial. However, there are instances in which a complainer might find it unexpected. For example, when a woman has been attacked by a complete stranger, it might never cross the woman's mind that the accused might try to lead a defence that claims that she was a willing participant in what happened. The provision simply ensures that the complainer receives fair warning that the possibility that she consented to the act will be examined during the trial.

Bill Aitken: I understand that point. Such a possibility might not arise in the remotest dreams of a woman in that position. However, in practice, the depute fiscal dealing with the matter would point out to every complainer, "Look, I know you might find this distressing, but there is a possibility that it will be suggested during the trial that you gave consent." Does that not happen?

Iain Gray: I would have thought that that was only good practice, but I see no harm in ensuring that good practice becomes 100 per cent practice in future, if we so desire. That is the bill's purpose.

Stewart Stevenson: Professor Gane pointed to part of proposed new section 275 of the Criminal Procedure (Scotland) Act 1995, in which it appears that the introduction of this measure would transfer the burden of proof to the accused. Will you comment on that?

12:00

Iain Gray: There is no intention to do that. The prior warning that is required for the defence of consent does not change the position that the prosecution must show lack of consent as part of proving that the offence took place. The phrase in proposed new section 275 that probably concerned Professor Gane is:

"facts are relevant to issues falling to be proved by the prosecutor or the accused in the trial".

I repeat that we do not intend to shift the burden of proof. If the drafting of that section carries that implication, we may have to consider that. Other special defences require prior notification, but they are not intended to shift the burden of proof either.

The Convener: I will return to the restriction on evidence. The Law Society of Scotland said that the bill's definition of the proper administration of justice should, to provide a more balanced definition, be amended to include reference to

"the importance of ensuring that the accused can lead evidence in a full and fair defence".

The Law Society suggests that those words be included. Part of the dialogue has concerned whether the proper administration of justice is defined enough. Do you have a view on that?

Iain Gray: That seems to be the statement of a fundamental principle that we would not want to breach, but I will ask Mr Foubister to comment.

Stuart Foubister (Office of the Solicitor to the Scottish Executive): The purpose of the definition in the bill, as has been brought out in earlier evidence, is to draw attention to aspects of the proper administration of justice. We do not feel that there is an overriding need to include elements such as the fairness of the trial, which might be taken as obvious.

The Convener: You might have had the chance to read the evidence that we received from the Equality Network, in which Tim Hopkins described what he believed to be discrimination in the bill against gay men. I notice that your memorandum makes some response to that, but what are your intentions on the points that he raised?

Iain Gray: I read the evidence that Tim Hopkins gave. He had a point. We intend to ensure that the bill is not discriminatory. At stage 2, we intend to consider an amendment that might meet Tim Hopkins's concerns. He has some amendments in mind. We would be willing to examine what he might suggest.

The Convener: The Equality Network suggested that proposed new section 288C(2)(b) should be amended to read

"without consent or with a person under the age of sixteen years".

That is a straightforward suggestion.

Iain Gray: On the face of it, that is the case, but we should consider the drafting of amendments in more detail with the committee at stage 2.

The Convener: We have some general questions about how the provisions will work in practice.

Stewart Stevenson: I thank the minister for making it clear that the Executive will focus on monitoring, because the committee is concerned that the bill should lead to change in the courts. There is concern that existing legislation has not resulted in the expected change. You said,

minister, that you would draw together baseline figures, which you would use for monitoring. Could you develop that and explain the nature of the monitoring and of the baseline figures that you expect to gather and use?

Iain Gray: It would be our intention to have the work done independently. We would have to work up some kind of brief, which we would pass to an independent research body. Potentially, we might put the research out to tender. The baseline figures should provide answers to some of the questions that have been raised about the situation following the Jamieson report, for example how often some of the things that we are concerned about and some of the measures that are in place have been used. We would then have a monitoring programme for the future. We would consider, for example, the number of applications for the use of sexual history or character evidence and the percentage of applications under which such evidence was admitted.

Stewart Stevenson: We heard encouraging information from Susan Burns and Alison Di Rollo of the Crown Office about planned training. It was not entirely clear that that training would be directed at everyone involved in the process and in the application of the new rules. We are keen for everyone involved to be well equipped to implement the new legislation when and if it is passed. How do you intend to take action to ensure that it leads to change?

Iain Gray: We maintain an interest in the work of the Judicial Studies Committee for Scotland. The encouraging information that I assume the committee received from Crown Office colleagues was that they could not stay too late because they had to set off to be involved in induction training for new judges and sheriffs. That is a significant step forward compared with recent years and it is a sign that progress has been made. I hope that that progress continues.

We may return to the broader questions around vulnerable witnesses in the court system early next year, when our consultation paper is published. There are other parties involved, including solicitors and advocates. I understand that during evidence-taking sessions the committee discussed the compulsory professional development training that lawyers have to undertake. We hope that that training is improved and that more of it is done in future. I will ask Mr Beaton, who has more experience in such matters than I do, to say whether things are improving.

Peter Beaton (Scottish Executive Justice Department): The committee has heard evidence, most recently from the Crown Office, about the recent developments in training. My colleagues, in anticipation of the passage and implementation of the Sexual Offences (Procedure and Evidence) (Scotland) Bill, have discussed with the Law Society of Scotland the nature of the training arrangements that it wishes to put in place. It is important for us to include all the component parts of the system in a uniform strategy.

On judicial training, there is no doubt that the establishment of the Judicial Studies Committee has led to a much higher level of activity and a much greater focus on training for sheriffs and, now, senators of the college of justice and lords commissioners of justiciary. That is a major innovation. The fact that they are opening themselves up to hear from interests other than themselves—that idea is gaining ground—is of major importance.

Officials and, I am sure, ministers wish to encourage all initiatives in that regard. As we hold discussions with all the interested parties, including the Law Society, we will emphasise the need for a comprehensive package of implementation measures. I have spoken to the director of judicial studies about the matter with a view to having a dialogue about the nature of the training that he might want to propose to the judiciary to reflect its interests.

Stewart Stevenson: I want to come back briefly on that answer. My business background means that alarm bells ring whenever I hear the words “hope”, “try”, “encourage” and “emphasise”. I would like us, if we can, to be much more positive and proactive. I am sure that we all share the goal of the bill—I have no concerns about that at all—but I would like to focus on using language that is more engaged than some that we have heard.

Iain Gray: The point is well made. I add the specific detail that those solicitors who are appointed by the court to represent those who had wished to represent themselves will be potentially important actors in the new procedures. I am pleased to say that the Law Society revealed in the discussions that it had with my officials that it is considering setting up its own database of solicitors who would be willing to volunteer to represent such people and who perhaps have experience of similar circumstances. Having taken an interest, those solicitors might also have undertaken some training, have considered the procedures and have a good understanding of the position in which they would be placed, as we discussed.

That seems to be by far the best way forward. It is much better than having to set up the kind of formal duty solicitor scheme that might have been the alternative. With regard to such specialism, there is hope of progress and a positive response from the Law Society.

The Convener: You will gather that that is of primary importance to the committee and will be

reflected in our report. I am particularly pleased that you mentioned that the provisions would be monitored after they had been enacted because we feel that although the provisions are welcome, if concerns are not addressed we might as well stick with the old provisions.

Before we conclude, I will ask a few questions by way of tidying up, as this is the last meeting at which we will take evidence from the Executive on stage 1 of the bill.

You talked about the formal procedures by which an application is made prior to the trial for the use of sexual history or character evidence. The Law Society has expressed worries about how cumbersome that procedure might be. I ask you to address a point that the Law Society made to the committee. The concern was that the judge would make decisions that the jury would usually make.

Iain Gray: The bill is about striking a balance between protecting the complainer and protecting the right of the accused to a fair trial. I believe that judges already have the role that you mentioned in the case of some other special defences and have to screen the admissibility of evidence. There is not a significant shift of responsibility between the judge and the jury. There is experience in the Scottish system of that kind of screening of evidence for admissibility.

The Convener: A number of witnesses have raised concerns about the trial within a trial process. We have noted that whether a trial within a trial should be held is within the judge's discretion, so it is not absolutely necessary that the complainer be present to give evidence twice.

12:15

Iain Gray: The committee's understanding is absolutely correct. It is possible for such a procedure to take place, but it is not necessary because the judge can decide on the basis of the written application. At the moment, judges seldom, if ever, use the trial within a trial to decide whether evidence is admissible. They do not ask for evidence that has by its nature been tested for admissibility to be given again in full court in front of the jury. The evidence that we have at the moment leads us to believe and hope that the trial within a trial procedure would not be necessary in most cases.

A balance must be struck between ensuring that the evidence is tested for its admissibility before it is allowed in court and doing so in a way that ensures that that is done properly, so that such evidence can be used in a trial and the right of the accused to a fair trial is maintained. It is fair to say that it is not impossible that the complainer might have to give evidence twice, but we believe that that would happen seldom, if at all. We expect that research will be carried out on that aspect of the workings of the new provisions.

The Convener: Should the judge be able to make a decision on the evidence without a trial in the vast majority of cases?

Iain Gray: That is our belief, but the application of the provisions will have to be tested.

The Convener: Is that one of the aspects that you could include in the monitoring process?

Iain Gray: Yes.

The Convener: I have a final question. At our previous meeting, we heard from witnesses from the Faculty of Advocates who made a controversial proposal for the redefinition of the crime of rape. Although it does not relate directly to the bill, we thought it important to ask you about that. The Faculty of Advocates gave evidence to the effect that juries tend not to convict when presented with a typical date-rape scenario, but if different categories of rape were to be defined, a higher conviction rate for serious crimes would result. Obviously, we thought that the proposal was controversial and we are not saying that we agree with it, but we felt that in the context of the whole dialogue about the crime of rape and sexual offences, the point was an important one, on which you should be given the opportunity to comment.

Iain Gray: I will take the opportunity to comment, but only in a limited way. The proposal is controversial and has been examined to some extent in England and Wales. The Home Office review "Setting the Boundaries: Reforming the law on sex offences" concluded that a change similar to that proposed by the Faculty of Advocates should not take place. I remain to be convinced that a rape that occurs between strangers is somehow worse than a rape that takes place between two people who know each other. It seems to me that the impact of the latter could be just as bad or worse—it depends on the circumstances. The seriousness of the individual case must be reflected in the sentence and the court has broad discretion in such cases. I think that part of the case that the witnesses from the Faculty of Advocates were making was probably that that led to some reluctance in juries to convict.

For today's evidence, the key point is that the definition of rape is not the business of the bill. We await the result of the Lord Advocate's referral on the definition of rape. I have no doubt that the Parliament and/or its committees will return to this controversial matter, but it is not a matter for discussion today.

The Convener: Stewart Stevenson has a question. Please make it brief.

Stewart Stevenson: May I suggest a useful comparison? In charges of theft, the jury may, as an alternative, give the verdict that the defendant is guilty of reset. In your opinion, would juries be likely to convict more often if they had an alternative conviction of, say, serious sexual assault instead of rape?

Iain Gray: I do not know and it is difficult to find out because it is not possible to do research with jury members in Scotland. It is difficult to find the evidence base for that. I can see why some people might think that that is the case. Such questions are difficult and complex and should be properly addressed, but they are not—and are not required to be—in the bill that we are dealing with today.

The Convener: That concludes our evidence-taking session. I thank the minister and his team. The session has been helpful.

Iain Gray: May I say one final thing in closing? Mr Stevenson made the point that we will know that the legislation had succeeded if there is a change in the courts. Although I think that that is true, I would like to leave the committee with the thought that we will know that the legislation has succeeded if there is a change in the fear that is felt by those who have to face entering the courts in such circumstances. That is the real policy purpose of the bill.

The Convener: That is accepted. Thank you.

Items in Private

The Convener: Agenda item 4 states:

"The Committee will consider whether to discuss the draft report on the Sexual Offences (Procedure and Evidence) (Scotland) Bill in private at its meeting on 6 November."

That should have read "31 October". Does the committee agree to consider that item in private on 31 October?

Members *indicated agreement*.

The Convener: Thank you.

Item 5 is discussion of the draft report on the Sexual Offences (Procedure and Evidence) (Scotland) Bill, which we had agreed to take in private, but I worry that we are running out of time.

Mrs Mulligan: Can we put it off until the next meeting?

The Convener: Do members agree not to have the planned private session, as we are not able to discuss the report today?

Members *indicated agreement*.

The Convener: Thank you.

Meeting closed at 12:22.

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