JUSTICE 2 COMMITTEE

Wednesday 28 November 2001
(*Morning*)

Session 1

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

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JUSTICE 2 COMMITTEE
33rd 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:

Professor Peter Duff (Adviser)

WITNESSES

Lorraine Gray (Children 1st)
Louise Johnson (Scottish Women's Aid)
Margaret McKay (Children 1st)
Elaine McLaughlin (Hemat Gryffe Women's Aid)

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 28 November 2001

(*Morning*)

[THE CONVENER *opened the meeting in private at 09:48*]

10:01

Meeting continued in public.

The Convener (Pauline McNeill): I remind members that the meeting of the Parliament will start at 12 o'clock today, which is earlier than usual. This meeting of the Justice 2 Committee will have to wind up by 11.55 am at the latest to allow members to run up to the chamber.

I have received apologies from George Lyon. Members should take note of Mary Mulligan's rise to the position of Deputy Minister for Health and Community Care. I am sure that committee members wish her all the best in her new post. She will not be with us this morning, but I will pass on to her the committee's regards.

I have a few matters to report to the committee. Last week, we discussed scrutiny of the Marriage (Scotland) Bill. The Justice 1 Committee has also considered the issue and has decided that it will not report on the bill to the Local Government Committee at stage 1. The bill is procedural and makes no substantial change to family law. I suggest that the Justice 2 Committee does not need to become involved in scrutinising the bill, although we might want to consider the stage 1 report to satisfy ourselves that the bill makes no substantial changes to family law. If the bill were to make such changes, that would be a matter for the justice committees.

Members have among their papers a submission from the Crown Office and a letter from Andrew Normand, the Crown Agent. The document updates members on the audit that is being conducted of pressure at the Crown Office. Obviously the Crown Office has issued a press release about the audit, as it was covered in the news this morning. I propose to put the document, which makes for interesting reading and which will be helpful to our inquiry, on the agenda for a later meeting. That will give members the opportunity to read the document. The contents of the paper bear out our decision to embark on an inquiry into the Crown Office and Procurator Fiscal Service.

I ask members to note that I have received a letter from the Minister for Justice, who advises that the working group that is reviewing legal practice and information provision in Scotland published its report on 26 November. The minister has welcomed the report, which makes an important contribution to the debate on access to justice. He will respond formally once he has considered the group's findings. If members have questions about the report, we can revisit it at a later date.

Items in Private

The Convener: I invite members to agree to consider item 5, on witness expenses, in private.

Members *indicated agreement*.

The Convener: I also invite the committee to agree to consider in private lines of questioning for the witnesses who will give evidence on 4 December.

Members *indicated agreement*.

Crown Office and Procurator Fiscal Service

The Convener: Item 3 is our inquiry into the Crown Office and Procurator Fiscal Service. Members will have paper J2/01/33/7, which has been prepared by our adviser, Susan Moody. It provides useful and recent information on crime victims and witnesses in the Scottish criminal justice system. The committee agreed to take evidence from the organisations that are listed in the document.

The witnesses from Children 1st will make a brief introductory statement. We welcome Margaret McKay, the chief executive, and Lorraine Gray, the communications manager. We have received some information from Children 1st, which we have had the chance to read in advance.

Margaret McKay (Children 1st): Children 1st is the campaigning name—the working title—of the Royal Scottish Society for the Prevention of Cruelty to Children. We work throughout Scotland, from the Black Isle, in the north, to Selkirk, in the Borders. Our work contains several strands, but for the purposes of the committee's inquiry, we will draw on the experience of our staff and volunteers who work in abuse recovery projects.

In such programmes, we work with children who have been abused either sexually or physically. We also undertake family support work and work in relation to child protection more broadly. This morning we will draw primarily on the evidence of three projects that work with children who have been physically or sexually abused. Those children are likely to appear as witnesses in cases that come before the district courts, for example, in relation to cases of lewd and libidinous behaviour, or—more likely—the sheriff court or the High Court, when there are charges of serious sexual assault or physical abuse.

Scott Barrie (Dunfermline West) (Lab): Not surprisingly, given my background, I start by asking about a statement that you make on your website. You say:

"Many abused children are so traumatised by their experience in Scottish courts during the trial of their abuser that they wish they had never reported the abuse in the first place."

You go on to compare the situation in Scotland unfavourably with that in England. Can you explain what the English courts have done to improve the position of child witnesses, focusing on the prosecution of such cases?

Margaret McKay: Between 1995 and 1999, the Lord Advocate commissioned research and a report, which was published in 1999 and contained recommendations about the way in which improvements might be made in relation to the appearance of child witnesses in our courts. The implementation programme for that is only just beginning, although many of the measures that are referred to in the Lord Advocate's report have already been implemented in England. I am thinking particularly of the fast-tracking of cases that involve children. For example, in cases in which children appear as victims and witnesses in sheriff courts or the High Court, there may be a delay of 15 months or two years between the point at which the child first tells their story or is subject to police investigation and the point at which the case comes to court. We would like there to be fast-tracking of cases involving children.

A delay of that length is significant for any witness, but for children who are as young as six or seven—and even for children up to 14 or 15 years old—a delay of that nature is very significant for the quality of the evidence that the children are able to give and for the impact on the children of the matter being unresolved for that length of time.

Scott Barrie: In your work, have you found the fact that, by virtue of making allegations, children may be the subject of care protection proceedings through the children's hearing system to be a problem? The children will have had to answer for the allegations in a different forum and will then have to go to court. Does the fact that the two situations are out of kilter cause difficulties for young people?

Margaret McKay: Yes. Children being subject to multiple legislation is not a new issue; it has been a long-standing matter of concern to people who work with children who are subject to care proceedings.

To return to your previous question, our organisation and other organisations have commented on delays and their impact on children in the justice system. The question was put to us before we came to the committee. The most recent evidence from our projects shows that where a case has been fast-tracked, it has been as a result of human rights legislation. The response has come not because the Procurator Fiscal Service acknowledged children's needs and requirements, but because of cases falling as a result of defendants bringing into play the delay and the length of time between the action being raised and its coming to court.

We are delighted about fast-tracking in the one area in Scotland where it is now happening, but we are disappointed that the reason for it is not the acknowledgement of children's needs and rights.

The Convener: Have you thought about the practicalities of more general fast-tracking? How would it be done? Would it happen for every case

involving a child victim or witness? Would fiscals pick out those particular cases and move them up the queue?

Margaret McKay: Fast-tracking needs to be implemented systematically throughout Scotland. The evidence from our staff who work with child witnesses shows that practice varies enormously from area to area. Clearly we do not want to have justice by geography; we want a systematic approach to cases involving children.

The mechanics of fast-tracking are for the Procurator Fiscal Service or the Crown Office to work out. It ought to be reasonably simple to identify those cases where children are victims as well as witnesses and give those cases priority in the courts. Clear time scales ought to be set, which should reflect the reality of children's experience. If a case involving a six-year-old takes 15 months or two years to come to court, we are then dealing with an eight-year-old. In our view, that is not acceptable.

The Procurator Fiscal Service and the Crown Office will have to decide what goes down the queue if such cases are moved up the queue. There may be a resources issue.

The Convener: Should fast-tracking apply to every case involving a child witness, not just child abuse cases?

Margaret McKay: There are particular issues where children are victims as well as witnesses. Children can appear in court as witnesses in cases where they might have been a casual bystander—at an assault, for example. Any court appearance is demanding and stressful for a child, but there is a particular issue in cases where children are victims as well as witnesses. Our emphasis would be on ensuring that those cases are given absolute priority when it comes to fast-tracking.

The Convener: Are there any questions on fast-tracking?

Bill Aitken (Glasgow) (Con): It is totally desirable that such cases are fast-tracked, but we have evidence that contradicts yours. The Crown Office tells us that it is fast-tracking cases already. It might not always have fast-tracked such cases, but it has given clear assurances that they are given priority now. How current is your experience?

10:15

Margaret McKay: Our experience is current—it is this year's. We are involved in about 20 cases a year—including this year—in which children appear as victims and witnesses. We have evidence that fast-tracking occurs in one area, but I emphasise that we were told that it was implemented to ensure that cases did not fall because of the impact of human rights legislation and defendants using delays to challenge proceedings. We may well not have had cases in some areas this year, but we do not have evidence that fast-tracking is happening in every case—in fact, we are clear that it is not happening in every case.

The Convener: Will you tell the committee which area in Scotland is implementing fast-tracking? You mentioned that it is happening somewhere.

Margaret McKay: Particularly good practice is taking place in Aberdeen. I did not mention that specifically because the guidance notes asked us not to refer to individual cases or particular areas, but I am happy to respond to the question.

The Convener: If there is an example of good practice, I think that the committee needs to know that.

Margaret McKay: In Aberdeen, practice is particularly strong in other areas as well—for example, in our staff's liaison with the fiscals.

Scott Barrie: You mentioned the Lord Advocate's working group, the recommendations from which are only beginning to be implemented. What have been the main barriers to implementation? For the information of other committee members, will you say a wee bit about last month's meeting, which I was involved in, at which we talked about child witnesses?

Margaret McKay: Our view is that the report by the Lord Advocate's working group has not been treated with the urgency that the issue requires. Children do not have a strong voice—they need others to help them speak out and to speak out for them. There may be reasons of which we are not aware, such as pressure of work—I cannot comment because I do not know—but we find it astonishing that implementation of a report that was produced in 1999, of which all but one of the 44 recommendations were accepted, is only now beginning to take place.

Scott Barrie: Has your organisation raised that point with the Lord Advocate?

Margaret McKay: We have raised it with the justice department rather than with the Lord Advocate directly. Clearly, we support the Lord Advocate's proposals, which are about improving processes. We are working with two other children's charities on a much more profound issue—whether children should appear at all in our court system. Our scrutiny of that matter includes obtaining evidence of best practice from elsewhere. We will produce a report on that early in the new year.

Fast-tracking, which I have mentioned, is one

issue that we would like to be prioritised. A second issue is ensuring provision of a videolink, so that children can give their evidence that way if they wish to. There should be a presumption in favour of children giving evidence by videolink, rather than that being something that has to be argued for separately.

The point about the availability of screens applies equally to children who appear in open court as victim witnesses. I emphasise that, instead of one system being chosen automatically, the wishes of the child should be taken into account. We would like a presumption in favour of giving evidence by videolink because we observe that people who work in the legal system are not necessarily tuned into—or do not give due weight to—the balance of power between the alleged abuser and the child. Even in court, there are ways of silencing a child, for example by looks or the use of certain words or phrases that were used when the child was subjected to the abuse. Children have spoken to us about how frightened they were when they gave evidence and about how facing their abuser in court or in the environs of the court disabled them.

The Convener: In your experience, does the use of a videolink improve the quality of evidence from children in every case or in only a percentage of cases?

Margaret McKay: I am not sure that I can answer that question because it would involve a judgment about the evidence. The people who hear the evidence give their view on it. For children who are fearful of appearing in open court and facing their abuser, a videolink is the preferred option. Anything that makes the child more comfortable and more able to give evidence clearly and at their own pace is beneficial. The feedback that we receive from people involved in the court process is that the best method is to have children in open court so that the jury or, if there is no jury, the sheriff can hear the evidence directly. In our view, that meets the needs of adults rather than the needs of children.

The Convener: What you are saying is that invariably, children would rather not go to court and that their preferred option is to give evidence by videolink.

Margaret McKay: Not all children. A related point is that some older children who have had the benefit of pre-trial support—which is not coaching—feel strong enough to give evidence directly in court. In such cases, we support and recognise the child's right to do so. We argue that, instead of requiring a special request for the use of a videolink to be made in advance by the child or his or her supporter, the presumption should be that evidence will be given in that way. Children should be able to buy out of that if they would prefer to appear in open court and are able to do so.

Scott Barrie: Do you feel that the Lord Advocate's recommendations require legislative action, or could they be implemented merely by a change in practice?

Margaret McKay: The proposals about improving processes in the court could be brought in now. Legislation would be required if it was decided that children did not have to give evidence in court at all and could, for example, give evidence through an intermediary, but that matter is separate from the one that we are considering today.

Our justice system is based on a long-established adversarial concept that is strongly held to. Whether that provides the best way for children to tell their story is open to question. All people who come in contact with children in the legal or justice system need training, briefing and awareness of the ways in which children's perceptions and understanding differ from those of adults.

Being a witness in a case is stressful for any of us, and much more so for a child. I will give a practical example. If children are asked a question, which they answer to the best of their ability and honestly, and then they are asked the same question again, they begin to think that they have given the wrong answer. Children become confused, anxious and uneasy, which affects the quality of their evidence.

Mrs Margaret Ewing (Moray) (SNP): Good morning. Your written evidence says that a provision to take evidence on commission is available in Scots law, but is rarely used. As a lay person, I do not understand what you mean by that. Will you elaborate?

Margaret McKay: That means that children can give their evidence outwith the court. A provision allows children to give evidence on commission outwith the court process, which can then be presented.

Mrs Ewing: Is that the evidence that you said could involve videolinking?

Margaret McKay: No. That is a separate matter. Videolink evidence involves the child being in the confines of the court, but in a separate room. Their evidence is relayed to the court through a videolink.

Mrs Ewing: On commission, the child would give evidence outside the court. How would that be relayed to the court?

Margaret McKay: The evidence would be relayed through an intermediary.

Mrs Ewing: How do the rules of evidence

establish confidence that a child is being interviewed by an appropriate person with correct support, to ensure that correct evidence is being given to the court?

Margaret McKay: The evidence would have to be tape-recorded, or the court would have to have some other way of satisfying itself that questions had been addressed appropriately to the child. Similarly, we would like a child's first interview, even by the police, to form part of their evidence-in-chief, provided that that evidence was duly recorded. Thereafter, a judge, sheriff or jury could form their opinion about the reliability of the responses.

Mrs Ewing: You say that that provision has been used rarely. How often has it been used?

Margaret McKay: I do not know of the provision's being used at all, but that is not to say that it has not been. We have no direct evidence of its being used; if it has, it has been rare.

Mrs Ewing: Do you feel strongly that the taking of evidence on commission should be recommended?

Margaret McKay: Yes.

Scott Barrie: You said that you could give no evidence about how that provision has been used. Where does it come from in Scots law?

Margaret McKay: I cannot answer that. I do not know where the provision first came from, but it registers in the report that appeared in 1990—the name of the report escapes me and I will have to check it; I am sorry.

Bill Aitken: How is such evidence tested? There appears to be no facility for cross-examination.

10:30

Margaret McKay: A key issue is whether cross-examination is the best way for children to give their evidence clearly. One of our proposals is that, rather than expose children to multiple cross-examinations in cases where there are multiple defendants and multiple advocates or lawyers, the questions that are to be put should be gathered together, identified, fed to the child and then fed back to the court.

Bill Aitken: You appreciate that, for the accused person to have a fair trial, the evidence must be tested. I heard what you said and perhaps the cross-examination of a child does not need to be as robust as that of an adult witness. However, a basic principle of justice is involved and I am not convinced that taking evidence on commission would adhere to that principle.

Margaret McKay: We recognise that it is important for the rights of the accused to be protected; there is no argument about that. Our argument is that it is in everybody's interest to arrive at the truth, which means that there must be measures that ensure that children can tell their story—as they call it—and so give their evidence clearly. We are suggesting measures that would allow them to do that.

The Convener: That procedure is rarely used. Is that because having no cross-examination interferes with the accused's right to a fair trial?

Margaret McKay: I do not know why the procedure is not used. I cannot imagine that a recommendation that was introduced to the law in this area—it was not introduced simply in relation to children's cases—did not clearly take the accused's rights into account.

I think that the fact that the procedure is rarely used has more to do with custom and practice. Courts want to have the witness in front of them because that is the norm. However, to get the best evidence from children, one must consider how to ensure that they can tell their story clearly and openly to enable people to judge its credibility. That situation might apply to other vulnerable witnesses, but our experience relates to children only.

The Convener: You make your point very well. Do you recommend that evidence on commission should be taken only from children of a certain age or in particular types of cases? If not, are you saying that the procedure should be available for all ages of children and all types of cases?

Margaret McKay: We are saying that how children give their evidence should be considered on a case-by-case basis. Some adults are more able than others to manage stressful situations and the same applies to children. We believe that children have the right to be full participants in the decisions that are made about them. We want the options for children to be set out clearly and a decision to be taken on the easiest, most comfortable and right option for a particular child. However, we recognise that, whatever decisions are made, the accused's rights must also be considered.

Lorraine Gray (Children 1st): We also recommend the use of child witness support officers, because every child is different. For example, there might be a 14-year-old with learning difficulties. The question is what procedure is appropriate for each child. We have discovered that it is difficult to find out the relevant information about a child. For example, it is often only when a child arrives at court that it is realised that the child has a difficulty, such as a speech impediment, that will make giving evidence harder for them. It would be good if someone was

responsible for ensuring that the child was supported through the court process and that the court had the relevant information about the child. The court should be aware of the needs of a particular child.

Mrs Ewing: Where would the people who would support children come from? How would they be trained and funded?

Lorraine Gray: Children 1st ran a pilot scheme with our Glasgow project that was linked to the courts. The scheme worked well. I do not know how such people would be funded, but the question is, how can we improve children's evidence, and ensure that justice is done and the process works better? Our proposals seem to help.

Margaret McKay: Children 1st and another children's charity funded a child witness post on a trial basis as part of research for the Lord Advocate, but it would be unreasonable to expect a children's charity to continue to fund positions that are integral or important to the administration of justice. Our proposal is that funding should be part of justice provision—court provision—to ensure that children in particular are able to give best evidence. The committee may have a view on other vulnerable witnesses.

The Convener: On taking evidence on commission, are you saying that procurators fiscal should use more of the choices that are available to them and think about how best evidence can be obtained on a case-by-case basis?

Margaret McKay: There should be a range of measures, such as screens in court, videolinks, fast-tracking and evidence on commission. Delays are one of the most problematic things for children, particularly if there is an expectation that a case will be heard on a certain date or week and the case is put back.

I have an extract from a nicely worded letter from a procurator fiscal to a child, which says:

"I cannot tell you how disappointed I personally am that this case was adjourned for the seventh time at the last trial date."

That would be difficult for any witness to understand, but is particularly stressful for a child. However, the letter was well expressed and nicely put by the fiscal's office.

Stewart Stevenson (Banff and Buchan) (SNP): A series of headings—such as fast-tracking, presumption in favour of videolinks, evidence on commission and child witness officers—that relate to the justice system as a whole has been used and useful background information has been given. However, our inquiry focuses on the prosecution service—the Crown Office and Procurator Fiscal Service. Are there ways in which the prosecution service could help to make the plight of a child witness less stressful?

Margaret McKay: First, the procurator fiscal must take responsibility for and charge of decisions on timing. Secondly, members of the fiscal service must be able to communicate directly with children.

We are not saying that our experience of the ability of members of the fiscal service to communicate with children is universally poor. It varies enormously, from procurators fiscal who are able to relate directly and clearly to children in the ordinary language of any man, woman or child, through to situations in which the procurator fiscal seems to have little understanding or experience of how to address, deal with and communicate with children. That is an issue of training and experience for the fiscal service.

I do not want to suggest that practice is universally poor. It varies throughout the country. We want communicating with children to be part of the repertoire of training for members of the fiscal service.

Stewart Stevenson: Is there any particular reason that practice differs throughout the country? Is it a resources issue or are other factors involved?

Margaret McKay: My understanding is that practice differs because there is no built-in training on that area for all members of the fiscal service. Just as in any professional group, some people will be better than others are at communicating with children. We suggest that communicating with children needs to be part of the training for the fiscal service, so that one raises the standard and identifies who communicates well with children and who needs additional help.

Lorraine Gray: One of our projects also brought up the matter of a procurator fiscal not allowing counselling to take place until certain legal procedures had occurred. That does not happen throughout the country. Some areas seem to be good.

I will give two examples from one of our projects. In the first, a child was not allowed support until the precognition had been taken. I think that that took three or four months to happen, so the child had no support for that whole period. In another case, a procurator fiscal decided that no counselling would be allowed because our member of staff did not have experience in the type of case concerned. Our staff have vast amounts of experience in supporting children in dealing with the trauma of their abuse. That is the area in which they work. Procedures vary. It is important that a child gets support when they need it, but that does not happen in every case.

Margaret McKay: That is an important point. We believe that children have a right to receive help with overcoming the effects of their experiences when they need that help, not when someone in the legal system determines that they should get it. We are well aware of, and experienced in, the importance of keeping separate anything to do with what will be said in court. There are no grounds for preventing children from having pre-trial support therapy if they have experienced abusive circumstances. There should be no attempt to prevent children from getting such therapy.

Stewart Stevenson: Your evidence has related largely to the fiscal service. Is your experience of the Crown Office any different?

Margaret McKay: Our experience of the fiscal service is more substantial. That is why we have been talking about the fiscal service.

Our most recent experience of the Crown Office showed what appeared to be considerable pressure on members of staff. That was reflected in difficulties in allowing time for communication with the child or their next of kin in advance of appearing in court and an apparent—I emphasise "apparent"—lack of preparation for the case, which we can judge only as a result of pressure of business.

Stewart Stevenson: In how many cases has that been your experience?

Margaret McKay: That was only one recent example. We have more experience of working with the fiscal service, but the problem of delays applies equally to the Crown Office.

The Convener: Unfortunately, we will have to leave it there so that we can hear from Scottish Women's Aid. Are there any points that have not been covered?

10:45

Margaret McKay: Experience varies throughout the country from very good, with regular liaison, to what appears to be quite a hurried approach at the last stage before cases come to court. The sad reality is that, as a result of their experience in our courts, all the children we deal with, without exception, say, "I wish I hadn't told anyone." That is a sad reflection on what happens to children in the court system.

One 12-year-old girl said:

"the dates keep getting cancelled all the time and I feel scared. I don't want to give evidence anymore, it's taken so long."

An eight-year-old girl, in response to attending court on three occasions without being allowed to give evidence, said:

"I felt sore in my heart."

That situation may be replicated time and time again. That is why we feel so passionately about the need to reform the way in which child witnesses are dealt with and allowed to give evidence in our court system.

The Convener: The committee can understand why. I am grateful for the clear and helpful evidence that you have presented to the committee. Thank you.

Margaret McKay: Thank you for giving us the opportunity. If we can provide any further evidence in writing, we would be happy to do so.

The Convener: We might want to follow up that offer.

Our final set of witnesses this morning is from Scottish Women's Aid and Hemat Gryffe Women's Aid. I welcome to the committee Louise Johnson, who is Scottish Women's Aid's national worker dealing with legal issues and Elaine McLaughlin from Hemat Gryffe Women's Aid. Thank you for coming along and for submitting a helpful statement. We will go straight to questions, if that is okay.

We are grateful for the evidence that you submitted to the committee on 16 August. Has anything changed since then or does the evidence remain the same?

Louise Johnson (Scottish Women's Aid): I have spoken to several of our groups over the past two or three days in preparation for coming here. Unfortunately, on the points that we raised about information not being communicated to women, their not being advised of bail conditions, their feeling threatened and intimidated in court, and delays in court, the story is still the same.

However, we heard a positive story from a woman in north Lanarkshire who had been in the High Court. She talked about the prosecutor—I do not know whether it was a fiscal or the advocate depute—being incredibly helpful. The woman was allowed to go to her office; the prosecutor would have come to her home. The prosecutor took the time to go at the witness's pace and to explain what was going on. The witness, who was also the victim, felt very supported by that. If such procedure could be followed uniformly, women would be much more inclined to give evidence, stand up in court and not feel victimised.

The same woman said, of a different case, that she had felt that she had no support because she had no lawyer of her own. She had felt that she was on trial. A number of other women to whom I have spoken have talked about having support in court, for example from Scottish Women's Aid. A valid point was made in relation to a rape trial. The court was cleared and Scottish Women's Aid

representatives were not allowed in because of the procedures. The defence had objected that the woman in question was being given undue advantage. However, the woman said that the defence had an undue advantage because the accused had a solicitor there, whereas there was nobody there for her.

The problem is that women are not being allowed into court in time to meet the procurator fiscal or the advocate depute, so they are faced with a phalanx of strangers. The whole process is intimidating. A woman comes into a formal, overbearing situation—as courts have got to be—and is faced with people whom she has never seen before. That is the anecdotal, practical evidence that representatives from our groups in east Fife, north Lanarkshire, Clackmannanshire and Inverclyde have given me in the past two or three days.

The Convener: Thank you; that was very helpful.

A recurring theme in the inquiry, which a number of witnesses have mentioned, is the fact that the victim feels that they do not have anyone or any support in court. What you have said seems to bear out what we have heard from other witnesses.

Mrs Ewing: In your useful submission, you said that one of the difficulties that you experience is that when a procurator fiscal decides not to progress with a case, there does not seem to be any sufficient way of getting a full explanation of that decision. Will you elaborate on that? I think that that happens not only to women who have been subjected to abuse, but in other cases.

Louise Johnson: It seems to happen fairly regularly in a number of cases. I do not know whether it happens because of a procedural practicality and the procurator fiscal feels that the case has changed because of certain evidential matters that cannot be disclosed to the public. Women have never been given any reason for the case being dropped, and the problem with that is that the woman feels that she is not being believed and that her evidence is not sufficient.

I have been asked whose duty it is to ensure that the evidence that is before the court is substantive. Obviously, I cannot answer that question. I do not know whether the procurator fiscal can answer it either, but it could be considered. I do not know whether the reason for women not being told why a case is being dropped is a matter of policy or legal procedure, but they are not told.

Mrs Ewing: What do you want to be altered? Would you like there to be a procedural change that would provide a better way of relaying to a victim the reasons why a case is not being proceeded with? Victims do not always have legal representation. The lawyers might understand the technicalities, but the victim does not necessarily understand them. Is there a better and more humane way of relaying decisions?

Louise Johnson: I made a point about having a liaison person. In the prosecution code, the fiscal service mentions that precognition officers can give information. I do not know how often that happens. We have spoken to women who have said that they would like there to be a link person—possibly someone within the Crown Office and Procurator Fiscal Service—to whom they can turn for information. The person who could relay the information could be the fiscal, because it is a legal matter. It does not seem to be too difficult to relay in lay terms, without going into complex legal arguments, why the case was dropped.

It is important that that is done before the victim turns up in court to give evidence and finds that the case has been dropped. People have turned up at court to find that the case has been dropped and no one will tell them why. Sometimes they are told that they cannot be told the reason because it relates to a legal matter within the evidence. What does that mean? The victims do not know whether there was not enough evidence or whether the case was bargained down and they feel very let down.

Mrs Ewing: Should someone in every fiscal office be in charge of that responsibility?

Louise Johnson: Absolutely.

Mrs Ewing: They might go into a quiet room and explain the reasons in layperson's terms.

Louise Johnson: There should be someone to support the woman through every facet of the trial. Women have said that they feel that there should be someone in court for them during the trial. The defence solicitor is there for the accused and will interject when he feels it appropriate. The fiscal is not there to protect the victim; he is there to act in the public interest. Women feel completely abandoned. The court has a common-law duty to protect the victim, but, in reality, that is often not done. Elaine McLaughlin would like to make a comment on link people.

Elaine McLaughlin (Hemat Gryffe Women's Aid): Our group works primarily with Asian, black and ethnic minority women. We dealt with the case of a young girl who had come into the drop-in centre. The police had tried to get in touch with her to serve a witness citation on her. There had been an incident with her husband; she had an interdict, but he was shouting and bawling in the street. She found out that he had been charged and that she had to attend court as a witness only when the police served a witness citation on her. The case

was adjourned on the day that she went to court because the accused failed to appear. No one told her why; she was simply told to go home. She came to the drop-in centre to ask if we could find out why she had been sent home and what was to happen next.

Mrs Ewing: Have you an overall statistical view of how many cases in Scotland are dropped without an explanation being given?

Elaine McLaughlin: It is different for Asian women compared with the mainstream public.

Bill Aitken: You mentioned plea bargaining, or plea negotiation as it is more euphemistically called. Are there occasions when that could be of benefit to the complainer, who is invariably the witness in such cases?

Louise Johnson: That question would probably need to be answered by the complainant. If the plea was bargained down, for example, from rape to sexual assault, I presume that the victim would not have to come to give evidence in court.

That happened in the case involving the woman in north Lanarkshire, which was particularly horrendous. The woman's partner was charged with rape and assault after he tried to drop the hoover into the bath when she was in it. Although the case was serious, it was bargained down from rape to sexual assault and the woman had no idea why that had happened. She continues to feel that she cannot move on because she did not have her time in court—she wanted to confront her partner. I do not know how many times that situation is mirrored, but women say to us, "I want to face him. I want to tell my story".

Sometimes, it may be in the interest of the victim to have the case bargained down so that she does not have to face the accused. However, rather than finding out, as a fait accompli, that the case has been bargained down, women should be asked about it. They should be told that the bargain will save them having to go to court and face the accused, and that it is not being done because they are not believed. As I said earlier, no information is ever given about why pleas are made. Yet again, women feel lost and uninformed.

The Convener: The committee intends to examine plea bargaining. The heavy pressure on the fiscal service might mean that plea bargaining is used more often to relieve the pressure on courts. I assure the witnesses that the committee will examine that point in more ways than one.

Stewart Stevenson: You talked about communication; indeed, that issue is at the core of your evidence. At any of the stages—precognition, preparation for trial or after trial—is there a way of improving the communication mechanisms between witness, complainer and the Crown Office and Procurator Fiscal Service, which is the focus of our inquiry?

Louise Johnson: Some legal issues would have to be committed to paper, for the record. However, verbal and written communication could be used when the legal issues are not fundamental. In such situations, the link person whom we have mentioned could phone the witness to check if they are okay, to tell them when the trial will take place and to ask whether they will turn up. They could also ask whether the victim or witness feels okay about the situation. Does the victim or witness feel intimidated? If the accused is out on bail, is he adhering to his bail conditions?

A combination of written and verbal communication is needed, so that the victim or witness is kept appraised at all times of the progress of the case, whether there are any major alterations to the timing and when the hearing will be called. They could also be given details of the charge, plea and sentencing.

There is a victim notification service, through which, if the offence is serious and carries a sentence of four years or more, the victim can elect to be told. However, we think that in all cases of domestic and sexual abuse the victim should be told when the accused is likely to be released. The victim might think that the accused has been sentenced to two years, but then he gets out for good behaviour and she meets him in the street, which is not acceptable.

11:00

The Convener: You say in your evidence that there is a problem with addresses not being kept confidential.

Louise Johnson: I will give you an example of what happens. The issue was to do with civil legal aid, but you might be interested. The Scottish Legal Aid Board conveyed the address of a woman in one of the East Lothian refuges to a prisoner in Saughton prison, the effect being that probably every prisoner in Saughton now knows the address of that East Lothian refuge. The prisoner was to be released at the end of that week, so the refuge had to be closed and additional security measures costing several thousand pounds had to be implemented. The safety of the women in the refuge and the Women's Aid worker were compromised, there was additional expense and inconvenience, and upset was caused to the women, who had to be farmed out to other accommodation. The woman involved was scared, because she knew that the man would come immediately.

It has been reported to me—I cannot give you numbers—that women's addresses have been

read out in court. The trouble is that the location where incidents were perpetrated has to be disclosed in evidence—the incident took place at such-and-such high street, for example—which means that women's addresses have sometimes been disclosed. That information has been relayed to me by Women's Aid workers, but I cannot give you specific incidents.

The Convener: How unusual is that disclosure?

Louise Johnson: Women's Aid workers have mentioned it to me two or three times, so it does not seem to be completely unusual. I cannot give you specific incidents of an address being repeated, but it does happen.

The Convener: It is not supposed to happen, but it has happened.

Louise Johnson: Yes. It is not supposed to happen, but it has happened.

The Convener: So it has happened in error. We will take note of that.

Scott Barrie: What is your experience of the Crown Office victim liaison office?

Louise Johnson: I do not think that the office is up and running yet. As I understand it, there are pilots in Aberdeen and Hamilton. We have not yet been contacted by the victim liaison office. I phoned the head office to speak to Elizabeth Bott, who is in charge, but she has not yet replied. I would be interested to find out what is going on, because the office could provide the link person whom we have mentioned. I do not know how the scheme will operate or the extent of the liaison office's commitment to victims or witnesses, but I would be interested to meet the officials involved to discuss that.

Scott Barrie: Clearly, you see the office as something that could help.

Louise Johnson: It is very positive. If there is an official in the court who is prepared to support victims and witnesses in the way that I have suggested, that will be constructive.

Scott Barrie: Earlier, we heard evidence from Children 1st on child witnesses. In your experience, given how often children are involved in the types of cases with which you are concerned, how frequently are pre-trial visits organised for child witnesses?

Louise Johnson: That is not done uniformly, although it has happened on occasion. A worker in east Fife told me about a case involving a young woman, who was allowed to go to the court only the day before the trial. We have spoken to women and children who have come along as witnesses. They say that, when they have been allowed to go to the court to meet the person who is prosecuting or just to see the court layout, that has helped. It has defused the tension of the situation—a court has a formal atmosphere. I cannot tell you how often such visits are organised, but they are beneficial to children and to the women.

Scott Barrie: As an aside, I remember a case in which we thought that we had done well by organising a visit. However, the case was heard in another court, which was a mirror image of the court that the young child had visited. The child had been told where everyone would be, but those people were sitting in the opposite places and the child was totally confused. The situation is not always as easy as people think.

The Convener: It is the small things that are important.

Bill Aitken: I notice from your written submission that you offered to help the Crown Office with training. Has that offer been followed up? Have you been approached by the Crown Office?

Louise Johnson: I am pleased to report that we have. In May, we attended a training day with procurators fiscal and precognition officers throughout Scotland. Moreover, about a month ago, we conducted a domestic abuse awareness session with 40-odd procurators fiscal and precognition officers. In fact, I would have been giving another session tonight and I hope to give one in January. Certainly such commitment exists.

We were well received by the fiscals. The sessions promoted debate, which is a good thing; if people are debating the issue, they are thinking about it. The exercise was constructive and positive.

Bill Aitken: That is encouraging.

Louise Johnson: It is. However, I should point out that we would like access to the judiciary.

Mrs Ewing: Would not we all?

Louise Johnson: Yes. There is no statutory requirement for the training of judges. They obviously have to be independent, but it would be beneficial to have awareness-raising sessions with them. Whether they think so is another matter, however.

Bill Aitken: I hope that you are not going to be murmuring judges.

Louise Johnson: No. I can assure you that we would be very respectful.

The Convener: The committee seems to agree that training cannot stop at the level of procurators fiscal and precognition officers; we must ensure that it is delivered from the very bottom to the very top.

Louise Johnson: We have delivered training to family law students at Napier University and will be delivering training on evidence to Dundee University students. We would very much like to start to deliver training sessions at other universities, as law students are future fiscals and judges. Educating people at an early stage to be aware of the issues would be most beneficial, instead of going in when people have developed notions and—dare I say—prejudices that sometimes cannot be refuted.

The Convener: We will be meeting the Lord President and judges of the High Court perhaps next year—the meeting has had to be rescheduled—and we might just raise that issue on your behalf.

Louise Johnson: We would be grateful if you could do so.

The Convener: Do you have any other comments that you want to make?

Louise Johnson: Yes. Elaine McLaughlin wants to raise a point about black and ethnic minority women and translator services.

Elaine McLaughlin: We feel that interpreting services should be made available in courts. There should also be a link person or liaison officer who is aware of the various different languages that are spoken and of the religious requirements and cultural beliefs of women from the black and ethnic minority community. It is pretty daunting for such women to go into court; they are vulnerable before they even get to that stage. Our housing support workers have sometimes accompanied women to court and found that, for one reason or another, no interpreter has been available. As a result, the case could not proceed or was delayed.

The Convener: Thank you for raising that matter. You said earlier that that was a particular problem for Asian women. However, the problem is much wider than that and the committee will take careful note of your point.

That concludes this evidence session. I thank the witnesses for taking the time to attend; your evidence has been very helpful to us.

Louise Johnson: Thank you very much.

The Convener: The committee might not believe it, but we are exactly on time. We will move on to item 4, which is a briefing session in our inquiry into the Crown Office and Procurator Fiscal Service. I welcome Peter Duff to the meeting.

Professor Peter Duff (Adviser): Good morning.

The Convener: Thank you for coming along.

Professor Duff will brief us on a range of issues, such as fiscal fines, intermediate diets, delays to trials in the High Court and in sheriff courts—some of which we have heard about this morning—and plea negotiations. I will let him kick off, after which members may ask any questions that they wish.

Professor Duff: The clerk sent me a fairly comprehensive list of things that I might talk about. Most of what I have to say is informed by various bits and pieces of research that I have done for the Scottish Office and Scottish Executive central research unit over the past 10 or 12 years. I will make some more general points as well.

The evidence that the committee has received so far seems to show that over the past five or six years the no-pro rate—the number of decisions not to prosecute—has remained relatively constant. It rose slightly last year, but it is too early to say whether that is the beginning of a trend or a one-off. Prior to that, the rate was relatively constant.

I did some research on fiscal fines between the late 1980s and early 1990s; the no-pro rate now is much the same as it was then. The fact that it was higher in the early to mid-1980s led to a great deal of concern, but there was a political move to drive the rate down—that was successful. The rate of no pros was down about 9 per cent in the mid-1990s, since when it has crept up again. It is now at about the level that it was at the beginning of the 1990s. There is no evidence that that rate is out of control or increasing rapidly.

I was interested that the Lord Advocate's recent submissions to the committee contained the Crown Office figures on the reasons for no pros. Fiscals have little tick boxes and, when they no pro a case, they have to tick the reason for it. As far as I am aware, that information has never been made publicly available. I know that it does not appear in the annual reports, as I have scoured them for it. As one would expect, the main reasons for the decision to no pro a case are insufficient evidence—a legal reason—and the triviality of the offence, which is a public interest reason. There is a range of other reasons that are much less commonly cited, among which are delay and lack of court time. Those are the reasons that I suspect the committee would be most interested in. However, they are at a comparatively low level.

I looked up an article written in 1990 by Sue Moody and Jackie Tombs, who, for the purposes of that research, had been given access to the information produced by the tick boxes. The article showed a pattern of reasons for no pros—insufficient evidence and triviality were the main ones. At that stage, there was a third category, which was "in the public interest". That category has since been scrapped, because it was felt that it did not really explain anything and was not much use to the Crown Office in establishing why a

decision not to prosecute had been taken. The information is interesting; the reasons for no pros perhaps could be published in the Crown Office and Procurator Fiscal Service annual reports.

I notice that some of the submissions suggest that people who pay fiscal fines by instalments will often pay only the first instalment, thus avoiding prosecution. I do not have any information on that and I am not aware of any research on it. I carried out the study to evaluate fiscal fines when they were first introduced—I can provide the committee with a copy of that study. At the time, many informants told us that the accused were paying the first £5 instalment and not paying the rest. However, when we analysed a large sample of fiscal fines, we found that that was not the case. It was an urban myth—you may be hearing the same urban myth. I am not aware of any evidence to show that the accused are paying the first instalment and no others, but I am not aware that it is untrue either. All I can say is that, when the fiscal fine was introduced, the same scares were raised but were not borne out by the facts.

As you probably already know, the level of fiscal fines has remained much the same over the past five or six years. There is no evidence that fiscal fine use is increasing and that the prosecution rate is dropping. Fiscal fine usage has remained constant since fiscal fines were introduced in, I think, 1989—about 5 or 6 per cent of all cases reported to procurators fiscal are dealt with in that way. There was a slight dip in the middle of the 1990s—to about 4 per cent—because, when the fiscal fine was introduced, it was set at £25 and inflation gradually made it less suitable as other fines generally increased. When the sliding scale for fiscal fines—£25, £50, £75 and £100—was introduced, usage returned to normal. Crown Office figures show that, while the rate of fiscal fine usage has remained constant in recent years, the number of £25 fines has dropped and the number of £100 fines has slightly increased. Obviously, if we want the usage level of the fiscal fine to be maintained, the fine must keep up with inflation.

11:15

The research that I did in the early 1990s indicated that the fiscal fine was being used appropriately; there is no evidence that the fiscal fine is used inappropriately. The Crown Office has issued detailed guidance on when it should be used. One might take exception to some of the guidelines but, by and large, they seem fairly reasonable to me.

In many European countries, particularly the Netherlands and Germany, much more extensive use is made of the prosecutor fine mechanism. In the Netherlands, it is called the transaction; in Germany, it is called the penal order. In both countries, the prosecutor can issue unlimited fines, which means that the fines are used to divert a much larger number of cases from prosecution. In the Netherlands, about 50 per cent of cases end up being dealt with by prosecutor fine; the proportion is similar in Germany. We are not alone in using the mechanism and in many ways we are lagging behind much of Europe.

There is a difficult political question. Obviously, the public take meanings from the sanctions that are imposed for crime and there is an outcry when a penalty is felt to be too light. The imposition of a prosecutor fine sends out a different message to the public than that sent out when someone is prosecuted with the full majesty of the law—if I can use that phrase in the context of the district court. Would the public be satisfied that cases were being dealt with appropriately if more serious cases were being dealt with by way of increased fiscal fines? The system seems to work in the Netherlands, Germany, Sweden, Norway and Denmark, but it might not work here.

I have also done research on intermediate diets, adjournments and agreement of evidence. We cannot consider the Procurator Fiscal Service in isolation. When we are trying to assess whether it is coping, whether it is efficient or whether it has enough resources, it is difficult to disentangle its actions from those of the other agencies and the other moving parts of the criminal justice system.

I will start by considering intermediate diets and agreement of evidence. Members may consider the subject to be excessively academic but I think that it has a bearing on the wider issue. There is tension in all measures that are designed to make the system of prosecution more efficient as people go through the courts. We have an adversarial system, which entitles the accused simply to say to the prosecution, "I am not co-operating with you in any way. Prove the case against me." Not all systems are adversarial—many continental systems are not. Ours is, however, and we give accused people the right to say, "We are not co-operating. We don't have to prove anything; we don't have to do anything. It's up to the prosecution to prove the case against us. We can sit and say nothing and force you to lead your evidence."

Once we give the accused that right—and all the associated rights, such as presumption of innocence and the right to silence—it is difficult to make the system more efficient. There is often tension. For example, in the case of agreement of evidence, the accused is asked, "Will you agree some of the evidence against you before the case goes to trial?" From the adversarial viewpoint, why should the accused agree any of the evidence? He is entitled to put the prosecution case to the

test. If he agrees to evidence, he has nothing to gain and everything to lose. The evidence that he agrees to may not be available on the day of the trial because a witness does not turn up. There is no incentive for him to agree evidence and he cannot be forced to do so because of the nature of the adversarial system. One is always fighting against the tension between, on the one hand, the rights of the accused to put the prosecution case to the test and not to co-operate and, on the other hand, the endeavour to get the accused and the defence to co-operate to make the system run more effectively and efficiently.

Members have up-to-date figures on intermediate diets from the Crown Office. The layperson might be surprised at the number of last-minute guilty pleas. In England, a lot of time has been spent on the major problem of cracked trials. We have the same problems here: everyone turns up in court on the day of the trial; there have been umpteen hearings leading up to that; there have been adjournments; there have been intermediate diets to check whether the accused is going ahead with his plea; and then, lo and behold, on the day of the trial, the accused pleads guilty. That is the accused's right. As I have suggested, one of the main reasons for the accused's doing that is the hope that the main prosecution witness may not show on the day. That often happens, meaning that the case may have to be adjourned yet again or that the prosecution may throw in the towel. The accused will often hang on until the last moment but, on seeing that the main prosecution witnesses have all turned up, he or she will plead guilty. Because of the nature of the adversarial system, there will always be a lot of last-minute pleas. We can tinker around with the system, as has been attempted, but we will not really remove that basic tension.

As I said, I carried out an evaluation of the introduction of intermediate diets and agreement of evidence. A report was published for the Scottish Office. Members can have copies of that if they desire. Despite what I have just said, one thing struck me from the figures. Quite a large number of cases are disposed of at the intermediate diet—or first diet, as it is called in solemn procedure—because the accused pleads guilty at that stage and the trial can be cancelled with consequent savings in time and inconvenience to witnesses.

When intermediate diets and first diets were introduced, they were not implemented in the High Court, which obviously deals with only a small number of cases. The reasons for that are not clear to me. I think that it is to do with the fact that the High Court, because it is in circuit, does not sit in regular sessions in the regions, so a judge would not always be available to hear a first diet. It strikes me that that would not be the case in Glasgow, Edinburgh, Dundee, Aberdeen or any other major town. If some consideration were given to introducing first diets in High Court cases, we might be able to get rid of a number of cases that are scheduled for trial but that never come to trial. That is the type of thing that Lord Bonomy was complaining about and has been instructed to look into. It is an area that should be examined.

We found that intermediate diets were reasonably effective. The figures indicate that that is still the case. The diets take out a number of cases that do not progress to trial and allow trials to be cancelled at an early stage—two weeks or four weeks beforehand. For the reasons that I have given, we cannot get rid of all the cases that eventually fold or terminate in a guilty plea on the morning of the trial. However, we can make a dent in the number.

The effectiveness of intermediate diets and of adjournments depends on the culture in the court. In the sheriff courts, the culture is largely driven by the sheriffs. In the district courts, it is driven by a combination of the magistrates and the clerks. It is fair to say that, by and large, there is a culture of delay and procrastination. During our research on adjournment, we were told on more than one occasion that the first time a case comes up for trial the expectation is that the trial will never run. That is not much help to all the witnesses who are there or to everyone else who is not aware of that expectation.

There is evidence that, when the sheriffs or the magistrates in the district courts take a proactive approach to intermediate diets and challenge those involved—asking whether they really are ready to go ahead and, if not, why not, and whether all the witnesses are ready—that makes a difference. There is also evidence that, after an initial flush of enthusiasm in which such a proactive approach was taken, the courts are slipping back into the old way, where the intermediate diet is seen as a rubber-stamping exercise whereby the sheriff simply asks, "Are you all ready to go? Yes, fine. The trial goes ahead in a month's time."

If the intermediate diet is treated as a routine exercise, it is a bit of a waste of time. If the defence team says that it is not ready to go ahead with the trial and asks for an adjournment, there is not much point in the sheriff simply saying, "Yes, no problem." The sheriff must ask the defence its reasons for wanting an adjournment and he must say why he does not think that they are good enough. Sheriffs must maintain a proactive approach to change the culture in a court, which, as I said, is driven largely by the judges. Because there is a culture of delay and of leaving everything to the last minute, that is what will happen unless it is sat on.

I note that, in his recent submission to the committee, the Lord Advocate cited our research on adjournments. We found strong evidence of the success of intermediate diets. The rate of adjournments is markedly different in Kilmarnock sheriff court from that in the other sheriff courts that we looked at. As members will probably know, Kilmarnock sheriff court is notorious. I think that one can distinguish between its notoriety for heavy sentencing—and various other things that go on there—and its efficiency. In terms of efficiency, it deserves nothing but praise. The bad things or disadvantages that appear to go along with that do not necessarily have to accompany the advantages.

Rates of adjournment in Kilmarnock sheriff court are low. That is because the sheriffs are merciless in quizzing people on why they need an adjournment and in exposing them to severe criticism in open court if their reasons are not good enough. The sheriffs use another tactic when the prosecution or the defence—it is usually the defence—says at the intermediate diet that they will not be able to make the date of the trial. Rather than putting off the trial for four weeks, as happens in most courts, the sheriffs in Kilmarnock set the trial date for three days earlier than it was going to be. That prevents people from asking for adjournments and concentrates the mind wonderfully. A lot can be done to change court culture so that the judiciary takes a much more proactive approach towards case management.

11:30

Many adjournments and delays are unavoidable. A major problem, which may be no one's fault, is that an essential prosecution witness may not turn up at trial. Little can be done about that. The detailed figures are given in our research. Often, the solicitor will not have had a chance to meet the client until the pleading diet. Defence solicitors often claim that they are unable to go ahead because they have not been able to consult the client. Although that might seem a bit weak to an outsider, the criminal accused are often from what one might call a feckless population and have disorganised and chaotic lifestyles. It can therefore be hard for defence solicitors to pin them down to come in for meetings. The first chance for defence solicitors to get hold of their client is often at an intermediate diet, at which point the solicitors will say that they are not ready to go to a trial because they have not yet spoken to their client. However, I should point out that our research shows that some adjournments could be avoided by more proactive case management by judges.

The resources of the Procurator Fiscal Service is a relevant issue that often crops up. A common thread running through much of my research is that it is difficult for defence solicitors to get hold of the fiscal at an early stage to discuss a case and to reach some sort of resolution or agree evidence. That is largely because fiscals are so hard pressed. Ideally, defence solicitors would want to get hold of the fiscal the day before the intermediate diet and agree a plea, thus removing the need for the trial. Often, their only opportunity to do so is on the morning of the intermediate diet. The intermediate diets are due to start at 10 am and the fiscal is due to do 90 intermediate diets in that session. The fiscal will sit with a pile of files 1ft foot high with 20 defence solicitors buzzing around, all of whom are trying to cut deals for their clients. That is an impossible situation for anyone to be in. Inevitably, the fiscal does not have time to talk to each defence solicitor, so resolutions are not reached.

One or two courts—offhand, I cannot remember which—do not start their intermediate diet sessions until 11 am, which means that the fiscal has an hour or longer to negotiate with the defence solicitors. However, the problems could be avoided if the Procurator Fiscal Service had more resources so that there were people in the office when the defence phoned. Of course, defence solicitors are not blameless, as there is a culture—

The Convener: I will stop you there. When Bill Aitken and I visited Glasgow sheriff court, we witnessed—for the first time in my case—the situation that you describe. The fiscal was surrounded by loads of defence agents and was expected to respond to each one. One of the lessons that we learned from our visit is that no human being should be put in that situation. We are talking here about dispensing justice and my impression is that defence agents take advantage of the situation by shouting out things to get the fiscal in a tizzy. The depute fiscals whom we questioned at the Glasgow office complained that defence solicitors leave everything until the last minute.

Professor Duff: That is right. In a sense, there is a vicious circle. Experienced defence solicitors know that if everything is left to the last minute, the poor fiscal depute will be so hard pressed and have so much to do that the defence solicitor might be able to negotiate a better deal on behalf of their client than they would if they did not leave matters until the last moment. That impression has been created and it encourages people to leave matters until the last moment rather than negotiate or sort them out much earlier. As you say, that is a nonsensical situation.

The Convener: Let us go back to the beginning. Members might have questions about what you have said so far.

Professor Duff: Sure—I have probably gone on

for too long.

The Convener: After that we will come back and sweep up matters that you think members have not covered.

Bill Aitken: I have asked questions previously—although I have been unable to get answers—about the extent of non-payment of fiscal fines. The evidence that we have heard is apocryphal. However, it is powerful evidence that suggests that there is significant non-payment. Do you agree that the easiest solution would be to amend legislation to enable a prosecution to be mounted in the event of non-payment in full of a fine?

Professor Duff: That is obviously a possibility. However, I would be suspicious of such apocryphal evidence—no matter how powerful—until I saw hard figures. Back in 1990, we were told by almost everybody that non-payment was a significant problem. However, when we analysed payment of 600 fiscal fines—the number might have been higher—from around the country, there was little evidence that people were not paying all their instalments.

What Bill Aitken suggests is an option, but its trouble is that it would create an awful lot more work. The point of fiscal fines is to make procedures more efficient. If, halfway through the fiscal fine procedure, an element of prosecution were introduced, that would create at least double the amount of work.

Bill Aitken: What happens in the Netherlands and Germany in the event of default on payment of fines?

Professor Duff: Because systems in those countries are much larger and more formalised, they have provisions for enforcement that we do not have.

Bill Aitken: There is an obvious difficulty in the fact that the people in question here are prosecutors, not judges.

Professor Duff: That is right—that is the objection in principle that many prosecutors make. In Germany, that difficulty is overcome through penal orders, whereby prosecutors make all the decisions and those are then run past a judge. As I understand it, the judge merely rubber-stamps those decisions so that they have that seal of approval.

In the Netherlands, an elaborate sentencing tariff gives, on one side, details of all the offences in gradations of seriousness and, on the other side, the appropriate fine in court and the appropriate prosecutor fine. Prosecutors can simply look at that tariff and they are supposed to stick to it—the tariff imposes that measure of judicial control. Such a tariff would be a problem here, however, because there is no judicial supervision.

Bill Aitken: Let us turn to the question of intermediate diets. The committee visited the High Court in Glasgow, where I raised this point. It occurred to me that the courts could revert to the situation that existed prior to 1980, in which there was, in effect, a preliminary diet at a sheriff court before cases went to the High Court for committal. I was told that the practical difficulties of that would be considerable, that there would be no court space and that getting advocate deputes and counsel together to agree to that—albeit only counsel for the accused—would cause problems. Do you have any comment to make about that?

Professor Duff: That would apply only to a small number of cases. I cannot see that there would be any greater problems in getting people together for solemn cases in the sheriff court than for High Court trials. By using the evidence of the figures that you have, we could say that if—for example—there were 1,000 High Court cases a year, one might guess that 200 or 300 would be knocked out at the first diet stage. Whatever practical problems that might raise would probably be counterbalanced—or more—by advantages, because such cases would not have to be reconvened for trial.

Bill Aitken: I am attracted by that idea. In Glasgow, sometimes as many as 56 cases must be dealt with in a fortnightly sitting. Clearly, that could never be achieved. However, people at the High Court there insisted that the practical difficulties in that idea could not be overcome.

Professor Duff: There are other possibilities. The Auld report has just been published in England. It is a major report into efficiency in the criminal justice system. The report recommends that there should be a system similar to a pre-trial hearing—in fact, there is already something similar—in which it would be decided whether a trial need go ahead. It is suggested that such a system in England could be entirely paper-based and that judges would make decisions. If that were the case, the parties would not have to be convened—one could simply write to them all to find out their positions. I do not know how practical that solution is, but it is what the Auld report suggested.

Stewart Stevenson: I wish to return to fiscal fines and the different experiences of the Netherlands and Germany, to which you referred. There, 50 per cent of cases are dealt with through fiscal fines, as you described. Are you aware of the history of that situation? I presume that that system did not arise overnight from a previous position in which there were no fiscal fines—or the equivalent. Was a series of steps taken to build public acceptance of the new system?

Professor Duff: Yes—that is absolutely right, but those countries started the process earlier. At the time when the prosecutor fine was introduced in the Netherlands—I cannot remember the exact year, but it was about 1920—there was a series of changes whereby the number of fiscal fines was gradually increased and the whole system was gradually expanded. The fears of those who claim that we are moving towards a system of administrative justice—that will be carried out by prosecutors and will not involve judges—are borne out, but it seems that the transition in the Netherlands took place without much fuss.

The situation is the same in Germany. There, the system has been built up from small proportions and there have been continual changes. The situation used to be the same in this country; we started with fixed penalties for a few road traffic offences. That system gradually expanded and fixed penalties crept into what we would regard as criminal offences in the true sense, and the fiscal fine was increased to £100. One would not anticipate changing over to the Dutch or German system overnight; such a transition would be incremental.

Stewart Stevenson: Essentially, society accepts such a system. Is that because the mix of offences in the criminal justice systems in the Netherlands and Germany are broadly similar to ours?

Professor Duff: Yes. Very heavy penalties can be dished out in the Netherlands and Germany. In Germany, a penal order can even include a sentence of up to six months' imprisonment, I think.

Stewart Stevenson: Gosh.

Professor Duff: In the Netherlands, only financial penalties are issued, but there is no limit on fines.

Stewart Stevenson: So the only identifiable difference is in when those countries started the transition to a different system.

Professor Duff: Yes. There is also a question of politics: is it, with regard to what the public think, acceptable or unacceptable to continue with the current system?

Stewart Stevenson: I accept that but—wearing your manager's hat—is it worth knowing quite a lot about this matter?

Professor Duff: Yes.

Bill Aitken: As long as people pay the fines.

The Convener: I turn to case marking and the question of the public interest—I suppose that those are two separate subjects. You mentioned the ticking of boxes that fiscals do when there are to be no proceedings and so on. It strikes me that the fiscal holds considerable power in marking cases. Fiscals make decisions about which cases will go to court and which will not; they are making decisions about people's lives. I am not clear about the extent of supervision of those decisions that exists in the fiscal service. In any profession, there will be some human error.

The second issue—the public interest—is related to that. Way back in the then Justice and Home Affairs Committee—I am not sure whether Peter Duff will remember that—the members, of whom I think just Scott Barrie and I remain in this committee, were written to by a petitioner. The name of the case escapes me, but it was heard in Kilmarnock. In it, a young man died in a fire and the house was burned down. We were asked to ask the then Lord Advocate, Lord Hardie, why there had been no proceedings in that case. We were written to and told that that decision was in the public interest. We met representatives of Victim Support Scotland and so on, and no one to whom I spoke about that case could come up with a reason why such a decision could possibly be in the public interest.

The Crown Office decides to press charges of dangerous or reckless driving in a number of road traffic cases, rather than press more serious charges. MSPs are often asked to question those decisions, but we are not allowed to question what lies behind the phrase "in the public interest". I am in two minds about that. In the Kilmarnock case, an explanation should have been offered to the victim's family. However, I understand that if one went too far, one could also cause problems. The Crown Office must be able to make some decisions without having to explain exactly why those decisions were taken. Is there any way in which to strike a balance? What information could the Crown Office give when deciding to take no proceedings?

11:45

Professor Duff: Academics always characterise that difficult situation as one in which a balance must be struck between the independence of the prosecution system—which must be free from political interference or pressures—and accountability. It is fair to say that, historically, the Crown Office has been greatly lacking in accountability, although I think that that is changing. There are many ways in which the Crown Office could be made more accountable, although whether following such procedures would be desirable is another matter. In several jurisdictions on the continent, the victim of a crime is given the right to appeal to a court against a decision not to prosecute. The victim could be given the right to ask of a superior of the fiscal who made the decision that he or she review the

fiscal's decision. One could render the Crown Office more accountable by allowing people a way in which to challenge decisions in order to ensure that decisions are reviewed. It is difficult for the Crown Office to give reasons—the Crown Office has already explained to the committee the reasons for that difficulty, and I have some sympathy with its position. There are issues about witness confidentiality, privacy and so on. It might be very difficult for the Crown Office to give detailed reasons why it is not proceeding with a case.

In general, the Crown Office's traditional attitude is, "We are not accountable. We don't need to tell anyone anything." That is unacceptable. However, that attitude is changing, albeit slowly. The Crown Office is prepared to be more accountable. I do not know about the mechanics of that change, beyond the formalistic solutions such as giving the victim of the crime, or the relatives of the victim, the right to go to court to pursue judicial review of a prosecutor's decision.

The Convener: You talked about a high number of last-minute guilty pleas. I am interested in getting to the bottom of those figures, in order to identify whether there are reasons why that happens or whether it is a product of the culture that you talked about. I have been approached by several defence lawyers in Glasgow who say that many police statements are not available at the intermediate diet and that they cannot therefore assess the preparedness of their cases or their chances in court. That means that they cannot settle such cases at the intermediate diet stage. It would be hard to get evidence to support the defence lawyers' position, but I have received representations that the difficulties with the intermediate diet mean that cases must go to trial because defence lawyers cannot make judgments at intermediate diets. They believe that those difficulties are a result of the pressure on the Procurator Fiscal Service.

Professor Duff: There is evidence of those difficulties. Our research into adjournments in criminal cases in the sheriff summary court indicated that one of the main reasons for the problems with intermediate diets—as detailed by the Lord Advocate in his paper and as noted in the research report that I have in front of me—is that police statements have not been handed over to the defence. That is not usually the fault of the fiscal—it is usually the fault of the police. The statements are supposed to go from the police directly to the defence. If that does not happen, the defence solicitor is unable to assess the strength of the case against his client and consequently he is unable properly to advise his client. Caution would then dictate that the solicitor would advise his client to plead not guilty. Earlier provision of police statements would certainly be helpful. Our research identified that that was a genuine problem.

Bill Aitken: In my experience of call-overs for trials in which a plea of not guilty was maintained, that plea was subsequently not adhered to after the witnesses were checked and found to be present. Can you comment on those situations?

Professor Duff: Absolutely. As I said before, such situations are inherent in the adversarial system. If I was being prosecuted for any criminal offence—which I hope sincerely will not happen—I would plead not guilty right up until the last moment; anybody who had any experience would plead not guilty right up to the last moment. I would do that in case a witness did not turn up. Only when I was sure that all the witnesses were in court would I plead guilty.

It is clear from various pieces of research that I have done that the longer a trial is delayed and the more adjournments there are, the more likely it is that the Crown will run out of steam and that it will fold and abandon the case. Anybody would be well advised to plead not guilty until the last moment because that offers the best chance of getting an acquittal.

Bill Aitken: When the intermediate diet was introduced in the mid-1980s, it was inferred that there should be sentence discounts. Is there evidence to suggest that that has happened?

Professor Duff: I was going to come to that. Section 196 of the Criminal Procedure (Scotland) Act 1995 was the next subject on my list. No research has been done on sentence discounts, but all the anecdotal evidence that I heard in the course of projects in which I was involved—on adjournments, intermediate diets and most recently with the Public Defence Solicitors Office in Edinburgh, from which we got some valuable information—indicates that there are no sentence discounts.

In England, as members probably know, there is a formalised system in which it is recognised that one third of the sentence will be taken off for an early plea. The court must specify what reduction a convicted person will get and, if they will not get one, why not. In Scotland, the legislation says that the court "may take into account" an early plea. Many sheriffs have told me that they think that the discount is unprincipled and that they will not discount. The incentive to do so is absent.

The sentence discount raises difficult theoretical issues. In an adversarial system, if we give the accused the right not to co-operate and to put the prosecution case to the test, why should we be able to penalise him for exercising that right? That takes us into a difficult philosophical and academic debate—a debate about which legal scholars are still arguing.

In practice there is no sentence discount in Scotland, but there is in England.

The Convener: I apologise for our being so short of time this morning. We have been called to Parliament early today for reasons that you are probably aware of, so we have only a few minutes left. Are there any points that you have not covered that you would like to put on the record?

Professor Duff: I will make three other points and perhaps go slightly beyond my remit. Research into the PDSO in Edinburgh—in which I was involved and which was published a couple of months ago—and other research that I have done indicate that if we change the structure of legal aid we might be able to increase the efficiency of the system in that we might be able to get more guilty pleas earlier. At the moment the incentives do not work correctly and they need to be reconsidered. There is no doubt that—in what we might call an ethically neutral or ethically confused situation—a financial incentive will drive a legal practitioner just as it would any other professional. That could be achieved by changing the structure of legal aid and front-loading it so that there is more money.

At the moment there are benefits to not pleading guilty at a pleading diet and going to an intermediate diet—there is certainly a financial benefit in that. The committee should examine legal aid, which would go beyond the remit of the inquiry into the Crown Office and Procurator Fiscal Service, but the matters are all tied up together.

I have also seen various bits of evidence to suggest that the system for appointing advocate deputes is a nonsense. I agree with that; the entire system is historical. The prosecution of cases in the High Court is used simply as a training exercise for judges. It strikes me that it is not acceptable to train judges through prosecuting cases in the High Court. Appointments should be made on merit, not on the basis of who needs to be trained. Other witnesses have said that; I merely back it up.

My final point relates to what Scottish Women's Aid said. The Crown Office is moving in the right direction on liaison with victims. However, liaison is largely a question of resources. As the Crown Office said in its evidence to the committee, many new burdens have been put on the Procurator Fiscal Service, such as intermediate diets, which mean extra court hearings, agreement of evidence and victim liaison. Unless we provide the resources that will allow the fiscal service to carry those burdens, problems will occur, which has happened. I suspect that that is not a new story for the committee.

The Convener: I am afraid that we must close with that. The meeting has been extremely useful and I cannot thank Professor Duff enough. Everything that you have said will be in the *Official Report*, which is important because that will allow us to go over and think about what you have said in more detail. If you do not mind, we will liaise with you if we need more detail on some of the points that you made.

Professor Duff: If you need references to any of the literature, research or reports that I have mentioned, I will happily provide them.

The Convener: It is good of you to take the time to advise the committee. We are extremely grateful for that and I record our thanks.

The meeting will go into private session for literally 60 seconds. We have only one matter to agree.

11:56

Meeting continued in private until 11:57.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178