JUSTICE 2 COMMITTEE

Wednesday 27 February 2002
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
7th Meeting 2002, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Bill Aitken (Glasgow) (Con)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Mr Duncan Hamilton (Highlands and Islands) (SNP)
George Lyon (Argyll and Bute) (LD)
*Mr Alasdair Morrison (Western Isles) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

*attended

WITNESSES

Gerry Brown (Law Society of Scotland)
Professor Christopher Gane (University of Aberdeen)
Anne Keenan (Law Society of Scotland)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Fiona Groves

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 2

Scottish Parliament

Justice 2 Committee

Wednesday 27 February 2002

(*Morning*)

[THE DEPUTY CONVENER *opened the meeting at 10:02*]

The Deputy Convener (Bill Aitken): Good morning, ladies and gentlemen. The convener has some transport problems this morning, but I hope that she will arrive in the not-too-distant future. We have a fairly tight schedule and a lot of work to get through today, so we will make a start. We have received apologies from George Lyon, but I hope that all the other committee members will be present at some point.

Items in Private

The Deputy Convener: I ask members to agree to take item 5, which is our draft report on the Land Reform (Scotland) Bill, in private. Do members agree?

Members *indicated agreement*.

The Deputy Convener: We will also wish to consider a revised draft report on the Land Reform (Scotland) Bill in private at next week's meeting. Do members agree to doing that?

Members *indicated agreement*.

Sexual Offences (Procedure and Evidence) (Scotland) Bill (as amended at Stage 2)

The Deputy Convener: The next agenda item is the Sexual Offences (Procedure and Evidence) (Scotland) Bill. We will hear additional evidence on an amendment—amendment 16—that the Executive lodged fairly late in the day. The amendment proposes that an accused person's previous convictions may be referred to during a sexual offences trial. Members have before them a list of questions that were suggested by the clerks as a basis for our questioning.

We will hear first from Professor Christopher Gane, whom I welcome to the committee and thank for his further contribution to our discussions on this matter. Professor Gane, we have read your submission with interest. Do you wish to amplify any part of it?

Professor Christopher Gane (University of Aberdeen): I do not think that it is necessary for me to add to what I have already said. I am sure that it would be better for the committee if we were to move straight to questions.

The Deputy Convener: I agree. Do members have any questions to put to Professor Gane? I see that Mr Stevenson is looking uncharacteristically hesitant.

Stewart Stevenson (Banff and Buchan) (SNP): I am sorry, but the Land Reform (Scotland) Bill has hypnotised me to the extent that I am less prepared than usual.

The Deputy Convener: In that case, I will start off the questioning. Your paper was extremely useful and most interesting, Professor Gane. Is the Executive's assessment of the present position realistic? From your experience, if the legislation had been in force, in how many cases would the question of previous convictions have been relevant?

Professor Gane: On the second question, I am unable to give a figure to the number of cases in which previous convictions would have been relevant. I am not aware that such figures are gathered.

As I said in my previous oral evidence and set out in my follow-up paper, the general thrust of the bill is entirely correct and defensible. It is necessary to address the situation of complainers who, in the past, may not have been as well protected and served by the legal system as they should have been. Given that the bill properly addresses the question of balance and fairness towards the complainer, my major concern is that

the additional and late amendment drives matters too far in the other direction.

My concerns are not whether it is ever right to reveal previous convictions; they are about how to determine which previous convictions should be revealed in the criminal process. The heart of the question is whether that previous conviction should be of a kind that is listed in a statutory provision or whether it should have some greater factual similarity or relevance to the issues that are before the court. The bill is not as good as it could be on that.

One way in which the bill could be improved, while maintaining the appropriate opportunity for previous convictions to be introduced, would be to examine the criteria that should be applied in the cross-examination of the complainer about her character and antecedents. If the bill becomes law, those criteria, which are set out in section 8, will be inserted into the Criminal Procedure (Scotland) Act 1995, in what will be new section 275. It is clear that the important criteria are those that involve relevance. New section 275(1)(b) states that evidence may be admitted if the court is satisfied that

"that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged".

New section 275(1)(c) states that the court must be satisfied that

"the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited."

It is not unreasonable for previous convictions to be introduced. I am not sure whether we can move on to the practicality of that; the representatives of the Law Society of Scotland, who are to give evidence next, may have something to say about the practical implications of the provisions. As a matter of principle, it is not unreasonable that, if previous convictions are to be introduced, they should satisfy a test of the kind that is set out in new section 275.

The Deputy Convener: You referred to the nature of the conviction. Are you saying that you would have no objection to analogous convictions being placed before the court, but that you would have an objection to the Crown having carte blanche to introduce convictions for a wide range of offences? If so, would you exclude convictions for offences such as motoring offences and breaches of the peace, as opposed to offences that have a sexual connotation?

Professor Gane: There is no justification for introducing completely irrelevant previous convictions. It is extremely difficult to see what relevance a previous conviction for a non-analogous offence would have to the procedure.

I want to go slightly further by saying that even if the previous conviction is analogous in the statutory sense—that is, it is in the list in the bill—there might be arguments against introducing it. In my written submission, I give the example of a man who is charged with rape and has a previous conviction from some time ago for unlawful sexual intercourse with a girl. Both cases have a sexual content, but the fundamental difference between them is that in one the Crown's case is predicated on the fact that the woman did not consent and in the other it is predicated on the basis that the woman consented. Unlawful sexual intercourse with consent is a statutory offence; without consent, it becomes rape.

Such offences should not always be excluded, but we should not automatically assume that they must be included. The Crown should have to demonstrate that the previous offence is factually relevant, that it will help the jury and the court to reach the right conclusion and that the interests of justice require that it be introduced.

The Deputy Convener: How should the court handle a situation in which the previous conviction relates either to perjury or to an attempt to pervert the course of justice?

Professor Gane: The bill does not bring out the important distinction between evidence of previous convictions that goes towards proving what lawyers would call sufficiency—it proves that the accused committed the crime—and evidence that attacks the credibility of the accused. In rape cases, it can be argued that a prior conviction for offences such as perjury or an attempt to pervert the course of justice is relevant to attacking the credibility of a witness—whoever it might be—but I am not sure that such evidence is relevant to whether the accused is likely to have acted in a sexually aggressive manner towards the complainer.

The Deputy Convener: The Executive argues, and I think that everyone agrees, that the bill is about achieving a balance. Differences of opinion arise over the point at which balance has been reached. Without amendment 16, would the bill be balanced and fair to everyone?

Professor Gane: A case can be made that the bill is balanced without amendment 16. An amendment of that type would improve the bill, but amendment 16 is not good because it fails to tackle the factual relevance of previous offending behaviour. That behaviour is relevant; studies show that certain patterns of behaviour emerge in some sexual offenders. If such a pattern emerges in a case, it is not unreasonable to suggest that it is more likely than not that the accused is guilty.

Under the bill, that type of issue cannot be well

addressed unless the court considers whether introducing the evidence is in the interests of justice. The bill has the presumption that introducing previous convictions is in the interests of justice, but I am not sure that it is correct to presume something that could have a serious impact on the jury. Evidence from objective studies shows that some previous convictions are likely to have a significant impact on jury perceptions. For example, convictions for offences of indecency and recent convictions for similar offences are likely to have a significant impact on jury perceptions.

Stewart Stevenson: When we considered juries' behaviour, we were told that no studies had been done. Will you refer us to the studies that you mentioned?

10:15

Professor Gane: Yes. The Home Office commissioned a study by Sally Lloyd-Bostock in 1995. She reported its general findings on page 734 of the *Criminal Law Review* for 2000. Lord Justice Auld referred to the study in the official report of his substantial inquiry into the criminal justice system in England and Wales. There have been studies in New Zealand to which, I think, Lord Hope referred in a recent case before the Privy Council. There is a substantial amount of information about the potential impact of previous convictions on jury perceptions.

It would be misleading to say that the findings are always consistent with each other. There are different views, but patterns can be seen. I am not saying that that is a good reason for excluding previous convictions. However, if they are to be used, one must be sure that some relevance to the issues before the court can be demonstrated, otherwise there is a risk that the balance between the probative value of that evidence and its unfair and prejudicial impact will be incorrect.

Stewart Stevenson: Should it always be proper to disclose an offence that caused a guilty person to be put on the sex offenders register? Is that a test?

Professor Gane: Again, the difficulty is that a wide variety of circumstances lead to offenders being put on the sex offenders register. I can imagine situations in which there is a kind of sexual offending that fully merits registration but that is not in any sense related to or similar to the offence with which the person has been charged. Members may recall a recent example—I think that the High Court reversed the decision—of a man being placed on the sex offenders register because he had allowed shamelessly indecent behaviour in a pub that he ran in Elgin, I think. He had foolishly allowed a girl who was under 16 to strip off for free drinks. That is significantly different from a man being charged with raping a woman. I am not saying that such behaviour should be excluded, but the question of the relevance to a case of a person's previous offending behaviour needs to be addressed. Perhaps the fact that an offence is one of the scheduled category of offences is not sufficient.

Stewart Stevenson: You seemed to imply that there should be a category of spent sexual convictions and that, if an offence was committed far enough back, it should cease to be relevant. What tests might reasonably apply to reach a view on that?

Professor Gane: I am sorry if I gave the impression that time is a critical factor—I should correct that. I am not sure that time is a critical factor, although time, the circumstances and the nature of an offence are all relevant considerations. Under the bill, such considerations can be dealt with only by the judge being asked whether a decision is in the interests of justice. I am not sure whether that test is particularly helpful and I am not sure how things will be done in practice in the courts without further guidance.

Pauline McNeill (Glasgow Kelvin) (Lab): I apologise for being late. I am interested in the balance of evidence, which is what we and the Executive are trying to achieve through the bill. We found difficulty in obtaining evidence to support our suspicions about the tactics that defence agents use against complainers in the witness box. Defence agents try every trick in the book to get complainers' sexual histories out to try to tarnish their reputation with juries, as you said. The bill is about trying to achieve a balance. If the defence is going to put the case to the sheriff or judge that they should be able to disclose a woman's sexual character or history, a provision for the automatic revelation of previous convictions will make them think before they act. Surely that would be one way of balancing the interests in the evidence.

Professor Gane: Yes, I understand that argument. However, it is a kind of in terrorem argument and I am rather uncomfortable with it. The logic of all this is somewhat different from what the bill has produced. This is a development of what I said earlier, which I have been thinking about. It seems to me that the question is essentially whether the accused's previous convictions should be used in evidence in a sexual offence case in any circumstances. The bill suggests that previous convictions should be used if he decides—it will generally be a "he"—to attack the character of the complainer and if certain conditions are satisfied. However, if we genuinely believe that the previous convictions of the accused are relevant considerations, that should

be established from the beginning without the in terrorem argument. That argument is not offensive, but it is not a good principle to threaten to introduce evidence simply to constrain the way in which a defence might be presented. I am not sure that I like that idea.

I would much prefer a more honest and straightforward rule whereby, if the Crown can establish that a person's prior offending behaviour is genuinely relevant and has a sufficient probative weight that will outweigh potential prejudice, the introduction of such evidence should be allowed. That is a much wider principle, but it is the right one. The approach is a principled one, provided that those factually relevant questions can be satisfied and the judge can decide whether the interests of justice want such evidence.

Pauline McNeill: Is that not a lower test? You are saying that, even if the defence does not ask for the complainer's history to be revealed, the judge should consider whether it should be disclosed.

Professor Gane: The logic of the argument is that that should be possible in any event.

Pauline McNeill: The Executive states categorically in its evidence that the bill complies with the European convention on human rights. However, you are saying that it does not.

Professor Gane: No, I think that the bill is ECHR compliant. As it is drafted, I cannot see what the ECHR objections would be. The convention does not say much at all about rules of evidence. Rules of evidence are diverse across Council of Europe member states. I take issue with what the Deputy Minister for Justice said about the way in which previous convictions are used in other European countries. I consulted a colleague who is a senior member of the academic profession in Belgium—a seriously regarded lawyer—who said categorically that, if a French or Belgian judge took a previous conviction into account and used it as the basis for convicting, that would be regarded as an error of law. The Executive's interpretation of practice in other European countries is therefore wrong.

Nevertheless, nothing in the bill is incompatible with the European convention on human rights, which says little about evidence. The European Court of Human Rights tends to ask whether the accused has had the opportunity fairly to challenge the evidence that the state has put forward and to test it by whatever procedures are provided. By and large, that is what happens in this country. After all, the accused is given the opportunity to challenge the complainer and to test the complainer's evidence. The way in which that is done is restricted. The European Court of Human Rights has said that the interests of the accused in a criminal case have, from time to time, to be balanced against the interests of the victim and other witnesses, including the victim's right to respect for their private life. Nothing is impossible, but I would be surprised if the bill could be challenged on ECHR grounds.

Pauline McNeill: Are there other reasons why disclosing previous convictions in court might be a problem? Would that cross over issues of rehabilitation of offenders, for example?

Professor Gane: I cannot answer that off the top of my head.

Pauline McNeill: I am interested in the question that you posed about relevance. Does the bill require more to guide judges on what is relevant, or should that be left mainly undefined?

Professor Gane: The provisions that apply to the grounds on which it is permissible and acceptable to cross-examine a complainer about her antecedents could appropriately be adapted to the question whether evidence of previous convictions should be introduced. For example, a judge could be explicitly asked to address whether the probative value of the evidence of previous convictions is significant and likely to outweigh any risk of prejudice. That formulation is not dissimilar to the way in which English courts now deal with previous convictions.

The Deputy Convener: Scots law has precedent for references to previous convictions, such as when the accused is charged in a special capacity—the most obvious examples are cases of prostitution or those in which the accused is a known thief. Does the provision depart greatly from that principle?

Professor Gane: The provision extends that principle a long way. You are right: there is no blanket prohibition. The legal system has just been generally unwilling to accept the idea, because we have failed to address the general question of the relevance of a previous conviction. Sometimes, previous convictions can be relevant.

The Deputy Convener: In the cases that we are discussing, there are always problems with corroboration, because apart from the odd bizarre case, which does not concern us, normally only the accused and the complainer are present at the crime. The Moorov principle allows corroboration on the evidence of a series of individual complainers. Could the Moorov principle be extended?

Professor Gane: If previous convictions were introduced as corroboration, that would be an extension of Moorov, but that relates to a problem in the bill. One infers from what the Deputy Minister for Justice said and from the Executive's evidence that the evidence of previous convictions

goes beyond corroboration and on to the question whether evidence is sufficient. One should ask whether the evidence of the complainer and of an analogous previous conviction would be sufficient to convict.

The Deputy Convener: That is the question.

Professor Gane: I would be happier with that conclusion if I were satisfied that a previous conviction was really similar or relevant. I would be unhappy with evidence that, for example, a person who was charged with indecent assault had a scheduled or listed conviction that had no particular similarity to the present offence or that did not suggest that the person was likely to do that kind of thing or had done it before. I would be unhappy about that being a sufficient ground for convicting for what is, after all, quite a serious offence.

The Deputy Convener: If there are no further questions for Professor Gane, I thank him for a clear exposition of the situation. We are much obliged. I now hand over to the convener.

10:30

The Convener (Pauline McNeill): I thank the deputy convener for taking charge in my absence.

Our next witnesses are Anne Keenan and Gerry Brown from the Law Society of Scotland. Good morning and thank you for attending the Justice 2 Committee once again. Does the Law Society of Scotland support the idea that previous convictions should be disclosed?

Anne Keenan (Law Society of Scotland): I start by thanking the committee for inviting us to give evidence on this matter. It is clearly an important issue. The Law Society agrees with the statement that the Deputy First Minister made when he discussed the issue. We agree that complainers in sexual offence trials should not be subjected to unduly one-sided criticism of their character or behaviour. We hope that the newly drafted section 275 of the Criminal Procedure (Scotland) Act 1995, as contained in the bill, in conjunction with the existing provisions of sections 266 and 270 of the 1995 act, will ensure that a balance is struck between the interests of the complainer, the accused and society as a whole.

Ultimately, it is for the Parliament to decide whether to go a stage further on a policy issue and to implement the new measures on disclosure of previous convictions. Before you decide that, the key question—which is along the lines of what Professor Gane said—is, what is the function of the measures? That is a difficult question to address, unless we know what the Executive intends to do with information on previous convictions. Will the information go to the question of sufficiency? Will it be accepted as enough evidence to prove a charge, or will its effect be restricted to a matter of credibility?

That distinction has to be made clear in the bill, not only so that the Parliament can understand and debate the policy properly but, from a practical perspective, so that the intention of the bill and how it will work is understood. In particular, that is necessary so that in directing a jury a judge will be able to say, "You have evidence of a previous conviction before you. This is what you can take from it. You can look to it for corroboration of the complainer's evidence," or, "You can't do that. You can only look at it from the point of view of whether you believe the accused." It all depends on getting to grips with the intention of the amendment that was made to the bill.

The Convener: So you think that it would be helpful if the function of the provision were made clearer in the bill, so that judges could ascertain what Parliament intended.

Anne Keenan: Absolutely. The intention has to be clear. The thrust of the legislation is that we want a better system for victims. We do not want retrials because a judge has misunderstood or misinterpreted the function of the legislation and has misdirected a jury. The aim behind the legislation must be clear.

Bill Aitken (Glasgow) (Con): Is Mr Brown—a long established Glasgow solicitor, now a solicitor advocate—happy with a departure from a basic principle of Scots law by allowing the introduction of information about previous convictions?

Gerry Brown (Law Society of Scotland): As Mr Aitken said earlier, there are already provisions within Scots law for previous convictions being relevant, for example, in cases of driving while disqualified. As many witnesses have indicated, a balance must be struck. Without amendment 16, the bill strikes that balance. What concerns me about amendment 16 is that it would put the balance out of kilter. If certain changes were made, I would be comfortable with a previous conviction being revealed in advance of the determination of a case. Those changes have been touched on by Professor Gane and Anne Keenan.

One of the most important changes is to establish clearly what the purpose of revealing the previous conviction is. Anne Keenan spoke about that a moment ago. The second important change to safeguard the amendment and any challenges to the bill in due course would be to ensure that the onus remains on the Crown to allow the conviction to be revealed, once allowance had been given by the judge to allow the admission of certain evidence of sexual history. As the bill is framed, it is presumed that disclosure of the

previous conviction will be allowed—the onus is on the accused to challenge that. What are the criteria of that challenge? At present, they are very restrictive. The words "interests of justice" are used, but there is no guidance as to what is meant by them. Other legislation and regulations refer to interests of justice, but include guidance as to how a judge is to interpret that. That must be clarified in the bill.

Bill Aitken: Proponents of the bill have real concerns, which we all share, about the low percentage of rape convictions. The discussion is about achieving the appropriate balance. In summary, does the bill as its stands, without amendment 16, restore a reasonable and equitable balance?

Gerry Brown: If the previous provisions had been properly implemented and used as regularly as intended, the bill would not have been necessary. Having considered all the evidence, I take the view that the bill is now necessary, excluding amendment 16, which must be considered very carefully.

The impact of the bill and its effect on convictions or acquittals will need to be examined in due course. One must always bear in mind the special nature of the allegations in question. I will not bore the committee with all the details of that.

Stewart Stevenson: Taking a jury trial specifically, do you think that the point at which previous convictions are disclosed will matter to the way in which the jury considers the evidence? It could be disclosed right at the beginning before any evidence is heard, immediately before or after the accused gives evidence or perhaps only in the summing-up. Do you think that there will be different effects on outcomes depending on when and how evidence of previous convictions is disclosed?

Gerry Brown: We have provision for the determination of previous convictions being disclosed at an earlier stage, possibly 14 days beforehand, if an application is successful. In any event, if a previous conviction is being disclosed, it will have to be disclosed before the jury is directed by the judge. My opinion is that the timing of that will be of no major significance to a jury's determination of the verdict.

Anne Keenan: The important thing will be what directions the judge gives the jury about the effect that the information can have on the determination of the verdict. That goes back to the first point, about what the function of the amendment is and what the judge can tell the jury that it can take from it.

Stewart Stevenson: So the key role that the judge has with the jury is at the core of whether the provision will work.

Anne Keenan: The judge will assist in the clarity and the smooth operation of the provision. We must have a clear determination in the bill about the purpose of the provision, so that the judge can discharge his or her function properly.

Gerry Brown: The judge has to address the jury on the law. The judge has to know whether the conviction, if revealed, would—as Professor Gane stated—corroborate the complainer's evidence. However, if the conviction reflects on the credibility or the reliability of the accused and whether the accused is telling the truth, and is part of another body of evidence—such as the evidence of two or three witnesses plus admissions—the judge will have to say that it is the jury's job to weigh that up. Finally, the third position is that the information may simply be what is called an adminicle of evidence—another element of the evidence that the jury has to consider. On the amendment, we are unclear—we lawyers are often unclear—what we would tell the jury if we were in that position.

The Convener: Obviously, it is for the jury to listen to the evidence and give due weight to whatever it thinks is appropriate. Is there any difference between the weight that the jury would attach to revelations of the complainer's sexual history and that which it would attach to the accused's previous convictions?

Anne Keenan: That is a difficult question. There has been some research, to which Professor Gane referred, on the weight that juries place on previous convictions. I do not know whether there have been any comparative studies of the weight that juries attach to the complainer's sexual history and that which they attach to the accused's previous convictions. However, the fact that we do not know about that is all the more reason to apply a test to ensure that the same degree of fairness is applied in each case, so that the jury only hears about a complainer's previous character if the probative value is such that it will not have an undue weight on the jury's determination of the verdict. If we are going down that route in connection with sufficiency, the fact that we do not know the comparative effects would be all the more reason to apply the same test to the disclosure of a previous conviction.

The Convener: So you would want the same test to be applied to the previous conviction that is applied to the disclosure of the complainer's history and you would wish it to be clear what direction the judge gives to a jury in relation to that provision.

Anne Keenan: If it is a question of sufficiency, and therefore the previous conviction could be a corroborating element in the case—as it would appear to be, judging by the tenor of the evidence that we have heard from the Executive—we should say, "We have considered this issue in

relation to section 275. What is appropriate for the complainer? When is it appropriate that this be disclosed?" The whole weighing process, the probative value and the relevance all come into play when considering that. For the protection of the accused, sufficiency would also have to be considered.

Mr Duncan Hamilton (Highlands and Islands) (SNP): On the proper administration of justice, are you saying that, until there is further clarification of whether the information goes to sufficiency, corroboration and so on, any impact on the jury cannot be evaluated by the judge?

Anne Keenan: No. I am saying that we do not know. I am not aware of any comparative studies of the effect of such disclosure on the jury.

Mr Hamilton: But in the absence of that evidence, what would you take from this?

10:45

Anne Keenan: It would be fair to apply the same test in both cases before the evidence reaches the jury to ensure that the same weighing process is carried out and that the probative value and so on are taken into account.

Mr Hamilton: Witnesses this morning have said that the bill's use of the phrase

"in the interests of justice"

causes problems. If that phrase is not to be used, what could we put in its place?

Gerry Brown: There must be criteria. As Anne Keenan has already pointed out, if the onus is on the Crown to make the application and there is no reverse presumption, we need the test that applies to the admission of previous sexual history. I will not read it out, but new section 275A(4) of the Criminal Procedure (Scotland) Act 1995, as proposed in the bill, lists four grounds on which an objection can be made. How is the judge to decide on that basis? Paragraph (c) says that an objection can be made if

"the conviction does not apply to the accused".

Well, either the accused did it or he did not do it and, given the grounds for objection outlined in paragraph (d), either he admits the conviction or he does not. Paragraph (a) stipulates that an objection can be made if

"there was not a substantial sexual element present in the commission of the offence".

However, the paperwork would reveal that. Finally, paragraph (b) allows an objection to be made if

"a conviction would be contrary to the interests of justice".

How can a judge decide that, if there are no other criteria? His role will be pretty simple—indeed, he will be defunct—if all he has to do is sit there and ask the accused whether the conviction applies to him and whether he or she admits the conviction, and then simply consult the paperwork to find out whether the offence contains a sexual element. How does he go with the next test? That would be my problem if I were sitting there, trying to decide what was in the interests of justice.

Mr Hamilton: In the absence of the clarification that you seek, is that an impossible role for a judge?

Gerry Brown: In the absence of such clarification, the judge would be wondering about the criteria for deciding what is in the interests of justice.

Anne Keenan: Another question is the mechanism that the judge can use to establish what is in the interests of justice. For example, would they hear parole evidence? Presumably the accused would make some representations to try to establish that a conviction was not in the interests of justice. However, how far does one go behind the extract of the conviction? A judge has only the bare narrative of the charge. Would the accused then be able to outline the circumstances of the case, which are not disclosed in the extract of the conviction, and to argue that they were not relevant and should be excluded in the interests of justice?

We also have to consider the Crown's role in this respect. Would it have to look at old case papers and then disagree with the accused's version of the facts and circumstances behind the extract of the conviction? That would almost mean another trial of the initial offence. It is not clear how the mechanism for probing behind the extract of the conviction would work and therefore how the judge would determine what is in the interests of justice. As a result, we want some clarification of how that would work in practice.

The Convener: Is it fair to say that what you have described also happens when the complainer's sexual history is asked to be revealed? The judge has to examine the circumstances behind the incident. We have already discussed with you and Gerry Brown pre-trial issues, and the particular dangers of having a trial within a trial and the ordeal that the complainer would have to go through. We have taken all that on board. However, I do not see the difference in this respect. Although I note your comments about the tests that should be applied, the judge will have to examine the matter in relation to the complainer. As a result, the principle would be the same for the complainer and the accused.

Anne Keenan: The difference is that, when a judge considers a case from the complainer's

perspective, he is dealing with an instant case and therefore with all the facts and circumstances as they will emerge during the trial. As we have heard, the judge could call the complainer to give evidence and use the trial-within-the-trial procedure. That means there is some way of testing that information. What is not clear is how any dispute between the Crown and the defence over the facts is to be resolved if, in consideration of a previous conviction, the defence leads evidence of what happened on a previous occasion. That is the real issue.

Gerry Brown: There is a slight practical worry about going down that road without establishing criteria. If a previous conviction were allowed to be admitted, would the judge not be required to make a decision before the court—based on whatever criteria or interests of justice—on an agreed narrative, regarding what the previous conviction was about? In such cases, in making a finding in the knowledge that it may be used again, a judge or sheriff may be obliged to have a full report of the evidence prepared, which would have to be agreed by both parties.

Bill Aitken: You raise an interesting point. One also wonders how current court records might be. Let us consider a situation that could arise. One of your clients, Mr Brown, who offends fairly frequently and is not able to—

Gerry Brown: I do not have clients like that.

Bill Aitken: Unfortunately, I have dealt with a few of them, as you know.

Gerry Brown: I do not deal with such people personally.

Bill Aitken: Let us suppose that a client has offended regularly but not seriously, over a period, and is unable to avail himself of his rights under the Rehabilitation of Offenders Act 1974. Let us suppose that he has a conviction for indecent exposure, dated 1981. As you may recall, prior to the introduction of the Civic Government (Scotland) Act 1982, if someone in Glasgow was charged with indecent exposure, there might have been no sexual aspect to that offence. The fact was that, in dealing with cases of urinating in a public place, the fiscals had to rely on some ancient legislation that imposed a maximum fine of £2. Therefore, someone who urinated in a public place was charged with indecent exposure. That would go down on that guy's record as an act of indecency. Most people would think that such an offence would have a sexual connotation, but it could be simply that, after a night at the pub, he had been caught short on the way home.

Gerry Brown: Yes, that is absolutely right. That is why I highlight the issue. The historical records may not be clear cut. However, if the bill becomes an act and aspects of amendment 16 are in law, it may be incumbent on sheriffs, judges, magistrates and bailies to compile a report in such cases so that, if there is a further allegation and the evidence is likely to be used, all the information will be available.

In the example that you have cited, it would be incumbent on the Crown and the defence to hold a meeting to clarify the situation. There would be an intrinsic unfairness in using that previous conviction.

Bill Aitken: Equally, to balance the argument, a previous breach of the peace could have had a sexual content but the record would just say, "Breach of the peace, Glasgow sheriff court, £300 fine." As far as anyone would know, that could have been a football-related breach or a bad breach in the street.

Gerry Brown: Correct. It could have been a housebreaking. Housebreaking often contains elements of some concern.

In response to a question, Professor Gane referred to the extension of previous convictions into other areas. We already have a list, and we are having enough problems with that. I would be keen to have the balances that we are talking about in place before we look to do anything else.

Stewart Stevenson: I want to pick up on something that was said earlier, which I may not have understood properly, concerning amendment 16 and proposed section 275B. In a sense, I am asking you to speak for the Executive, which is rather unfair. Subsection (2) says that applications that are made at a later stage have to be considered

"in the absence of … any person cited as a witness".

I think that I heard reference to a complainer being present when issues such as this were being considered. Did I?

Gerry Brown: Yes. The application—

Anne Keenan: Is this in reference to when the convener asked about the difference between the weight that the jury would attach to revelations of the complainer's sexual history and that which it would attach to the accused's previous convictions?

Stewart Stevenson: Yes.

Anne Keenan: The distinction that I was drawing at that stage was that we were considering when you would admit evidence of the sexual history or behaviour of a complainer. Provision is made under section 275 of the bill that, in determining whether it would be proper to admit that evidence, the court can take evidence to determine the issue. That would be within the usual context of a trial within a trial or at a pre-hearing diet to which they may call the complainer.

The defence would put the questions that they were seeking to ask and the Crown would do so. The judge could make a decision at that stage about whether the questions should be asked in the trial. It is like a procedure outwith the trial. That would only be relevant in relation to the complainer's situation.

The other distinction that we made was on when it would be appropriate to disclose the accused's previous convictions. The accused may be saying that it is not in the interests of justice that the previous conviction goes before the jury. That matter would be dealt with outwith the presence of any witnesses. We were asking how it is determined whether it is in the interests of justice that that conviction goes before the jury. Would evidence of the previous conviction and what it entailed have to be led before the court?

Stewart Stevenson: If I understand you correctly—I am hanging on by my fingernails—parts of the court's consideration as to relevancy would take place in the absence of both the complainer and the accused.

Gerry Brown: No. The accused would be present.

Stewart Stevenson: I beg your pardon. But the complainer would be absent.

Gerry Brown: You would make an application, which might be heard by way of ex parte statements from the Crown and the defence. The judge might say, "I cannot decide this on ex parte statements, because I have to know exactly what the complainer is saying about a certain situation." The application would then be delayed until the complainer gives evidence, probably the same day, and the judge would then make a determination on the facts that were relevant to the law.

Stewart Stevenson: I think that I am still hanging on.

Gerry Brown: So am I.

The Convener: We discussed that point at a previous meeting—it seems a long time ago. A new set of amendments now allows the issue to be determined before the trial; previously that was not absolutely clear. Provision is also made for a trial within the trial, which is probably not the preferred option.

As there are no further questions, I thank you both for your evidence this morning and for your written submission, which have been helpful.

Before we move on to the next item, I want to stay with this matter for a minute. The committee is in the unusual position of taking evidence after stage 2 and before stage 3, which will take place next Wednesday. The deadline for amendments for stage 3 is this Friday. I do not want to detract in any way from the good work on the bill. From what we have heard, it is a bold step from the Executive and a good piece of legislation.

However, the committee has been put in a difficult position. We have heard from two witnesses who would like to see some refining of the provisions that we have been discussing and I do not see how the committee can now get that into the procedure before stage 3 next Wednesday. I have had words across the table with the Deputy Minister for Justice about that matter, but I think that at the very least we should write in the strongest terms to say that we should never be in the position where amendments are introduced at stage 2 and then we hear that there is controversy around them when we are going on to stage 3. Do members have any comments?

Stewart Stevenson: I echo the convener's remarks. Notwithstanding that, I remain four-square behind the bill's intention. The motivation is ensuring that the bill achieves that intention. I suspect that the committee can do nothing between now and Friday, although we are probably better equipped individually to go away and consider whether we want to take advice about amendments to the amendments. That is pretty unsatisfactory. Amendment 16 was substantial and complex, and today's evidence has probably left us with more questions than we had before we heard it. It is unsatisfactory and disappointing that we should be in that position at stage 3 of a bill that appeared to be relatively straightforward.

11:00

Bill Aitken: The position in which we have been left is to be deprecated in the strongest terms. It is intolerable that, 48 hours before the final amendments must be lodged, we cannot obtain answers from the Executive on several pertinent points that were raised this morning. The introduction of evidence of previous convictions of the accused will be a fundamental change in Scots law. The provision has a serious aspect and has not been happily handled.

The evidence has been extremely helpful and clear, and has helped me to crystallise my thoughts. However, this is not the way to carry out the legislative process. It is a slap-dash approach. Just 48 hours from having to finalise our position, we are uncertain about what to do. That is not the way to run a country.

The Convener: That was a bit strong.

We must be practical about what can be done. We will not have the *Official Report*, so we will have to rely on what we remember hearing. We should probe the Executive on some issues. We

should make the Law Society's point about making clear the function of the provision and ask for an answer on that. We should ask whether the Executive has considered whether the probative value of that evidence should match the provision for the probative value of justice in relation to the complainer. We should also make the point that the bill should make clear the guidance that judges will give on such evidence. Is there anything else?

Bill Aitken: That is fair.

Stewart Stevenson: Yes.

The Convener: It might be useful to have answers on those issues.

Stewart Stevenson: Could we ask that answers are provided urgently, so that we can consider any amendments that we may wish to make? If the Executive finds, after thinking about today's evidence, that it can produce amendments, I encourage it to do so, because it has greater resources in legal advice.

The Convener: We will see whether answers can be obtained speedily.

Petition

Asbestos (PE336)

The Convener: I hope that members have the note that was circulated late on petition PE336. We have dealt with the petition many times. It has become almost a feature of our committee business, and we are committed to dealing with it. I will not go through the whole note, but I will recap the situation. Members should have a letter from the petitioner, Frank Maguire, which is helpful. After we started dealing with the petition, an announcement was made about Lord Mackay of Drumadoon dealing with some asbestosis cases, to quicken the procedure. We wrote to Lord Cullen to ask for details on how that was working in practice. Members have a letter from Lord Cullen which explains the procedure.

We should consider the outcome of the Coulsfield report because its recommendations on rule changes might have helped to resolve some of the issues in the petition. The question is whether the procedure that the Lord President has enacted is sufficiently speedy to deal with the issues in the petition and whether the Coulsfield report tackles some of the rule changes in court procedure that the petition requires. I know from reading Frank Maguire's letter that he feels that those measures do not go far enough and that they do not get to the heart of the matter, which is about the Scottish pleadings system.

The committee must consider whether to take the matter further and, if so, in which direction. The note from the clerk contains suggestions as to what we might do. It is clear to me that, as we have taken matters so far, we should finish the business. We have a planned date to meet Lord Cullen, so we could put the issue on the agenda and discuss it with him then.

Perhaps members will give some feedback on the other options in the note from the clerk. One possibility is to initiate legislation connected to the issues raised in the petition.

Scott Barrie (Dunfermline West) (Lab): We have discussed the matter on three occasions; it is not for the want of trying that we have not found an adequate solution. Perhaps the way forward is a combination of some of the suggestions in the note from the clerk. At the proposed meeting with the Lord President in March, we should discuss the matter with him to discover his views. We should also invite the petitioner back to the committee to put evidence on the record about the events of the past few months.

We can then consider whether to initiate legislation to progress the matter further, which is

what the petition asked us to do at the beginning. At that time, we felt that we were not in a position to say yea or nay, but given the information that we have received in the intervening time, our view might be different. The way forward is along those lines.

Stewart Stevenson: I share Frank Maguire's concern that it appears to be only at this stage that Lord Cullen and others have become aware that there are as many as 500 outstanding cases involving asbestosis victims. That is a disappointing reflection of the way in which the Scottish court system has dealt with the situation.

We should raise the matter with the Lord President when we meet him. I concur with Scott Barrie that we should invite Frank Maguire back to the committee. We must not allow the issue to go away. Every member of the Parliament has constituents who are affected by the problem. Although we should welcome Lord Mackay's court as an additional resource that has been put into progressing the 500 cases, that court has not changed directly the way in which cases are dealt with. We must consider the considerable issues in the handling of civil cases of the type that are mentioned in the petition.

Bill Aitken: Scott Barrie's and Stewart Stevenson's comments contain a great deal of sense. One problem is that even with the introduction of Lord Mackay's court, insurance companies can still settle cases as they go through the court door. There is something intrinsically wrong with any set-up in which it benefits a party to an action to stretch out that action as long as possible, particularly in cases of this type, in which we know that real hardship is involved. There is therefore a secondary consideration here, which we may have to consider in due course.

In a few weeks' time, we will be able to give more attention to such matters. The dual approach is the answer. In the first instance, we should hear how Frank Maguire feels that the introduction of the new procedures is likely to assist his clients, many of whom continue to suffer seriously. At that stage we will have a firmer basis on which to approach the Lord President. It would be useful if we could hear from Frank Maguire in the morning, prior to the meeting with Lord Cullen.

The Convener: Okay. It is clear that the committee wants to continue its work on this issue. The letter that we received from Frank Maguire is helpful. It is clear that, although the new procedure is welcome—and we should welcome what has been done—and the Lord President has recognised that asbestos victims have been penalised by the process and should be a priority, another Lord President could do away with it next month: there is no certainty about it. Frank Maguire also makes the point that there is a procedure for commercial cases of the kind that is sought for these types of cases. It is not clear why we could not institute that kind of procedure for asbestos cases.

The committee's decision is to continue consideration of the issue and to call Frank Maguire for the next available slot. We will leave the other options lying on the table as a possibility. Is that agreed?

Members *indicated agreement*.

The Convener: We will meet the Lord President on 12 March and we can have an informal discussion to try to understand more of the detail attached to the petition.

Adviser

The Convener: Item 4 is consideration of the appointment of an adviser. Considering the various bills that we have dealt with, the committee felt that it should have an adviser on criminal procedure. The adviser's role will be to guide us on matters of court practice and issues that we might want to check that we understand, especially when we are dealing with technical legislation. We suggested that, in future, in dealing with criminal procedure bills, we should appoint someone to assist us.

When it first allocated the Land Reform (Scotland) Bill to us, the Parliamentary Bureau suggested that the Justice 2 Committee would also consider the proposed criminal justice bill. No final decision has been made on that, and the Justice 1 Committee has expressed an interest in considering that bill. The bureau will have to decide. Only in the event of the bureau's allocating that bill to the Justice 2 Committee would we appoint the adviser. If it allocates the bill to the Justice 1 Committee, we will not appoint an adviser at this time. Does the committee agree that, in the event of the bureau's allocating the bill to this committee, we should try to find someone to appoint as adviser?

Members *indicated agreement*.

The Convener: Before we move into private session, I remind members for the record that the next meeting of the committee will be on Wednesday 6 March. We will hear evidence in relation to our inquiry into the Crown Office and Procurator Fiscal Service. We will hear from Sir Anthony Campbell on the Chhokar reports and from Crown Office officials and ministers.

Mr Hamilton: When is the bureau expected to reach a decision about the lead committee on the proposed criminal justice bill?

Gillian Baxendine (Clerk): The bill has not yet been introduced. We expect that it will be introduced in the week before Easter and that a decision on the lead committee will be made in that week.

Mr Hamilton: If this committee were to be made the lead committee, when would we make a decision about the identity of the adviser?

Gillian Baxendine: We would aim to have the procedures in place so that you could decide straight away. The adviser would then be there to advise you as close to the beginning of the process as possible.

The Convener: In the past, we have found that such appointments require people to make a big commitment. There are usually two or three names to consider and we must ensure that we have enough time to reach the right decision if an adviser is necessary.

The committee earlier agreed to meet in private to discuss its report on the Land Reform (Scotland) Bill. We therefore move into private session.

11:14

Meeting suspended until 11:27 and thereafter continued in private until 13:07.

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