JUSTICE 2 COMMITTEE

Wednesday 13 March 2002
(*Morning*)

Session 1

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CONTENTS

Wednesday 13 March 2002

JUSTICE 2 COMMITTEE
10th 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

Derek Batchelor (Crown Counsel)
Helen Nisbet (Procurators Fiscal Society)
Richard Stott (Procurators Fiscal Society)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Fiona Groves

ASSISTANT CLERK

Richard Hough

LOCATION

The Chamber

Scottish Parliament

Justice 2 Committee

Wednesday 13 March 2002

(*Morning*)

[THE CONVENER *opened the meeting at 10:03*]

The Convener (Pauline McNeill): I open formally the 10th meeting in 2002 of the Justice 2 Committee. No apologies have been received, but I understand that Scott Barrie will join us later in the meeting. I ask members to check that their mobile phones are switched off.

Items in Private

The Convener: I ask members to agree that items 2 and 4 on our agenda be taken in private. Item 2 concerns lines of questioning for our inquiry into the Crown Office and Procurator Fiscal Service. Item 4 concerns the completion of our stage 1 report on the Land Reform (Scotland) Bill. Is that agreed?

Members *indicated agreement*.

10:04

Meeting continued in private.

10:30

Meeting continued in public.

Crown Office and Procurator Fiscal Service

The Convener: Item 3 is the committee's inquiry into the Crown Office and Procurator Fiscal Service. I welcome to the committee Derek Batchelor QC, Iain Armstrong QC and Johanna Johnston. Thank you for attending and for the papers that you sent to the committee. It is useful for members to read in advance some of the issues that you will have a chance to put on the record today.

We are going to move straight to questions. If you have anything to add at the end of the question session, you will have an opportunity to do so. I begin by asking you to explain to the committee the difference between prosecuting in the High Court and prosecuting in a sheriff and jury case.

Derek Batchelor (Crown Counsel): There are several differences between prosecuting in the High Court and prosecuting at a lower level. I have had experience of both, as has Ms Johnston, because we come from the Procurator Fiscal Service. In my case, that was some years ago.

One of the main differences is that the type of evidence that is dealt with in the High Court is different to that which is dealt with in a sheriff court. It is more difficult. In murder cases, for example, the court would be dealing with evidence from pathologists. In the case of child abuse, the court would be dealing with evidence from expert paediatricians. There might be technical evidence such as DNA analysis and other forensic evidence. Another difference is that cases that are dealt with in the High Court are more serious and complex. There is considerable responsibility attached to such cases and clearly there is a lot of interest from the points of view of the complainer, the victim and the witnesses.

It is important to note that there is a difference between prosecuting in the High Court and prosecuting in a sheriff and jury court. The difference is managed by experience and immersion in the process.

The Convener: If advocate deputes do not prosecute in sheriff courts, why are they considered to be the most appropriate people to make decisions about which cases should go to the High Court and which should go to the sheriff court?

Derek Batchelor: As I have tried to outline in the paper, we feel that, as far as advocate deputes are concerned, the element of institutional independence in relation to the decision-making process is most important. The Scottish system has up until now been regarded in Europe and the rest of the world as efficient and speedy. That is because we do not have court committal proceedings; instead, that role is played by advocate deputes. It is important that the element of independence in decision making is maintained and that there is a body of experienced court practitioners who can stand apart from the Crown Office and Procurator Fiscal Service and make an independent, objectively reasoned decision.

Another element comes into play for sheriff and jury cases. Advocate deputes provide consistency and uniformity in marking. What might be regarded by the fiscal in an outpost such as Elgin—if I can call Elgin an outpost—as a matter worthy of the High Court might not even merit sheriff and jury proceedings to the fiscal in Glasgow. Throughout the country, there are differences in the local evaluation of the seriousness of offences, and Crown counsel can bring more consistency and uniformity to the application of those matters. It is right that someone who commits the same offence in a different part of the country should be treated in the same way.

As for the division between the High Court and the sheriff and jury courts, there are clearly cases that have to go to the High Court because they can only be tried there. For example, murder and rape are the two pleas of the Crown that still exist. Otherwise, it is a question of assessing the seriousness of an offence, the circumstances relating to the offender and a number of other factors that come into play.

The Convener: In your paper, you talk at length about the importance of independence. Are you saying that independence is necessary to carry out prosecutions in the High Court but not prosecutions in the sheriff court?

Derek Batchelor: It is important to grasp hold of the element of institutional independence. By that I mean independence from the Crown Office, the Procurator Fiscal Service, the police and other reporting agencies and any other influence or self-interest. We are not career prosecutors; advocate deputes come in and work for a limited period of time. As a result, we do not do the job for the remuneration. We do not have any particular interests to peddle. We are talking about independence from the system that provides a guarantee not only to the accused but to the victim that the decision to place someone before the High Court or the sheriff court has been independently made using objective criteria and is justified by reasons.

The Convener: I understand your comments in relation to the High Court. However, you cannot make the same argument in relation to prosecutions in the sheriff court, which involve procurators fiscal. You are saying that that system is not sufficiently independent.

Derek Batchelor: The decision-making process is the same whether the decision is to prosecute in the High Court, in the sheriff and jury court or indeed in the sheriff summary court. The first part of the role of advocate deputes is to decide who should be prosecuted, where they should be prosecuted and for what charges. They are in the unique position of being able to consider cases coming in from all over the country and to make an independent assessment of what offences merit prosecution before which level of court. Of course, the effect is that the sheriff and jury court has lesser sentencing powers than the High Court and that the sheriff summary court has lesser sentencing powers than the sheriff and jury court.

As I have said, the decision-making process is the same regardless of whether the case ends up going to a sheriff and jury proceeding or to a High Court proceeding. As far as the prosecution is concerned, clearly procurators fiscal prosecute in the sheriff court. No one has ever suggested that that is improper. That, however, is a separate issue from my submission on the question of who takes the decision as to where a case should be prosecuted and for what.

The Convener: You devote much of your paper to the question of independence, to the particular skills of advocates and to their role in the High Court. I am not sure if you have had the chance to read the Crown Office's recent report on the management review of the Procurator Fiscal Service.

Derek Batchelor: I have certainly not read it all. I have just read the executive summary.

The Convener: It is indeed a rather large document. One of its recommendations is that consideration be given to the question whether there should be full-time prosecutors and to the use of procurators fiscal in the High Court. The committee had also been considering those matters. We have been hearing the views of procurators fiscal. They have suggested that the service is under-resourced, that people are feeling a bit devalued and that the desired career structure is not there. You devoted much of your paper to explaining that to us. Have you detected a shift in policy from the Crown Office?

Derek Batchelor: No. I have no inside lead on any policy from the Crown Office. Our request to come before the committee to make representations stemmed from matters that had been expressed in the press that we regarded as

inaccurate, not reasonably based and unfair.

One of the issues is the decision-making process, which ought to be independent. There is a separate issue about who can and should prosecute in the High Court. There is a further separate issue of whether the High Court is dealing with more business than it can reasonably be expected to handle. Those are all matters of which the committee is aware.

The question of who prosecutes crimes in the High Court is a matter for the Lord Advocate to determine. The committee will know that a fiscal has in the past acted as a prosecutor in the High Court. He was selected by the then Lord Advocate to do so. That option is clearly still open to the Lord Advocate if he decides to exercise it but, as I tried to express in our paper, much depends on his personal choice.

I am not suggesting—and no one here is suggesting—that there are not fiscals who would be capable of prosecuting in the High Court but, from my experience as a temporary sheriff, I doubt that every fiscal could walk into the High Court tomorrow and effectively prosecute. It is a different league in the High Court. I am not suggesting that there are not fiscals who cannot do it. I am saying that, if fiscals are asked to prosecute in the High Court, they will have to go along a learning curve.

The final decision must rest with the Lord Advocate. If he were to tell me, as acting home advocate depute, that a fiscal will prosecute in the High Court tomorrow, that would be something that I could readily live with.

The Convener: I do not think that that is in question. I just wondered if you were picking up any opinion that there is a policy shift. You are saying that you do not see that.

Derek Batchelor: I have read some of the *Official Reports* of the committee and I have read Mr Jonathan Pryce's review. I know that the issue is live. That is why, among other reasons, we addressed it in our written submission.

Stewart Stevenson (Banff and Buchan) (SNP): I detect that your focus is on technical complexity, including evidence from specialists. There is also the matter of the application of objective criteria and a need for independent decision. That is what I am hearing from you. We are told that a generalist is able to cover all that complexity, involving the various strands of technical evidence from different sources. We are also told that objective criteria can be applied. Is that a mechanistic thing? Can anyone do that? Is there a justification for asserting that an advocate depute can tackle anything? Is there a role for specialism? Perhaps that is the fundamental question.

Derek Batchelor: Advocates are specialist court practitioners. Among the present complement, eight people are from the criminal defence bar, six have done only civil work—that probably includes Mr Armstrong—and some have done both. I, for example, have done criminal and civil work. The expertise of the advocate lies in the fact that, day in, day out, he presents cases before the superior courts.

10:45

The committee probably knows that, as a fiscal moves up the career ladder, he looks for reward for his efforts by moving into the areas of management or policy. I do not know whether you have any statistics on how many procurators fiscal prosecute day in, day out in the courts. I suspect that it is not as high a figure as you might anticipate. I am not suggesting—no one here is suggesting, as I said before—that there are not people in the fiscal service who have the calibre, competency and ability to prosecute in the High Court. The Lord Advocate has asked Johanna Johnston, who was in the fiscal service, to do that. Two other people from the fiscal service are currently advocate deputes, having gone to the bar. Many fiscals have gone on to do that in the past, and I come from that same background.

I am therefore not suggesting that fiscals are not capable of prosecuting in the sheriff courts or that advocates do it better, except from the point of view that advocates have more experience at that level. What is important—and what we are at pains to get across—is the fact that the job involves not only prosecuting but decision making. It is the decision-making aspect that requires to be maintained as an independent element, free from influences—conscious or unconscious, seen or unseen—in making the important decisions that affect the lives not only of accused persons but of victims, and which impinge on the lives of the people who give evidence in the High Court.

Stewart Stevenson: Let me put a specific question. You made reference to Elgin; I shall make reference to Banff. Do you think that an advocate depute would have the skills and ability that the fiscal at Banff has in the prosecution of fishing cases?

Derek Batchelor: Fishing cases do not generally reach the High Court, and I suspect that an advocate depute would not have that specialist knowledge of fishing legislation and European Community legislation. That is not to say that the advocate depute could not acquire that knowledge. The skill in prosecuting the case would not be any different. It would still require the presentation of evidence in a concise, coherent and analytical way to enable the judge or, in our case, the jury to come to a conclusion.

Stewart Stevenson: Let us turn to the core of your presentation, which is the proposition that you are uniquely placed to be independent and that—by contrast and by implication—the fiscal is not. What influences are brought to bear on fiscals that adversely affect their ability, as people who hold a direct commission, to act independently as you can?

Derek Batchelor: Fiscals are in a career structure—they are in employment and seeking to advance. Fiscals are also in close contact with reporting agencies and can have pressure brought to bear on them by the police and the health and safety executive—which I know, from my experience, happens—and by other reporting agencies such as HM Customs and Excise. I am not saying that those influences on the fiscal result in his not making an independent decision. I am saying that, to the objective observer, he may be thought not to be making an independent decision because he is subject to those influences and is not isolated.

I have moved from that side of the business to the bar as an advocate depute and I am not subject to those pressures. I am isolated from the police and other reporting agencies. I am isolated from colleagues in the fiscal service who might want me to make a certain decision. I am answerable only to the Lord Advocate, who, in turn, justifies the decisions that I make on his behalf to the Scottish Parliament.

That is how the system works, and that brings me back to my initial point. It is fundamental to our system that we have that institutional independence. When we make a decision, we are effectively playing the role of a court. Because we take a decision on the basis of the precognition, our system, unlike any other system one might name, can deal with cases—in theory at least—expeditiously.

Stewart Stevenson: Before I pass the baton to someone else, I have a final question. Are you saying that, in practice, the fiscals make decisions as independently as you do, that the difference is simply the paper-thin difference that there could be a perception that fiscals are not acting independently and that that perception is absent for advocate deputes?

Derek Batchelor: It is not a paper-thin difference, it is fundamental, and every review that has looked at—

Stewart Stevenson: I am making a practical point rather than an observer's point. In practice, the fiscals are, in your view, making decisions as independently as you do. Do you agree with that?

Derek Batchelor: No, I do not agree.

Stewart Stevenson: Can you give a specific example or flesh that out for us in some other way?

Derek Batchelor: Advocate deputes generally have more experience of decision making than fiscals in local offices have, depending on what level you look at. Those who are doing the marking every day in fiscals' offices do not have the experience—

Stewart Stevenson: With respect, we are not talking about experience—that is another matter. We are talking about independence. You are asserting that the fiscals are not in reality and in practice independent in their decision making, and that is the point that I would like you to address.

Derek Batchelor: I am saying that fiscals are not institutionally independent and are not seen to be independent. That is what I said at the beginning, and that is the point.

Mr Duncan Hamilton (Highlands and Islands) (SNP): I understand what you are saying about the perception, but do you think that that perception is held by anyone other than a strictly limited category of people in legal society? I am willing to bet that the majority of people in the country are not even aware of that difference. That is not to say that it is not important, but what you have said about perception does not strike me as a particularly good justification of the situation.

Derek Batchelor: It is the committee that is calling it a perception—I did not call it a perception. It is a fundamental difference. If you are suggesting a move to a system where you have, to quote a term that has been used by the committee, professional prosecutors—who not only take the case from the police but liaise with the police, investigate the case and decide whether it should go ahead in the High Court or elsewhere—you are talking about a very different system.

There is no system in the world that has a provision for the prosecutor to put the accused on trial without the intervention of a judicial or quasi-judicial body. In Scotland, we do it through Crown counsel, which is a quasi-judicial body. In England, it is done through magistrates courts and in France there is an investigating judge. Our system has developed from an amalgam of different continental and common law or English systems, with the result that we have advocate deputes, who are seen to be independent and who take independent decisions on prosecutions.

That is the point that I am clearly not managing to get across to the committee. It is not a question of suggesting that a fiscal is partial and cannot be independent. It is an important part of the process of the criminal justice system that, before you put an accused person in custody or on trial for a serious crime, there has to be an objective judicial

look at the decision.

Mr Hamilton: We are beginning to go round in circles. You seem to be saying that you are not impugning the integrity of the fiscal service or its ability to be independent. I grant that it is important that the decision-making system is seen to be independent. However, what the committee needs to hear is why that makes a material difference. That is what we are missing. We can see that there is a difference, but we want to know why it is so important. If the fiscals were to take such decisions, given all the pressures that you have outlined—in terms of career structure and so on—in the worst-case scenario, would it change a decision one iota?

Derek Batchelor: It changes the decision. It is important to point out that most precognitions are done not by legally qualified staff, but by paralegals. It is important to check that the investigation has been conducted properly, that the analysis of the law is correct and that there is sufficient evidence to proceed before deciding whether it is necessary to prosecute. Precognitions come with recommendations, but those recommendations are not always adhered to. It is not a rubber-stamping exercise. The advocate depute looks at the case afresh, stands back and makes an objective decision, for which he must give reasons and for which the Lord Advocate is accountable to members of Parliament.

Mr Hamilton: That point is well made and understood.

I want to move on to those who prosecute cases. Your submission mentions the mix of civil and criminal practitioners. The committee has heard evidence that there may be those who, in their career to date, have practised solely or mainly in the civil courts. You say that far from that being a disadvantage, it is a substantial advantage, because a different approach is brought to bear, and that such a mixture helps to build a diverse team. I have some difficulty with that suggestion. If I were enlisting someone to defend me in a criminal context, I would go to Gordon Jackson or Donald Findlay because they are top criminal advocates—they specialise and are experts in that field. Might there be an unfair balance between someone who has not prosecuted a criminal offence—however clever they are or able to pick up the appropriate skills quickly—and someone who is an expert?

Derek Batchelor: If you wanted Mr Findlay to defend you—

Mr Hamilton: I could not afford Mr Findlay.

Derek Batchelor: If you went to Mr Findlay, you would have been charged with murder, because Mr Findlay defends murder cases for 90 per cent of his time. If someone was charged with VAT fraud or an offence relating to historical sex abuse or child abuse, they would not go near Mr Findlay, because the expertise—in terms of what they generally do—of advocates such as Donald Findlay and Gordon Jackson is limited, too.

The issue of how civil advocates could move into criminal prosecution was raised. I am saying that that adds to the mix and that there is cross-fertilisation. Criminal proceedings are fact driven—if one can establish the facts, the law is not that complex thereafter. Civil proceedings tend to be the other way round—civil cases produce legal problems, from which factual problems follow on. There is a difference in approach and technique, but individual members of the team learn from one another. In appearances before the appeal court, three judges will expect the advocate depute to be analytical and to produce coherent consistent arguments that are in tune with the development of the law. Civil practitioners bring many beneficial elements to the group.

I have more than 30 years' experience of the criminal justice system and I know that civil advocates who become advocate deputes prove to be extremely effective prosecutors—some of the best that Scotland has seen. Many of them, having been elevated to the bench, sit in the Court of Session and the High Court.

11:00

Mr Hamilton: Some criminal advocates would say that, because there is—if you like—less law surrounding the criminal courts, it is important to have experience, a feel for the court and an understanding of the court system. Such expertise can be built up only over time. If people have not been involved in a criminal trial or in the intricacies of a criminal cross-examination, I struggle to understand how that level of expertise can be achieved. I dare say that, in the fullness of time, it can be achieved, but how can there possibly be a fair match earlier on?

Derek Batchelor: It works both ways. There is court craft in the criminal sphere and court craft in the civil sphere. They are similar but not necessarily the same. The cross-examination technique is not different, although perhaps it is more aggressive in a criminal court than in a civil court. In a criminal court, the advocate is either trying to show that the witness is telling the truth, or that they are telling lies. A civil court is more gentlemanly and that does not happen to the same extent. However, there is cross-fertilisation.

Mr Armstrong may wish to add to my reply, but I accept that civil practitioners who become advocate deputes have a learning curve. However, there would also be a learning curve for procurators fiscal who were stepping from a sheriff

and jury court environment to a High Court environment. It is difficult to give definitive examples, but it is different. I know that it is different; I have been through the process. Ms Johnston will agree with me. She knows that it is different; she has been through the process. You need to have experience before you can prosecute effectively in the High Court.

The Convener: I accept what you say: we cannot presume that, just because someone has expertise in prosecution, they can be a prosecutor in the High Court. However, lay people will have difficulty in understanding why someone with a background in civil law, who does not understand criminal law, is the best person to mark and make decisions about criminal cases, which can be highly technical.

The committee is made up of lay people who have not practised in a criminal court. We have just signed off the Sexual Offences (Procedure and Evidence) (Scotland) Bill, and some of us had a bit of a hard time understanding some of the very technical aspects of that bill. What strikes us is the system's reliance on people who understand criminal law to make things work. We have difficulty understanding that.

Derek Batchelor: I would not say that there are any civil advocates who do not understand criminal law. Civil advocates have all studied criminal law, they have it in their heads and they know where to find the answers. They have not necessarily practised criminal law to the same extent, and the learning curve—

The Convener: Some civil advocates have not practised criminal law at all. Is that correct?

Derek Batchelor: That is probably correct, yes—not in many cases, but some will not have practised. They may have been lectured on it at university—

The Convener: I want to be sure that we have understood the point fully. In your paper, you say that deficiencies of evidence can be revealed in the marking of papers. Are you saying that someone whose background is entirely in civil law, but who is marking criminal cases, will produce the same quality of marking as someone who has a background in criminal prosecution?

Derek Batchelor: Yes.

Three points arise. The first is that the first stage of marking is to establish that there is sufficient evidence. That stage involves legal issues, such as whether there is corroboration, including corroboration of identification, and whether more than one source of evidence establishes that a crime has been committed. Any lawyer can do that. It is simply a case of looking at the evidence and saying, "Yes, this corroborates that, and that corroborates this."

The second point concerns the decisions over whether, in the public interest, the prosecution should go ahead and where the case should be heard. Certain cases—murder and rape—have to go to the High Court. The Lord Advocate instructs us to put certain cases to the High Court; there is also an element of guidance from the law officer.

The third point is that the decisions are not made in isolation. If the case is not obviously for the High Court or for a sheriff and jury court, and if the charges are not obvious, there are people—such as myself—with whom the decision can be, and is, discussed. The fiscals and the High Court unit will discuss difficult decisions.

The decision is not the end of the matter. The fiscal is entitled to come back and ask for the case to be looked at again. If a review is requested, I, as acting home advocate depute, will look at the marking again. If I do not agree with it—or even if I do—I discuss it with the person who did it and suggest that it was wrong or right for whatever reason. There is a process of development, perhaps more in relation to civil practitioners than to criminal practitioners.

Marking cases is not something that civil practitioners cannot do; it is not beyond their competence. They can do it readily and the learning curve relates more to the different craft—the way of presenting the case—in court than to the decision-making process. Civil practitioners bring a benefit to the process.

The Convener: We are not questioning whether marking cases is within the competence of civil practitioners. We are asking whether civil practitioners are the best people to do work that is different from civil work.

Bill Aitken (Glasgow) (Con): You said in your evidence that you are not career prosecutors. Is it not the case that some people are better at some things than others and that not everyone has the ability to prosecute?

Derek Batchelor: Some people prosecute better than do others. Some people find their niche in the criminal courts; some people find prosecuting more difficult. That is correct, but there are variables in every walk of life, such as medicine or being an MP. Each person has to prosecute differently.

However, one cannot look at the whole system and say, "There are some very good prosecutors and some not so good prosecutors, therefore we should change the system." That all depends on the selection process, which is a matter for the Lord Advocate. He selects people through consultation and through experience of having seen them work in the most senior courts in the

land over a long time. Before he approaches them, he checks with people such as my colleagues and me to ask whether we think that a given person can perform and how they have performed in the past, along with other general questions.

Bill Aitken: Accepting that for the moment, let us turn back a stage to the fiscals. The correct title for a fiscal is the procurator fiscal for the public interest, is not it?

Derek Batchelor: Petitions give that title, but the procurator fiscal was historically aligned to the sheriff and not to the Lord Advocate. He was the sheriff's assistant; he collected the fines and prosecuted in the sheriff court. Fiscals came under the wing of the Lord Advocate as the system developed from the 16th century to the present day.

Bill Aitken: That is an interesting exposé of the history of the matter, but we are talking about 2002 and that is no longer the case. Fiscals are independent and act in the public interest, as does the Crown Office. Is not that quite simple?

Derek Batchelor: The fiscal is subject to the directions of the Lord Advocate and what he does. The fiscal has a degree of independence, in that he can decide to prosecute some matters before the sheriff summary court where the maximum sentence is generally six months' imprisonment. He cannot decide to prosecute in any higher court without the approval of the Lord Advocate.

Bill Aitken: On the basis that people are basically independent and that some have a bent for prosecution whereas others are interested in civil matters, which is appropriate, is not there a case for having career prosecutors?

Derek Batchelor: No, there is not a case for having career prosecutors, for the reasons that I tried to outline in the paper. Institutional independence is fundamental to the criminal justice system. If we remove that, we remove any check or balance on the prosecutor. No democracy in the western world has such a system. We would be moving to a system in which we did not have that independent check and balance and did not have the fresh view that is necessary—in my view—to ensure that prosecutions are undertaken in the public interest fairly, reasonably and objectively.

Bill Aitken: You will accept that we have had a degree of difficulty with that.

Let us move on to some of the practical problems that have arisen. Are you content with the relationships and communications that exist between the Crown Office and other agencies with which you have to deal, such as the Procurator Fiscal Service?

Derek Batchelor: Are you talking about advocate deputes and others?

Bill Aitken: Yes.

Derek Batchelor: We are trying to develop that relationship. I encourage advocate deputes to discuss with precognoscers—whether those be fiscal deputes or precognition officers—their reasons for deciding not to follow a recommendation. We have asked the Lord Advocate and the Solicitor General to allow precognition officers to be present with us in court, so that they can see how the system works. Fiscals are reluctant to release resources because of the pressures that they are under in their offices.

Communication must be improved. At the moment, it is lacking because of the pressure that everyone in the Crown Office and Procurator Fiscal Service—not least advocate deputes—is under. Numerous comments have been made to the committee on that. We can add to those comments from the front line. There is constant pressure, work loads are unreasonable and stress levels are high.

Bill Aitken: To some extent, you are knocking at an open door. Over the past year, have steps been taken, particularly in the light of Lord Justice Campbell's report on the Chhokar case, to ensure that communications between the High Court units—your office—and fiscals in the district offices are more in line with what we would wish?

Derek Batchelor: I am not in charge of the High Court units—I merely orchestrate the advocate deputes. I encourage advocate deputes to give reasons for their decisions in writing and to communicate with the producers of precognitions to explain why a decision has or has not been taken. That does not always happen, either because the precognoscer is not available or because of pressure of business. However, if a recommendation is not followed, that will be discussed in our room and with me, and a joint decision will be taken. I am trying to improve that aspect of the system.

Bill Aitken: Undoubtedly, you face problems as a result of pressure of work. Given that, would it be beneficial to continue the present experiment of having a High Court unit based permanently in Glasgow? That would allow for greater continuity.

Derek Batchelor: I am glad that you raised that issue, as I would otherwise have raised it myself. I have been surprised to note that Sir Anthony Campbell's recommendation has been accepted without question by everyone who has appeared before the committee. The recommendation is impractical and unworkable, will not achieve the end that he thought it would achieve, and will place undue stress on the people involved.

Sir Anthony Campbell said that, because 60 per cent of prosecutions take place in Glasgow, advocate deputes in Glasgow should mark cases at the end of their working day. The committee has seen the figures that are set out in our submission, which are no longer accurate; each advocate depute now has to deal with about 15 cases per fortnight. That means dealing with case papers that range from something that is 4in thick to a pile standing 2ft off the floor. In the course of a day, the advocate depute will take the trial, which is tiring mentally. At the end of the day, they must organise the witnesses and business for the next day. At night they must work on that case and perhaps on the case that is to follow it immediately. It is humanly impossible for advocates then to mark cases in Glasgow.

I work no less than a 12-hour day and I work at weekends. I assure members that all my colleagues work every night of the week and at weekends on their present work load. In the Crown Office, marking is separated out and people are allocated specifically to that task. We cannot expect an advocate depute who has had one, two, three or four hard days at a court in Glasgow and has had to write his or her jury speech then to sit down to mark cases without mistakes appearing; that will not happen. Requiring advocate deputes to mark cases at the end of their working day would exacerbate the situation and increase stress. To my mind, the recommendation is wholly impractical.

Sir Anthony Campbell made the point in his report that there was too much stress on advocate deputes and insufficient time to mark. He said that advocate deputes required more time to consider cases, yet his suggestion would have the opposite effect.

11:15

Bill Aitken: But surely it would not, if there were sufficient staff to ensure that the depute who was prosecuting in court could do so, write the jury speech and deal with the cases that are allocated during that sitting. Other deputes would mark in the office; they would be detached from the day-to-day court procedure.

Derek Batchelor: Under the present system, there are not sufficient resources even to contemplate that. Major cases, for example murder cases, are allocated to an advocate depute as we know that they will be indicted. That does not mean that the advocate depute will get any time to prepare the cases—he or she has to find the time to do that. As others have told the committee, there is no guarantee that that advocate depute can stay with the case because, even when we are ready to go—and we are ready to go within 110 days—the defence will inevitably seek an adjournment for further investigation and the case will go off for six to eight weeks. The advocate depute cannot follow the case, either because he will not be in the same place or because he has been allocated another case for that period. The case has to be moved around again.

We have all considered the present system in depth, and there is no means whereby we can ensure continuity in cases, except in big fraud cases, where someone who keeps the case clearly has to stay with it. I am currently prosecuting a case in Edinburgh that will take two or three months. It is not feasible for anyone else to do that case now. Such cases are the sole exception, and special provision has to be made for them.

The Convener: Should the resources that are available to advocate deputes be increased? The committee is quite surprised that you are saying that the pilot project in Glasgow is not a good one. We heard evidence last week that, much to Lord Justice Campbell's surprise, the recommendation about the pilot was acted upon.

Derek Batchelor: That is why I raised the matter. An indicter has been sent to Glasgow to indict cases and give assistance on those cases, but it is not a realistic proposition to expect the advocate depute to conduct two sittings in Glasgow, handle 30 cases, and at the same time mark cases for future prosecution and thereafter to follow them through.

The Convener: What would be the solution to that?

Derek Batchelor: Let me put it this way: there is too much business in the High Court. Resolving that may mean better management, which would involve co-operating with defence counsel to ensure that the defence is ready to go when the case is ready to go. That is a different problem. The other solution would be to take cases out of the High Court. There are ways and means of doing that, but it would simply put pressure on other points in the system. I suppose the third solution, in very general terms, would be to increase the number of courts, judges, courthouses and prosecutors.

The Convener: But you would want more continuity in the system?

Derek Batchelor: Yes. We get frustrated at the amount of work that we do that proves to be fruitless. We can be allocated a case, and we investigate it and liaise with the precognoscer, and then, when the case comes to trial, it is adjourned. I followed through a fairly high-profile case of mine for five months and it was adjourned four times on defence motion. When it finally went to trial—a trial involving children—I was unable to take it because

I had other commitments. That is fruitless work, and it is frustrating not only for me but for the victims and the people whom I work with. It does no service to the public.

The Convener: Might it be important for the advocate depute who is marking the case to be the same advocate depute who presents the case in court?

Derek Batchelor: That would be the ideal, but the High Court unit will indict 1,500 cases this year.

The Convener: Yes, but would that be desirable?

Derek Batchelor: It would be beneficial, but perhaps I can illustrate by example why it does not happen.

Sir Anthony Campbell said that a judge had indicated that, as an advocate depute, he had always marked his own cases. In my 30 years' experience of the criminal justice system—I was in the Crown Office in the 1970s and 1980s—that never happened as a matter of course. In those days, Glasgow High Court sat for only two weeks every month. The other courts did not sit every month, except Edinburgh, which sat for perhaps every second month. In those days, the advocate depute was expected to do four or five cases in his fortnight.

However, the landscape has changed radically. Advocate deputes are now expected to do 30 cases in a fortnight, which is physically impossible. Each time that the advocate depute has disposed of their current 30 cases in one way or another—by pleas, adjournments or trials—the next 30 cases are backing up against them. The system is overburdened and overstressed. The work loads are high and, in my view, unreasonable.

The Convener: For the record, how many cases would an advocate depute mark on average each week?

Derek Batchelor: I do not get involved in day-to-day marking and I am not sure whether my colleagues can offer a figure. However, the flow of cases is not constant; there are periods when target dates are met and other periods when many more cases come in. The convention is that marking is done on the day when the case comes in, so that the case can leave the Crown Office on the same day. That puts pressure on the marking process, so perhaps that convention should be examined.

The Convener: Perhaps you could provide us with a figure to work with later, so that we can see where the pressures are.

Derek Batchelor: On average, an advocate depute probably has about 50, 60 or 70 cases to mark per day. There are supposed to be two advocate deputes in the office on the rota for marking cases but, more often than not, only one is available.

The Convener: That figure is high.

We must conclude shortly, but Stewart Stevenson has one pressing question to ask.

Stewart Stevenson: The 110-day rule is the source of pressure that has been referred to by most of those who have given evidence. I am of the view that having a fixed number of days is beneficial because it provides an objective benchmark by which the resources that are needed can be identified. We are interested to hear your view. Is the 110-day rule correct? Should the number of days be different? Is the existence of such a rule beneficial to the interests of justice?

Derek Batchelor: When I departed the Procurator Fiscal Service in 1983, the 110-day rule worked. Cases were sent to the High Court within 110 days and proceeded on the day that they were due to proceed. As I said, in those days there were four or five cases per depute, but that has changed.

From the Crown's point of view, there is no flexibility in the 110-day rule. The Crown is required to have cases ready to go to trial within that period. The 110-day rule's advantages are that it gives early foreclosure to victims and does not put undue stress on witnesses who are waiting to give evidence. Indeed, when witnesses give evidence, their recollection of events is also fresher. Another not unimportant consideration is that those who are presumed to be innocent are not remanded in custody for excessive time. We know that the time on remand in European jurisdictions is upwards of two years and that there is a similar length of time on remand in England.

However, although the Crown is required to be ready to proceed within 110 days and will not be given an extension by the court, defence lawyers are invariably not ready. The defence has 29 days in which to prepare its case, but defence lawyers now take a much more proactive role in defending. Rather than simply react to the Crown case, they tend to prepare defences by instructing their experts on things such as DNA analysis, fingerprint analysis, psychiatric evidence and psychological evidence. All sorts of experts can appear at the last minute, which means that the defence needs more time to prepare.

That has an effect on continuity. If we allocate a depute to a case in which the defence needs more time to prepare, the case will go to another sitting and the depute will not necessarily be able to follow it. That happens in many cases. The 110-day rule does not work effectively in practice,

because defences ask continually for cases to be adjourned. That removes from victims and witnesses the benefits of the 110-day rule and, to a certain extent, it has an effect on accused persons, who are usually remanded in custody for an extended period. The landscape has changed in that respect; defences are now more proactive, which has an effect on other elements of the system. That should be seen to be good.

The 110-day rule should ensure that we bring people to trial expeditiously, that we can tell witnesses that a trial will take place on a particular date and that we can allocate a specific depute to a certain case and speed the process through. We have moved radically away from the situation in 1983. The reason why first diets were done away with in High Court trials in 1980 was that High Court trials always went ahead on the day that they were allocated. That is now the exception rather than the rule.

Stewart Stevenson: I am sure that you might want to qualify your statement that the defence is "invariably" not ready in 110 days.

Are you suggesting that there ought to be a time limit for the defence? If so, what might that be?

Derek Batchelor: The defence must be given proper time to prepare. Currently, the defence has 29 days from service of an indictment. I understand from fiscals that prior to that, they receive intimation of witnesses who might be called. When expert evidence is introduced to the equation, that requires identification and authorisation from the Scottish Legal Aid Board. The experts are then required to examine the issues and produce a report. That all takes time. There are no time constraints on the defence; the defence does not have to be ready by a certain time if they believe that the judge will grant an adjournment in order for them to further their inquiries.

Stewart Stevenson: The prosecution must carry out similar procedures. It must have expert witnesses, get reports and so on, and a time constraint is put on them. Would it run counter to the interests of justice if a time constraint of whatever length were also placed upon the defence?

Derek Batchelor: One hundred and ten days is a target figure and has been a target figure in Scotland for a long time. I fully appreciate that the nature of High Court prosecution has changed in its complexity, the thoroughness of investigation and in many other ways. I raise the question whether shifting the time limit from 110 days to 170 days—the target in England, which is not reached—will move the pressure further down the line. If there are 15 cases per court per fortnight and everyone is ready to go to trial, the position will still be that the court will not get through all the cases. Courts could not cope with the amount of work they have without pleas and adjournments and without accused persons and witnesses failing to appear, with the result that cases are moved to another sitting, or to another place at another time.

The Convener: Do you want to make any brief points, which you feel have not been covered?

Derek Batchelor: We have had a full and reasonable hearing from the committee. Most of the issues that we sought to raise—if not all—have been raised by members of the committee.

The Convener: I thank all three witnesses for attending and for their useful evidence. Please follow the inquiry, if you are interested in what we are doing. Witnesses should feel free to engage with the committee and to respond to other evidence that we hear, as others do, by letter. It is important that witnesses feel involved.

Derek Batchelor: Thank you very much.

The Convener: We move on to our second and last set of witnesses, who are from the Procurators Fiscal Society. We will hear from Richard Stott, who is the president of the society, and Helen Nisbet, who is its secretary.

While we wait for the witnesses to take their seats, I inform members that I propose that we finish taking evidence at about 5 past 12, so that we have ample time to finish our stage 1 report on the Land Reform (Scotland) Bill.

I welcome Richard Stott and Helen Nisbet to the committee and I thank them for appearing and for their submission. We will go straight to questions, if that is okay.

11:30

Richard Stott (Procurators Fiscal Society): That is fine.

George Lyon (Argyll and Bute) (LD): What is your reaction to the management review report, which has just been published? Will the proposed changes allow procurators fiscal to do their job better?

Richard Stott: We welcome the conclusions that Jonathan Pryce reached in the management review. At last, what the trade union side has said for many years has surfaced and been realised by those who have the power to make some difference and changes.

We welcome Pryce's recognition that the fiscal service has been underfunded for a long time. We welcome the fact that he identified the lack of efficient management in the Procurator Fiscal Service and the fact that the Scottish Executive and the committee have hard and fast evidence

that—as committee members realised long before the management review was published—the Crown Office and Procurator Fiscal Service has had difficulties.

We contributed to the report by making submissions, but we have not entered a consultation process. We are anxious that, having obtained evidence about underfunding and management—particularly from the top of the Procurator Fiscal Service—we progress the report's recommendations by consultation and partnership, which will be new to the Crown Office and Procurator Fiscal Service. We have not yet considered whether the recommendations will deal with all the problems in the Crown Office and Procurator Fiscal Service, but we will do so. We hope to consult the Lord Advocate.

George Lyon: Jonathan Pryce states:

"There are a catalogue of management issues: poorly focused management information; inconsistencies in budgeting; a lack of resilience in the staffing of the organisation; and overall a lack of a corporate and united approach being taken to standards and processes across the service."

Do you agree with those conclusions?

Richard Stott: Yes.

George Lyon: How do you want the review to be implemented? What role would the Procurators Fiscal Society play in that implementation?

Richard Stott: We hope that the review will be implemented in partnership. The Lord Advocate implemented one of Jonathan Pryce's proposals by appointing a chief executive, but he did so without consultation. We hope that other proposals will be implemented in consultation with the trade union side.

When such major changes are made, it is important that staff are taken along with management and that they are involved in the process. Managing change will be difficult and there is no doubt that the Crown Office and Procurator Fiscal Service will change. Our members think it essential that they are involved in change management and in implementation of the report's recommendations.

George Lyon: The committee has heard much evidence about poor staff morale, high turnover of staff and the inability to recruit and retain staff. Was low staff morale caused by poor management, or were other factors involved?

Richard Stott: It is fairly clear from evidence in the reports that have been produced that a lack of trust in the centre, a lack of support from the centre and a lack of management have been major causes of low morale in the Procurator Fiscal Service. There is no doubt among our members—the legal staff in the profession—that the work load, the lack of people and the lack of experienced people are major issues.

George Lyon: We have heard reports that pay and conditions are an issue. What are the terms and conditions for procurators fiscal?

Richard Stott: There has been an historic problem with pay for legal staff in the Procurator Fiscal Service. It would take me the rest of the morning to put on record what each group of persons is paid, because we have so many hybrid groups, which have things such as preserved rights and so on. Our view is that we must examine the matter. For example, the comparability study—which is under way as we speak—will assess whether we are getting paid the appropriate amount for carrying out the job that we do, particularly in comparison with the pay of other lawyers in the public sector.

George Lyon: Surely there must be some basis for working out what people get paid. Can you give us a rough outline? The committee wants to pursue the issue a bit further.

Richard Stott: The comparability study is the first step; its starting point is to assess whether we are getting paid as appropriate a rate for doing our job as are Scottish Executive lawyers. That comparison will initially concern the depute grade, which is the entry grade—after the training grade—into the Procurator Fiscal Service. In addition, pay comparisons could be considered for levels further up the field, such as upper-level fiscals. Pay comparisons could be carried out between their pay and that of other major players in the criminal justice system, such as police divisional commanders and sheriffs, who sit on the bench dealing with cases on which procurators fiscal decide and prosecute.

George Lyon: Can you give a monetary indication of the starting rate?

The Convener: Is it possible to tell us the starting salaries of a procurator fiscal and a legal person in the Scottish Executive, whose salary a fiscal's is being compared to?

Helen Nisbet (Procurators Fiscal Society) We have sought and pressed for that basis for comparability during the pay negotiations that date back to 2000. Broadly, deputes are on a pay scale of roughly £25,000 to £34,000 or £35,000. It must be understood that there is also provision for starting salaries for people who come fresh into the service after completing their traineeship, or for people who have no prior criminal law experience. Such people would be started on what is referred to as the training grade, which offers salaries below £25,000. Our contention—we hope that the comparability study will bear this out—is that the starting salary of the entry grade for a depute in the fiscal service is several thousand

pounds short of what people could expect to receive if they were starting on the entry grade at the Scottish Executive.

The Convener: What is the gap?

Helen Nisbet: The Scottish Executive also has a training grade. However, my understanding is that the Scottish Executive's basic entry-grade salary is between the low thirty thousands and the low forty thousands; from £32,000 or £33,000 to £42,000 or £43,000. If our understanding is correct, one is therefore talking about a gap of about £8,000.

George Lyon: Is that at entry level?

Helen Nisbet: That is at basic grade. The discussion on entry-level rates can move backwards and forwards, depending on whether one is talking about the training grade or the basic grade. Both the fiscal service and the Scottish Executive have training grades that offer salaries that are pegged at levels below the starting band salary. If we compare like with like on the basic grade, which is the grade that carries no specific management responsibilities or anything of that sort, our understanding is that there is a gap of about £7,000 or £8,000.

George Lyon: Does the system have an appraisal system that rewards performance? If not, how does the system work?

Helen Nisbet: Do you mean our present system?

George Lyon: Yes.

Helen Nisbet: There is a performance appraisal system, which is a commonplace throughout the public sector these days, particularly in civil service departments. We urge that the pay issue be addressed in terms of comparability. There is more to the issue than just the minima and maxima of the salary grades. Our view is that the crucial aspect is the speed with which our members move from the scale minima to the scale maxima. The operation of a combination of factors, such as performance-related pay and alterations to the scale minima and maxima over the years, has led to a situation in which people whose experience in the job is between six months and five or six years are all bunched up toward the bottom of the salary scale. There is no mechanism that offers those people any realistic prospect of moving to the top of their pay scale. In the most recent pay deal, we received an indication that there would be an undertaking that people would move from the scale minimum to the scale maximum in, I think, seven years.

Unlike in the Crown Prosecution Service and the Scottish Executive—we hope that the comparability study will also address this matter—there is neither a mechanism to underpin that promise nor a way of acknowledging the experience of people who had been in the service for a number of years. If changes were made at the bottom of the scale to improve the situation for people entering the service, those people would merely start to catch up with people who had several years more experience and who were perhaps directly responsible for training them.

George Lyon: We have heard in earlier evidence about the unacceptably high rates of staff turnover. Have you any evidence of that? Can you give us figures relating to the numbers of people who leave the service because of poor pay and morale?

Helen Nisbet: We could not give you hard and fast figures. We are anxious to make the point that, when we lose staff, we lose them at a critical stage. The retention rates might not look much worse than those of other departments. However, our perception—it is only a perception because we do not have access to the resources that would allow us to firm this up—is that recently, because of the lack of progression that we spoke about, people have been leaving after two, three or four years, sometimes for the Scottish Executive. In effect, that means that after we have spent time training those people to the point at which we are starting to get a return in terms of productivity, they choose to go elsewhere because of the lack of career prospects and salary advancement.

The Convener: Pay is not the only factor that determines retention of experience in the service. I know that you welcomed the recommendations in the management review report, but do you worry that any uplift in the budget will go toward changing the management structure and that there might therefore be no money left to address some of the issues that your society is concerned about?

Richard Stott: We are aware of the submission that the Lord Advocate made to the committee on 6 March and we welcome his continuing commitment to addressing the comparability study to the best of his ability. We can ask no more than that from the Government minister who is in charge of our department. Jonathan Pryce said that the remit of the review of planning, allocation and management of resources in the Crown Office and the Procurator Fiscal Service was not to include reference to pay. However, we hope that the money that is obtained for implementation of the management review's recommendations will deal with the issues that were raised in the management review, and that the Lord Advocate will pursue other courses to ensure that money is available to pay staff appropriately, when we have the evidence to come back to the Scottish Executive to ask for that.

The Convener: The committee is interested in the question of career structures for procurators

fiscal, as I am sure your society is. Earlier this morning, we heard about the particular skills that Crown counsel can bring to the system. We would like to examine that in more detail.

When the Justice 2 Committee started examining the issue, we were aware that the Lord Advocate has some powers to grant rights of audience to allow any person to prosecute in the High Court. What do you think the formula should be to allow procurators fiscal to make that jump between prosecuting in the lower courts and prosecuting in the High Court?

Richard Stott: I listened with great interest to the evidence that was given earlier, some of which I did not agree with. I do not think that there is a great jump between prosecuting before a jury in a sheriff court and prosecuting before a jury in the High Court. If there is a great jump in the prosecution system, it is between prosecuting before a jury and prosecuting before a sheriff.

My view is that procurators fiscal would be able to make independent decisions, prosecute in the High Court and provide a service to the public equal to that provided by Crown counsel. Indeed, our members believe that they would be able to provide a better service than that currently provided by Crown counsel.

11:45

The Convener: Would that mean a mixed system where procurators fiscal prosecute in the High Court alongside advocate deputes? Are you suggesting something different from that?

Richard Stott: I am not suggesting anything other than that the Lord Advocate should now consider bringing in people who prosecute in the lower court day in, day out—despite what Mr Batchelor has said—to prosecute and make decisions on cases in the High Court.

To change overnight from one system to another would probably be a recipe for disaster. However, as a result of the recommendations in Jonathan Pryce's report, I hope that we can enter into meaningful negotiations on changing the prosecution system and involving procurators fiscal in the decision-making processes.

The Convener: Can you clarify the society's position? Would the system be mixed? What kind of system would you be negotiating?

Richard Stott: Our position is that it would be advantageous for career structures and for the public to have members of the Procurator Fiscal Service among the ranks of Crown counsel. We are aware that, among Crown counsel, there are some excellent prosecutors and people who have built up experience from having been in the system for some time. We are aware that some people, including Derek Batchelor, have been in the Procurator Fiscal Service and have developed the relevant skills. We see no reason why members of the Procurator Fiscal Service should be excluded. Indeed, when a member of the Procurator Fiscal Service was appointed as Crown counsel, everyone agreed that it was a great success.

Stewart Stevenson: You have talked about an increased role for the fiscals, particularly in decision making. You will have heard the Crown counsel and advocate deputes make a strong point about their institutional independence. Until I read the *Official Report*, I am not sure that I will understand the distinction between the institutional independence that they suggested and practical independence. How do you view the influences that come to bear on fiscals when they are making decisions? Are fiscals truly independent or are they manipulated by others?

Richard Stott: One of the main functions of a fiscal is to take independent decisions in cases. To suggest that taking an independent decision that affects a victim of a housebreaking is different from taking a decision that affects the victim of a murder is ludicrous. Every case is important to the victims.

Every procurator fiscal in each of the 49 districts holds a commission from the Lord Advocate. Procurators fiscal are accountable to the Lord Advocate and to Parliament in the same way as Crown counsel in the independence of those decision-making processes. The decisions are taken daily in fiscals' offices by all fiscals in the Procurator Fiscal Service. We are used to making such decisions. Procurators fiscal require to make difficult decisions that will never cross Crown counsel's desks, such as whether proceedings should be raised. That is perhaps the most difficult decision to take; it is not about being presented with a case and recommendations and having to suggest what happens to that case.

George Lyon: Could you explain why there has been a reluctance to bring people from the Procurator Fiscal Service into the Crown Office to become advocate deputes? I do not understand the background to that and it is certainly not clear from the evidence that we have received so far.

Richard Stott: You should ask the Lord Advocate that question.

George Lyon: In your view, what has been the reason?

Richard Stott: The Lord Advocate does not want procurators fiscal to prosecute in the High Court. At least, he has not wanted them to do so—that might be a fairer way of putting it.

Stewart Stevenson: I wish to close off the issue

of independence. How important to the independence of the Procurator Fiscal Service is the commission from the Lord Advocate?

Richard Stott: It is extremely important, for some of the reasons that Derek Batchelor talked about. There has to be something to show that there is independence. We have to be able to show that we are separated from our administrative bosses, if we want to put it that way, in the area of work where we are required to take important decisions that affect members of the public. The commission from the Lord Advocate is granted to us under the Sheriff Courts and Legal Officers (Scotland) Act 1927. It gives us independence from the administrative or job side, so to speak, which protects us in the same way as Crown counsel say that they are protected because they come into the Procurator Fiscal Service from an outside source.

Stewart Stevenson: How would the changes that are envisaged to the management structure of the Crown Office and Procurator Fiscal Service—the beefing-up of the management structure—affect the independence of fiscals, who may now have someone else pulling their strings?

Richard Stott: That is a major concern among what we call district fiscals. We hope that the issue is open for consultation between us and the management side. Our members would have grave concerns if the proposals were about removing commissions from district fiscals in the 49 offices throughout Scotland.

Bill Aitken: Mr Stott, at present you are a fiscal in Dunfermline, are you not?

Richard Stott: That is correct.

Bill Aitken: Have you ever felt that your independence has been threatened by the police, the Health and Safety Executive or any other body?

Richard Stott: I have often been approached by the police, the Health and Safety Executive and other bodies that have tried to persuade me to do something, but I trust that I have been able to rely on the independence of my decision making. You would have to seek evidence from others on decisions that I have taken. I certainly feel that I am more than capable of dealing with any pressure that the police or the Health and Safety Executive can throw at me.

Bill Aitken: If you felt that you were subjected to undue influence, would you see that off fairly robustly or you would pursue the matter through the appropriate management structures?

Richard Stott: Ultimately, the decision on a case in Dunfermline rests with me. I am content that I have been given the authority to deal with such cases and I am content that I have the experience to deal with such cases.

I am not trying to give the impression that the police and the Health and Safety Executive exert a great deal of pressure on me. The majority of decisions that are taken are taken in consultation. There may be minor disagreements, but it is not often that someone tries to place a great weight on your head and says that you have to go one way or the other.

Bill Aitken: So you would not accept the evidence of the home advocate depute that you are placed under unreasonable pressure and that your independence could be prejudiced.

Richard Stott: The ability to deal with pressure is one of the qualifications for the job. The Lord Advocate granted me a commission because he felt that I was able to deal with that type of situation. That is the same for any other commission holder; the Lord Advocate would not grant a commission to someone who he felt could not deal with those matters.

Bill Aitken: I would like to ask Helen Nisbet the same question. You are a depute in Glasgow. Have you ever felt that your independence was under pressure or threat?

Helen Nisbet: No. Part of the culture that people are immediately introduced to on entering the Procurator Fiscal Service is that the service is proud of its independence and separation from the reporting agencies. Like Mr Stott, I do not for one minute wish to suggest that the reporting agencies routinely seek to pressure the Procurator Fiscal Service. It feels as though the integrity of me and my colleagues is being impugned, which causes a lot of offence to deputes in the service.

Bill Aitken: You are perfectly relaxed that you can conduct your role totally independently of any external pressure.

Helen Nisbet: Yes.

Mr Hamilton: In fairness to our previous set of witnesses, we should put on record that Mr Batchelor was at pains to say that he was not impugning the integrity of the fiscals. Indeed, he had no doubts about that integrity. However, he argued that there had to be clear water between the different parts of the service. He talked about conscious or unconscious influences that might affect decisions. By definition, you cannot know whether some of the factors that he listed, such as career structure, either consciously or unconsciously affect your decisions.

Richard Stott: I beg to differ on that. Because of the nature of the job and the experience that we have, we are well aware of the reasons behind the decisions that we take. As for the issue of independence, quite frankly I do not see the difference that it makes to the prosecution of

cases at summary level. I disagree with Derek Batchelor's comment, which he may have made inadvertently, that Crown counsel takes the decision to prosecute either at sheriff and jury or at summary level. That is not correct: the procurator fiscal takes the decision to prosecute at summary level. I do not see what difference that makes to the perception of a victim in a summary case of the independence of the decision making. It is as important for that individual to see that the decision is independent as it is for a victim in a High Court case.

Mr Hamilton: I dare say that it is true that you know exactly why you take your decisions. However, you must be able to envisage a situation in which the factors that Mr Batchelor mentioned would have an impact on people's decision-making process or at least could be perceived as having a potential impact. You have both already cited two or three agencies that, at various points in your careers, have perhaps not attempted to pressure you but have at least made their best-case scenarios known to you. That suggests that there is at least the potential for others to be influenced, whether consciously or unconsciously. Does that not make the point about the importance of institutional independence?

Richard Stott: There can be an element of what might be called local pressure. Although the decision to prosecute in the High Court should not necessarily be taken by the person who has investigated and prepared the case, that does not mean that we should distance the matter by taking it to someone who is not a member of the Crown Office and Procurator Fiscal Service.

Mr Hamilton: I understand that. However, your evidence has made it clear that there is pressure and that people have tried to pressure you into taking a certain decision. As someone from outside your system, I would be much more relieved if I knew that you were not taking a decision under those circumstances. Ultimately, I have to trust to the fact that individuals who have admitted that there is such pressure will resist it. Is it not better to have institutional independence as a safeguard?

Richard Stott: The commission protects us.

Mr Hamilton: Sorry. I did not understand that answer.

Richard Stott: I said that we have the commission to protect us.

Mr Hamilton: Then what is the problem with having an additional check?

Richard Stott: I see no difficulty with making an additional check on important decisions. However, I do not know why getting someone from outside the organisation to take on the matter will make the process any more independent. It is important that decisions are made by people who have the ability, skills and experience to make it. I do not think that members of the public would think that a civil practitioner who had come in on day one would be the ideal person to take over a decision made by an experienced criminal practitioner, or that such a system would be advantageous. However, I might be wrong.

The Convener: As there are no further questions, I give our witnesses the opportunity to comment on Crown counsel's attitude towards the establishment of the High Court unit in Glasgow.

12:00

Helen Nisbet: Like the committee, I was a little surprised at the extent to which Crown counsel took issue with it. The general view of fiscals working in the process is that we would not expect advocate deputes to come out of court after many hours and then mark a pile of cases that were waiting for them. The detail is still to be hammered out, but we envisage an alternative base for the marking process, which would be properly resourced. A duty team of advocates would undertake office work rather than court work.

The crucial point, which has been made clear in the evidence from various inquiries over the past few months, is that, under the present legislation, we have a very small window in which to report cases. If a case is to be indicted by the 80th day, Crown Office and fiscal staff must report it by the 60th day. Losing days in that short period because paper is travelling between Glasgow and Edinburgh seems wasteful. It was that aspect of the process that most of my colleagues and I anticipated that the Crown Office west would address by reducing the movement of papers between Glasgow and Edinburgh.

The Convener: Do you perceive an advantage in having a base in Glasgow?

Helen Nisbet: Undoubtedly. If 60 per cent of the work is generated in the west and returns to be prosecuted in the High Court in the west, it makes sense to streamline the system so that the decision making is undertaken in the west. That will avoid papers shuffling back and forth across the country.

The Convener: That is helpful. Members have no further questions. Is there anything that you would like to say to the committee before I close this part of the meeting?

Richard Stott: We thank you for inviting us to give evidence a third time.

The Convener: Thank you. Your evidence has been useful. You have given us a lot of statistics, which we will use when we write our report. If

there are any outstanding issues, we will liaise with you to get any figures that we do not have.

Before we move to item 4, which is consideration of a draft report on the Land Reform (Scotland) Bill, I propose that we have a cup of coffee.

Mr Hamilton: It strikes me that, after today's evidence, there is still a substantial debate to be had on institutional independence. On the last page of its submission, the Faculty of Advocates offers to give oral evidence to the committee on that point. Can the committee consider additional evidence?

The Convener: I do not think that members would disagree with that. We should hear from every organisation that can add to the arguments that we have heard this morning. Is that agreed?

Members *indicated agreement*.

The Convener: We will try to fit that into an evidence session.

George Lyon: Would it be worth while to ask Jonathan Pryce to attend the committee?

The Convener: The committee will have to take a view on how it will write its report, given that a weighty report was published last week that goes well beyond the committee's remit.

Bill Aitken: Jonathan Pryce puts forward separate issues, which are outwith our fairly narrow remit. I have no doubt that hearing from him would be interesting, but I am not sure that it would be particularly helpful to our inquiry.

The Convener: Shall we keep Jonathan Pryce in reserve and think about inviting him?

Bill Aitken: Yes, I would be quite relaxed about that.

The Convener: As we draw near to writing the report, we will have to consider how we will bring all the information together. Members might want to give that more detailed thought. It would not be a case of sticking an hour on to the end of a meeting; we would have to consider holding a separate meeting devoted to examining all the evidence that we have taken since the beginning of the inquiry, for the benefit of Duncan Hamilton, Alasdair Morrison and Stewart Stevenson—perhaps George Lyon, too—who were not members of the committee at the start of our inquiry.

Before I close the public part of the meeting, I remind the committee that our next meeting will be on Wednesday 27 March. We have a breathing space of a week—the only one, I am sure—because that is the week in which we will publish the stage 1 report on the Land Reform (Scotland) Bill. Members will be busy with that, no doubt. On 27 March, we will hear evidence in relation to petition PE336, on asbestosis cases, from the petitioner, Frank Maguire. The committee may also want to consider how it will deal with some of the issues that we picked up yesterday in our meeting with the justiciary.

We will now have a break for coffee, after which I hope we will sign off our stage 1 report on the Land Reform (Scotland) Bill.

12:05

Meeting suspended until 12:15 and thereafter continued in private until 12:48.

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