JUSTICE 2 COMMITTEE

Tuesday 16 September 2003
(*Afternoon*)

Session 2

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JUSTICE 2 COMMITTEE
5th Meeting 2003, Session 2

CONVENER

*Miss Annabel Goldie (West of Scotland) (Con)

DEPUTY CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
*Scott Barrie (Dunfermline West) (Lab)
Colin Fox (Lothians) (SSP)
*Mike Pringle (Edinburgh South) (LD)
*Nicola Sturgeon (Glasgow) (SNP)

*attended

COMMITTEE SUBSTITUTES

Ms Rosemary Byrne (South of Scotland) (SSP)
Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Michael Matheson (Central Scotland) (SNP)
Margaret Mitchell (Central Scotland) (Con)

THE FOLLOWING GAVE EVIDENCE:

Alison Cleland (Scottish Child Law Centre)
Mike Holmes (Enable)
Anne Houston (ChildLine Scotland)
Margaret McKay (Children 1st)
Maggie Mellon (NCH Scotland)
Nicola Smith (Enable)

CLERK TO THE COMMITTEE

Gillian Baxendine
Lynn Tullis

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 2

Scottish Parliament

Justice 2 Committee

Tuesday 16 September 2003

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:04*]

Vulnerable Witnesses (Scotland) Bill: Stage 1

The Convener (Miss Annabel Goldie): I welcome everyone to the fifth meeting this session of the Justice 2 Committee. We hope to be joined at some point by Colin Fox, who is making his way back to Edinburgh from Sheffield.

I remind members to double-check that they have turned off their mobile phones and pagers.

We invited the Scottish Association for Mental Health to give oral evidence, but the association declined the invitation as it felt that it did not have much to add to the written submission that members have received. We are very pleased that representatives of Enable felt fit and enabled to come and see us. We appreciate your submission, which was most helpful, and your appearance at the committee today.

We had hoped to have Louise Johnston of Scottish Women's Aid with us today, but unfortunately she is unwell and cannot be here. We hope that she will be fit enough for next week's meeting. If not, I understand that a colleague from Scottish Women's Aid will be present to give evidence.

I extend a warm welcome to Mike Holmes and Nicola Smith of Enable. As I said, your written submission was very helpful. I would be delighted if you would make some short introductory remarks, but you might feel that, as members have had the opportunity of looking at your submission, we should just get on with the questioning. If you would like to say anything, please do not feel intimidated.

Mike Holmes (Enable): With your permission, convener, we would like to put Enable in context. We want to explain who we are to members of the committee or to others who are listening to the debate.

First, I thank the convener for the opportunity to attend today's meeting. Enable is a major voluntary organisation of, and for, people with learning disabilities and their carers. We are a member-led organisation with around 4,000 members across more than 60 local branches in Scotland. We are a fairly big player in the field of learning disability and a well-established organisation—next year we will be 50. We are a large employer; we employ more than 800 people who provide direct support to several thousand people with learning disabilities across Scotland.

All people with learning disabilities will fall into the category of vulnerable witnesses. The issue is germane and central to us. I thank the committee for inviting us to come along and answer questions. Nicola Smith is a solicitor for Enable. Between us, we hope to clarify any points that the committee wants to raise.

The Convener: Thank you for that introduction, Mr Holmes; it was very helpful. Without further ado, we will proceed to questioning.

Jackie Baillie (Dumbarton) (Lab): I hope that the witnesses do not find the process of being at the committee too intimidating.

Your submission was very helpful. One of the strongest points that leapt out at me was your view that all people with learning disability should automatically be entitled to the use of a special measure. However, the bill, as drafted, affords that automatic right only to children. Why should the right be extended to those who are learning disabled and not to other categories of disability? What is wrong with the approach that is suggested in the bill? Will that approach lead to insistency in decision making in different courts in Scotland?

Nicola Smith (Enable): In preparing our submission, we consulted people with learning disabilities, their families and carers. They feel very strongly that people with learning disabilities should be placed in the same position as children in this instance and that the right to use a special measure should be automatic. We think that the arguments that apply to children apply equally to people with learning disabilities.

The vast majority of people with learning disabilities are likely to need some help in giving evidence in court. A few of those people will be able to give evidence and will choose to do so; they will choose not to use a special measure. A small number of cases might involve someone with a learning disability who might choose to use a special measure when they give evidence. However, that is already the case with children.

We feel that an automatic right would protect the vast majority of people with learning disabilities and we are concerned that a discretionary measure might not be valued or used. For example, the submission from Children 1st mentions the current use of what are essentially discretionary measures in relation to children. Although most of us would think that, in many cases, screens or some other special measure

should be used, the sheriff or judge appears to put higher value on the interests of the accused. We are concerned that the introduction of a discretionary measure instead of an automatic right would have the same result for people with learning disabilities.

We are worried about identification, which will also be a discretionary measure. People with learning disabilities have to rely on one of the parties to the case identifying that they have a learning disability, which is not always immediately apparent. Moreover, they have to rely on the same party finding out whether they need a special measure. As a result, a heavy weight is placed on a party to litigation who probably has no learning disability expertise. We feel strongly that introducing an automatic right will benefit people with learning disabilities.

Jackie Baillie: I want to press you on what makes people with learning disabilities potentially more vulnerable than any other category of witness. What kind of special measures would be required for people with learning disabilities under the automatic right that you have described? For example, some people might argue neatly that the bill should list the different people who should be automatically considered for such a right, even though that would remove the court's discretion and ability to be flexible. Will you give me a sense of the balance that leads you to propose that people with learning disabilities should be considered for an automatic right?

Nicola Smith: We recognise that there are many categories of vulnerable witnesses and we do not want to say that people with learning disabilities are automatically more vulnerable than children in such situations. When we spoke to people with learning disabilities, they told us that they would be scared to go to court because they would not know anyone in the courtroom and they would be asked a lot of hard questions. They would also be worried about seeing someone who had harmed or threatened them. Finally, they felt that they would not understand the procedure and that it would be helpful to have someone present to assist them. We have based our position on comments that were made by people with learning disabilities, who confirmed overwhelmingly that a special measure would help them.

Mike Holmes: People with learning disabilities are not a militant lobby and are not good at exercising their rights. I have been involved with people with learning disabilities for years and often I have not known whether someone has a learning disability, even after I have spoken to them. It is also difficult to identify the extent of people's disabilities. For example, we deal with people who cannot read or write and others who can. Because their disabilities might not be apparent, those people should have an automatic right to special measures and the support that would enable them to communicate and give evidence appropriately.

The Convener: I ask for members' co-operation in keeping questions as focused as possible. We already know the contents of Enable's written submission. Members also know the areas from which they will want to tease out further clarification.

Nicola Sturgeon (Glasgow) (SNP): Regardless of whether entitlement to particular measures is automatic or discretionary, there will always be a need to identify vulnerable witnesses early in the process. The Crown Office indicated in its evidence two weeks ago that it would do so through engaging with support groups. Do you see a role for Enable in that process? If so, what would its role be? Secondly, what other steps would it be important to take to ensure that vulnerable witnesses are identified early in the process so that they can be given the protection of special measures?

14:15

Nicola Smith: One of the difficulties with the bill is seeing where, and by whom, a vulnerable witness will be picked up; it is not clear on whom that responsibility will fall. Ultimately, responsibility is on the court when the case is before it, but that is late in the proceedings. We have spoken to vulnerable witnesses and people who have gone through the court process and they have indicated that there has been a lack of proactive support for them. The support that they have received has been dependent on them having a good social worker or a family member who has contacted Victim Support Scotland and other support groups and arranged a pre-court visit. The system has relied on family members doing that, and the services seem to have been reactive. There will probably be difficulty in identifying vulnerable witnesses early on in the procedure.

Members should consider how cases are prepared, in particular on the criminal side. I am not a procurator fiscal; a fiscal could probably explain the system better. I understand that the police would usually take statements and send them to the Procurator Fiscal Service. The fiscal would often use precognition agents to go out to take statements. The fiscal may meet the witness for the first time in court on the day of the trial. Will the precognition agent have a duty to tick a box and flag up the fact that the witness might be vulnerable? Voluntary organisations and support groups will have a role, but that depends on a voluntary organisation or support group already being involved in someone's life or on a family member or social worker contacting the organisation or group to get them involved. That will not happen automatically.

We stated in our submission that we would like people who consider themselves to be vulnerable witnesses to self-refer to the court. That might not solve the problem, but at least when those people made contact with another group they could be advised that they may be entitled to special measures and they could make an application at an early stage.

Nicola Sturgeon: We will discuss self-referral later, but even that places the obligation on the vulnerable person. Should the bill be more explicit in specifying where the obligation should lie for the identification of vulnerable witnesses in the pre-court stage of the process?

Nicola Smith: We would like the obligation to be placed quite strongly on the parties to meet witnesses and provide something. A statement could perhaps be provided to the court at an early stage to state that they have met and spoken to witnesses and to indicate whether any of the witnesses are likely to be considered vulnerable.

Mike Pringle (Edinburgh South) (LD): You have highlighted a huge issue within the system. You say that, often, the day on which the vulnerable witness—I am talking not only about somebody whom you represent—goes to court might be the first time that they have met the procurator fiscal. Do you agree that the vulnerable witness often does not even know who the procurator fiscal is until they step into the witness box?

Nicola Smith: I think that that is correct. The procurator fiscal may have been given the case only the night before, so they might not have had an opportunity to speak to the vulnerable witness. In court, the witness may have no familiar faces around and no one to provide them with information.

The Convener: Are you saying that if a vulnerable witness is a witness for the Crown in any case, it is desirable that the earliest possible identification of the vulnerable witness should be effected? That would usually be at the police stage. No one is a witness until the police have taken statements and decided to refer the case to the fiscal.

Nicola Smith: I think that that is usually when identification of a vulnerable witness would happen, although later on in the proceedings the fiscal would be able to identify on sight vulnerable witnesses who may not have been identified by the police. The responsibility must be on-going at all levels. When a witness is identified, a basic assessment should be made of whether they are vulnerable.

Karen Whitefield (Airdrie and Shotts) (Lab): The Crown Office has been rolling out its victim information and advice service throughout Scotland. What experience do you have of that service? Has its introduction meant easier identification of witnesses who may be vulnerable and provision of support to them, which you have said is needed, so that they know what will be expected of them in court and are better prepared to go into court and give evidence?

Nicola Smith: I have not come across the victim information and advice service a great deal and those people to whom we have spoken who have recently gone through the court system have not had much involvement with it. I might be wrong, but I understand that the organisation is more of a signposting organisation that provides information and advice rather than additional support.

Scott Barrie (Dunfermline West) (Lab): I want to turn to the possibility of an accused person's being present while evidence is being taken on commission outwith the court, which is one of the bill's special provisions. Are you concerned about that proposal?

Nicola Smith: Things will depend on the circumstances of each case and on why evidence is being taken on commission. If, for example, a person is ill in hospital and cannot go to the court, it might be appropriate for the accused to be there. However, if there is another reason for evidence being taken on commission—for example, the person might find it too difficult and distressing to come to the court—we would hope that measures would be taken so that the person was not further distressed by the presence of the accused when evidence was taken.

Scott Barrie: So you would not go as far as some people whose evidence we have taken. It has been suggested that having the accused present when evidence is being taken outwith the court premises might be an impediment to the person who is giving evidence.

Nicola Smith: It must come down to the circumstances in each case. We hope that the provisions will be applied in the spirit in which they are intended and that sensitive decisions will be taken. Television link-ups, for example, could be used where they are appropriate.

The Convener: I want to turn to a more technical matter—the competence test. Your written submission says that you support the abolition of the competence test, which the bill provides for. If the test is abolished, is there a risk and concern that a witness with learning disabilities will end up in open court and will be required to give evidence, albeit that they will be subject to measures that the court might have determined to be appropriate?

Mike Holmes: There is concern that people with learning disabilities in general will end up in court giving evidence without special measures if there

is no automatic entitlement. The competence test simply establishes whether a person knows the difference between a truth and a lie; it does not establish whether a person is more likely to tell the truth. Just because a person knows what is and is not a lie does not mean that they will tell the truth. In fact, some people would argue that the more intelligent a person is, the more chance there is that they will tell a lie in court—however, we will put that matter aside. For such reasons, we want the competence test to be abolished.

The Convener: Has the Executive consulted adequately on the bill? Would it have been appropriate for it to have examined any other areas?

Nicola Smith: I do not know how much the Executive has spoken to people who have been vulnerable witnesses, although the bill team certainly asked for Enable's views. We introduced the team to people who had been through the criminal justice system, which I hope was a positive experience. Obviously, we would like the consultation of those whom the bill will affect to be as wide as possible.

The Convener: I have one final question, which was not covered in the earlier line of questioning. Could pre-trial support be covered by a code of practice, or something like that, rather than having to be written into the bill? Could it be dealt with by taking a commonsense approach in agreement with the Crown Office and Procurator Fiscal Service? I am talking about the pre-court element.

Nicola Smith: We hope that it could be dealt with by taking a commonsense approach, but that is not happening just now. Clearly, steps have to be taken to ensure that that happens and that people are properly supported.

It is difficult for me to say whether pre-trial support should be included in the bill, because I do not know how much research has been done on what happens at the moment and what could help. However, the people to whom we spoke who had had pre-court visits or who had had information explained to them properly found the process beneficial and were a lot less apprehensive about going to court. There can be huge benefits from relatively straightforward practical measures.

The Convener: Are there any more questions for our witnesses?

Mike Pringle: I have a question on self-referral. You said that some witnesses called for provision to be made to give witnesses the power to make an application in their own right to be treated as a vulnerable witness. Is self-referral desirable? If so, are there any impediments to that facility being made available? Could you expand on that?

Nicola Smith: Self-referral is important. As I said, there is a high risk that witnesses will not be identified until late in the proceedings, which may involve them turning up at court, being identified as vulnerable, a new date being set, them suffering distress at having to go to court in the first place, and additional delays. Self-referral would help from that angle.

As Mike Holmes said, identification of a learning disability is not always as straightforward as people may think. Sometimes, you may be able to look at somebody and identify that they have a learning disability, but often you will not be able to. It is important that people who consider themselves to have a learning disability, and therefore to be vulnerable, can make that known to the court at an early stage, rather than having to rely on someone else identifying their disability and then making the application.

Mike Pringle: Point 4 of your submission states:

"A person who has given evidence in a court case should be allowed to be a supporter."

Later, you state that you see no reason for excluding from such a role people who have already given evidence in the case. We have raised that issue with others. Could you flesh out your comments?

Nicola Smith: In a large number of cases, the person who is best placed to be the supporter will be someone who is known to the vulnerable witness; often, they themselves may also be witnesses. Normally, there is no restriction on someone giving evidence then sitting in the public gallery and hearing the rest of the case, so we cannot see why there should be a restriction on them sitting in front of the public gallery where they can provide support.

Mike Pringle: Do you mean beside the witness? You feel that that would be a good thing?

Nicola Smith: Yes, definitely.

Mike Pringle: I think that that is what others have said.

14:30

The Convener: Thank you both for coming here this afternoon and for the fullness of your evidence, which I am sure my colleagues on the committee have found to be very helpful. It has assisted our understanding of the submission that you made.

On behalf of the committee, I welcome the three witnesses who are appearing under the umbrella heading of justice for children. They are Margaret McKay, chief executive of Children 1st; Maggie Mellon, head of public policy for NCH Scotland; and Anne Houston, director of ChildLine Scotland. We have received written submissions from our witnesses that members have had an opportunity

to consider. We have also received a very recent submission that was immensely helpful. I hope that members have had a chance to see that.

As I indicated to the earlier witnesses, we would be pleased to hear any preliminary statement that you would like to make. However, if there is nothing in particular that you can add to the evidence that you have submitted, you may think it appropriate for us to proceed straight to members' questions. Do whatever you feel is appropriate.

Margaret McKay (Children 1st): We would like to make a few introductory comments.

I thank the committee for inviting us to meet it this afternoon. The Vulnerable Witnesses (Scotland) Bill is an issue of great importance to children, but it is also an issue of great concern to anyone who has an interest in child welfare and the delivery of justice.

The convener has introduced my colleagues and indicated that we are here both to give members the benefit of our experience in child welfare organisations and to draw on the experience of a wider group of people in the justice for children reform group.

We have welcomed the Scottish Parliament's commitment from its inception to addressing the needs and rights of victims in Scotland and to effecting a change in the balance between victims and accused persons, without in any way compromising the rights of the latter. We recognise that the bill is an important first step, as it acknowledges the vulnerability of certain groups of witnesses. Children are clearly one such group.

We understand that today the committee is examining the general principles of the bill. In that context, we want to make the following points.

The bill as presently framed will make modest improvements in the experience of children appearing in courts as witnesses. However, it falls far short of the reform that we believe is necessary. We would be happy to talk further with the committee about that. From our work, we know of the trauma that children experience when they appear as witnesses in our justice system, and of the long-lasting effects that that has on them. At the outset, it is important to point out that not all child witnesses are victims. Some will be bystanders who have witnessed criminal acts. Others will be the focus of care-and-protection proceedings or of marital disputes.

In our view, the bill in its present form serves to soften the blow for child witnesses in adult courts, but does not bring about the radical change that we believe is both necessary and possible. We have consulted widely with people with experience of working with children as witnesses, with people in the justice system and with academics, and we believe that our proposals are both practical and implementable.

We believe that children's needs should be given the same weight as the rights of accused persons, rather than counterposed against those rights, as happens at the moment. That can be done without compromising the tenets of justice. There is an urgent need for change in the culture and practice of our justice system. Children should be removed from the adversarial cross-examination system and should have the right to special measures, rather than there being discretion for such measures. There should be a clear assumption that children do not need to appear in court at all. Evidence should be taken routinely on commission or intermediaries should be used except when a child or young person clearly expresses a contrary view.

Above all, we want to see training for all those who are involved in the management of child witnesses, from the point at which children first give their statement right through to the delivery of a judgment. We think it important that people receive training about children's understanding of what questioning involves and means. Such training should be mandatory, not discretionary.

We are happy to answer any questions.

The Convener: That may have assisted members in cutting down their questions. You have covered areas that I know some members wanted to explore. I am aware that Jackie Baillie has a slight difficulty time-wise, so perhaps she could go first.

Jackie Baillie: Those opening comments were helpful, but I want to tease out the automatic right to special measures. The bill as currently drafted gives the courts the power to determine what special measures should be put in place and, indeed, even to deny special measures. My understanding is that the bill currently provides no right of appeal in the case of a court finding against the need for special measures. First, do you think that that is right? Secondly, does that afford adequate protection for children?

Margaret McKay: I will pass that over to one of my colleagues. Jackie Baillie may well know how we would answer that question, but it would be useful for one of my colleagues to contribute.

The Convener: Before you do that, perhaps I could ask for your co-operation. There will obviously be areas of questioning in which the three of you will entirely agree about the response. I am in your hands as regards choosing which representative should respond. I am afraid that we will run out of time if we have an answer in triplicate to every question.

Anne Houston (ChildLine Scotland): We must consider the issue from the child's perspective. At ChildLine, we hear regularly that the major thing that sometimes stops children even reporting what has happened is the fear that they will have to give evidence in front of the person who is accused. That really terrifies them.

Our view is that children should have an automatic right to special measures. We need to provide that if we are to ensure that we can get at the truth and enable children to give their best possible evidence. We approach the issue from that perspective, which comes directly from what children and young people have said.

Children have also contacted us after an experience in court where special measures have not been taken and they have sometimes told us that their experience in court was almost more abusive. We are concerned about how rarely special measures are implemented. We need a major culture shift and to make that happen, special measures have to become automatic.

Jackie Baillie: The right to appeal has been raised by others. If a court refuses a special measure, should there be a right to appeal?

Anne Houston: Yes.

Margaret McKay: The answer to that is obviously yes, but our position is that special measures should be automatic. That should not be a matter for discretion. That is the point that we want to make.

Nicola Sturgeon: The bill gives an automatic right to special measures except where it is considered that a trial may be significantly prejudiced and that that risk outweighs any risk of prejudice to the child. The Crown Office and Scottish Executive officials whom we heard from last week were quite strongly of the view that that is an extremely tough test, which they did not expect to be used very often. Notwithstanding that, do you fear that that get-out clause—if I may call it that—would be over-used and be open to abuse?

Maggie Mellon (NCH Scotland): The problem with a discretionary entitlement is that there is always room for error. Our view is that we should take out the room for error and make the provision of special measures automatic.

The very fact that we are beginning to think about special measures shows that we believe that justice can co-exist with providing a level footing for people who might not otherwise be able to give their best evidence. Once that point has been conceded, there is no reason why special measures should not be made automatic. That would take out any room for what could be very serious errors, which might end up in appeals and draw everything out for everybody in a very unhelpful way.

Nicola Sturgeon: I think that you heard the evidence from the previous witnesses, with whom we explored the early identification of vulnerable witnesses, which will be crucial regardless of whether entitlement is automatic or discretionary. It was suggested that the bill may not oblige certain people, such as the police or other parties, to identify vulnerable witnesses. Would you support such an obligation?

Maggie Mellon: We highlighted in our report the need for such early identification and for case management, so that the best informed decisions could be taken from the earliest point in the process. We produced a flow chart that showed how we thought that that would work. As our colleagues from Enable were saying, when a child or other vulnerable witness first makes a statement—either as a witness or as the victim of an offence—and people are aware that the matter may end in court, decision making must be brought to bear from that point onwards.

The Convener: That would normally be at the police stage.

Maggie Mellon: That is right. We highlighted the fact that, once the police have taken a statement with a view to forwarding the case to the procurator fiscal—or elsewhere, depending on the type of case—that is the point at which decisions should be made. We likened it to the children's hearings system, which was established with a view to bringing together multidisciplinary expertise in legal, welfare, health and mental health matters, to allow informed decision making about what is in the best interests of the child. That is the approach that needs to be taken, rather than everybody working away in their own field and then suddenly appearing in court and expressing a different view.

Nicola Sturgeon: I accept that, but is it your firm view that, rather than early identification happening only by way of good practice, there should also be a statutory obligation on the different agencies?

Maggie Mellon: Yes.

Nicola Sturgeon: Would those agencies be the police alone, or the police and the fiscal, or would defence agents be involved if the vulnerable witness was a defence witness? Have you thought about those details?

Margaret McKay: We are proposing that there should be a children's justice section within the Justice Department that should be charged with all aspects of anything material relating to child witnesses, although we have not described how that would work. That would cover the whole process, from the point at which the children first tell their story, usually to the police, right through to the point at which they are given special

measures. Our view is that they should not be appearing in court. We want somebody in the Justice Department to be charged with that responsibility, because we do not think that a culture change will come about otherwise.

The Convener: May I make a slightly provocative point? I imagine that there will be cases in which, with the full agreement of the parents, a child—a child over 12, let us say—is a witness, and the parents say, "We are perfectly content for our child to be a witness in this case, and we have discussed it with the child." That would beg the question of whether the automatic entitlement is required. Is there wisdom in leaving some flexibility in the system?

Margaret McKay: Our stated position is that the child's entitlement should be automatic, but that the child should be able to opt out of it if he or she wishes. That is especially likely to be the case with a teenager, who may feel that they want to stand up and give their evidence in court. They may do that for a variety of reasons; it may be their way of managing the trauma that they have experienced. The child's interests should be paramount in making that decision, but the entitlement should be automatic.

Maggie Mellon: I would like to add a quick rider to that. It is very important that decision making is informed, and that goes for parents, for children and for young people. Parents need information and advice from the people who are dealing with the health or social work aspects of their child's case. People cannot just be left to make decisions and then to pick up the pieces.

Margaret McKay: Parents tell us in retrospect that if they had known what the experience would be like, they would not have allowed their child to be put in that position. That cannot be in the interests of justice, nor is it in the interests of democracy. One of the key tenets of democracy is that people must be willing to bear witness. If children learn that that is a negative or damaging experience, that will undermine our democracy further down the line. As well as practical issues, there is an important philosophical point about the kind of society that we are building.

14:45

Mike Pringle: I am grateful for that point, which leads me to a question about age. In your paper "Child witnesses talking", Susan's and Wendy's stories are good illustrations of the fact that children do not enjoy going to court. We must do something about that. You say that the age limit under which children would not have to appear in court should be 18—a matter that we have explored in previous evidence sessions. I am not sure why the bill has picked on 12; it could equally have picked on 11, 13 or 15. Your submission suggests that the age of a vulnerable child could be anything below 18. Will you say a bit more about why 18 and not 12 should be the cut-off point?

Anne Houston: The issue is a difficult and subjective one, because children develop at different rates and have different capabilities at different ages. We must also consider how the bill fits in with other legislation on the ages at which children are considered to become adults. This matter is exceedingly confusing for us, so what must it be like for a child trying to understand whether they are considered to be a child or an adult in different circumstances?

All children under 12 should automatically be considered to have their evidence taken on commission, and the same should apply to children over 12, but below 18. The age of 12 is arbitrary: it is useful in many situations relating to the expected age of capacity, but our view is that, as Margaret McKay said, children should not have to appear in court unless they wish to, and that the age of 18 should be used so that the bill is consistent with other legislation.

Maggie Mellon: That view is informed by the United Nations Convention on the Rights of the Child, to which Britain is a signatory. The convention states that the age of childhood is under 18. All the charities in justice for children take the view that young people should not be dealt with in adult courts until they are 18. We support the extension of the children's hearings system to cover children up to that age. As young people under 18 do not have the right to vote and are not recognised as fully adult, it is logical to say that they are in the domain of childhood. With young people who are approaching adulthood, one would expect fewer special measures to be used, if they are used at all. However, where necessary, children should have the right to use them.

Nicola Sturgeon: I think that my question will take us outwith the remit of the bill, but this highlights the ridiculous situation that we have with different ages being used for different purposes. I understand your proposals and am quite supportive of them, but if your definition of a child were accepted, a young person who is married with kids would be entitled to be treated as a child before the adult courts. Is that sustainable?

Maggie Mellon: No. The matter is probably outside the realms of the bill, but we agree that we must examine the ages at which children are entitled to do certain things and have certain rights. The ages are all over the place: 8 is the age of criminal responsibility, and people can get married when they are 16, but they have to be 18 to vote. There are people who can be held

criminally responsible, but cannot vote. Those issues must be considered and we think that the Parliament should do that.

Scott Barrie: It is nice to see the witnesses again. In your written submission, which was welcome, you claim that there are two major omissions from the bill, one of which is the establishment of a child witness support service. Why is it fundamental to include such a measure in the bill?

Margaret McKay: Our submission draws on our experience. We have given examples of cases and we will provide other evidence for the committee on tape and through a visit. It is clear from that evidence how isolating and frightening the experience is for children and how unclear children are about what will happen. For example, children regularly describe the fiscal as "my lawyer", because if the accused has a lawyer, the fiscal must be their lawyer.

A child witness support service is critical if we are to protect children's rights and ensure that they give the best evidence. That is nothing to do with coaching them; it is linked to supporting them. At the moment, some people might see a child weeping and feel unable to pass a hankie to them in case they are slapped down for interfering with justice. It is important to recognise what that is like for children and that it is important to build in that child witness support service from the beginning.

Such a service is needed not only when a child appears in court, but throughout the process, because children and families are often mystified. They are at a loss and wonder what is happening, what will happen next, who they should talk to and what they should do in different circumstances. Matters that they might have thought about and then put behind them come up again. We think that this important service should be part of our justice service.

Anne Houston: Unfortunately, when gaps exist in the information that children get about what is going on, they often turn that into the idea that they must have done something wrong and that they have not been clear enough. They often assume, wrongly, that it is their fault that things are being held up and that they are not being believed. That adds tremendous pressure to an already pressurised experience for them.

Scott Barrie: How would a child witness support service fit in with the existing court procedures, including those concerning leading evidence? Would we have to go back to the drawing board?

Margaret McKay: No. The Executive has undertaken quite a bit of work on a child witness support service. Between 1996 and 1999, the famous Lord Advocate's report was produced, so we are not starting from scratch. Many people have given the idea much attention. It is important to recognise that such a service must be put in place because children need it.

Scott Barrie: Does justice for children support fully the recommendations in the Lord Advocate's report, which has been around for some time, as you said?

Margaret McKay: We support elements of that report, but we are concerned that provision is nebulous. That is why it is important to have a children's section in the Justice Department. From our experience, it is clear that coherent provision is lacking where children are concerned. A body or bodies must be charged with overseeing what happens to children in our justice system, from when they first give their statements to when the case is closed and beyond.

The Convener: Justice for children's letter to the committee of 12 September included harrowing accounts of three individuals' experiences. I will return to Scott Barrie's question. Is anything happening that might have mitigated those three individuals' experiences? I ask because I note that they were interviewed a year ago and that some years have elapsed since what happened in court.

Margaret McKay: A witness support service is available for children in some places, but the weakness is that it is not consistent or guaranteed. Also, there is no statutory requirement for a child witness support service. Such a service will therefore exist sometimes in some places, and in other places not at all. It might depend on a particular organisation having the resources to provide the service or being able to invest its time in it. Overall provision is incoherent and cannot be guaranteed. Our experience from talking to children and young people is that they feel cut adrift. That has not changed.

Anne Houston: Unfortunately, we still hear of the same kind of things that happened in those case examples.

Scott Barrie: The convener asked our previous witnesses from Enable about the abolition of the competence test. Why is that important and why do you support abolition?

Maggie Mellon: Because of all the arguments made by our colleagues from Enable. The test is very subjective. It seems quite discriminatory to apply it to one group of people and then, on the basis of that test, to debar them from giving evidence. We would therefore say that the test should not exist at all. People's evidence should be taken from their statement, however they give it.

Anne Houston: One thing that often confuses children and young people is that they come to

court to tell the truth, but then, once they have told the truth, they are questioned again and again and again, and made to believe that in some way they have given the wrong answer. If anything confuses them, it is that experience. The competence test does not deal with that.

Karen Whitefield: In your written evidence, you mentioned the need for training. Where will training be required? Who will provide it and who will be responsible for offering it?

Margaret McKay: Anyone involved in taking statements from children, or interviewing them, or examining their stories or evidence, should have training in how to communicate with children. The point that Anne has just made illustrates that very well. Children will say things such as, "They asked me a question and I answered it and told the truth, but then they asked again." If you ask a child the same question three times, they begin to think that they have got it wrong and will then say something different. People who interview children need to understand that. They need to understand that you cannot subject children to multiple questioning. I would suggest that you should not do that to adults either. We believe that training in interviewing children, questioning them, and understanding their development is important for all who are involved in taking statements, or are involved through the justice service.

Maggie Mellon: Our report makes it clear that that training should be mandatory. As Margaret McKay has said, that is especially important for people who have contact with children. However, contact should be kept to an absolute minimum. The bill does not address the number of precognition agents or the number of times a child will be interviewed. That whole process must be managed by someone with the authority to ensure that the child is not subjected to multiple interviews by untrained—or even trained—people, or by people who are not working to standards.

The Convener: This important subject has already been touched on by Nicola Sturgeon. It would help the committee if you could tell us what should be done. You have spoken about a multi-advisory service that would kick in at the beginning of the process. Does that need to be an especially complicated procedure? Are you saying that, at the stage at which a child witness is identified—I cannot think that anyone would identify such a witness earlier than the police, when they are called to investigate an alleged crime—something should be triggered to ensure that the child is dealt with separately, interviewed appropriately and led down a safe route through the criminal process?

Maggie Mellon: Absolutely. That captures our argument well.

15:00

Karen Whitefield: You said that training should be mandatory. Would there be a need to review that training and measure whether it is working effectively? Your evidence has highlighted some of the difficult experiences of children who have gone to court. Any training that was offered would, I assume, need to be benchmarked. If that is the case, how would you envisage that being done? Would that be a job for the youth justice section that you propose within the Scottish Executive Justice Department?

Margaret McKay: We envisage that such a section would be responsible for commissioning and evaluating training. It would test out the extent to which change had taken place with users and people who had gone through the training. It is critical that that responsibility be lodged within the Justice Department. Mandatory training is not a strange idea. South of the border, judges who hear children's cases must have had statutory training before so doing. That is not the system in Scotland, but the idea is not completely strange.

The Convener: Are you satisfied with the adequacy of the consultation process?

Maggie Mellon: It has, in some ways, been a model consultation as far as we are concerned. We have felt very consulted by the relevant sections of the Scottish Executive Justice Department, the police and the bill team. We would probably always say that the voice of children has not been heard well enough. If it had been, more progress would have been made towards the kind of far-reaching solutions that we are considering.

Mike Pringle: I have two other questions. You have all examined the bill and you obviously have considerable experience of children in court. What is your view of the fact that the bill excludes the district courts from its primary provisions, but might cover them through subordinate legislation? Do you think that the district courts are any more or less important than any of the other courts? I am interested in your observations.

Margaret McKay: We can see why the district courts might have been excluded. It would be rare for children to be involved in cases that come before a district court. If they were, the district court should not be excluded. However, we have not formed a strong view on that. That is probably for the same reason that the district courts are not covered by the bill: the sort of cases that come before them. The same principle should apply as with other courts.

Anne Houston: The issue for us is how a child experiences the district courts. If a child were to appear before a district court, the same issues would arise.

Mike Pringle: You devote quite a lot of the ChildLine Scotland submission to the threat of defamation action. We might hear from others later about that, but I would like you to give us a bit more reasoning why the threat of defamation action should be taken away.

Anne Houston: Our main points are covered in the submission from justice for children, with which we are involved and which we support fully. We discuss defamation at length in our own submission, which was submitted in addition to that from justice for children. I have had quite a lot of contact in the past with Donald MacKinnon, who raised the issue initially.

We do a tremendous amount of work with children and young people who are being bullied. That is a major aspect of our work, and it is the issue that is raised most frequently in calls to our service.

Mike Pringle: Roughly what percentage of calls does bullying account for?

Anne Houston: It accounts for one in four calls.

Mike Pringle: So 25 per cent of the calls that ChildLine Scotland gets relate to bullying.

Anne Houston: Yes. The calls are usually about child-to-child bullying but, on occasion, they are about bullying by adults—indeed, sometimes by teachers—although such calls account for only a small percentage.

Our concern is that children and young people already find it difficult enough to come forward and report incidents if an adult has treated them badly and defamation cases can stop children and young people reporting what can sometimes be quite serious cases of bullying at the hands of an adult. We have major concerns that such cases are yet another barrier to something that it is already difficult for children to do, particularly if the adult concerned is a well-respected person or a person in authority. We would hope that that barrier could be removed if things were done through an appropriate authority.

The Convener: From your collective experience, how many defamation actions are you aware of?

Anne Houston: I am not aware of there being a huge number of them. However, we are concerned that people will pick up on such cases once they become aware of them. Children are quick to pick up on concerns that exist in the public arena. That is particularly relevant if such concerns stop them speaking about issues.

Maggie Mellon: At the moment, children—or, indeed, anyone—have only qualified privilege in making allegations. We want that to be made into absolute privilege if the allegation or report is made to the appropriate authority—not if it is generally broadcast, used as gossip or bruited about. The need for a child to report to the proper authority—whether that is a head teacher, the police, a social work department or the head of a children's home—is usually spelled out in child protection guidelines.

Whoever the proper authority is, the onus should be on them to conduct a proper investigation—the onus should not be on the child. An appeal is pending in the case that we are concerned about, and we hope that it will be possible to demonstrate that such privilege should have been extended to the young people in that case. We believe that doubt should be removed altogether.

Mike Pringle: I see that you covered that point in your submission.

My next question is for Anne Houston. Do you believe that there is a defect in the bill around defamation? As far as I am aware, the bill does not address that issue. Should it have done so?

Anne Houston: My view is that the problem should be addressed. At present, the matter is not being addressed anywhere and provisions to deal with it appear to fit in with the aim of the bill. If the bill does not address it, I hope that it will be addressed elsewhere quickly.

The Convener: Let us be clear: the actual number of defamation actions that are raised seems small.

Anne Houston: Yes.

The Convener: I suppose that there is the practical question: why sue a child, who might have no assets?

Anne Houston: My concern is about the impact of such cases on many children—it is not a question of there being only a small number of cases.

Mike Pringle: I have a further question, which was prompted by what the convener just said. You say that the number of cases is very small now, which I accept. You made the point that children read newspapers. Ten years ago, we perhaps did not have the problems with antisocial behaviour that we do now, and we did not have the problems with defamation cases. Do you think that such cases are likely to arise more often because those that have taken place have been highlighted?

Anne Houston: Our concern is that defamation cases could arise more frequently, and that that would form a barrier to children coming forward about relatively serious incidents.

Mike Pringle: Do you believe that that is because it is a new phenomenon?

Maggie Mellon: It is not so much because the phenomenon might be new; if an action appears to have been successful, there is a danger that people will use the same avenue again.

The Convener: Once a case reaches court, would not there be absolute privilege?

Maggie Mellon: Alison Cleland, who will give evidence later on behalf of the Scottish Child Law Centre, might be better qualified to speak about legal matters. However, as far as I understand it, absolute privilege applies in court but qualified privilege applies in all the interviews that take place under proper procedure.

The Convener: Your concern is about the pre-court stage.

Maggie Mellon: Yes. Although adult professionals might follow the procedure to the letter, it is still possible for a young person or child to be subject to a successful defamation action, as the law currently stands.

The Convener: Thank you for your forbearance and for your toleration of our many questions on diverse subjects. Your evidence has been helpful to us all.

I welcome Alison Cleland, from the Scottish Child Law Centre, who has presented us with a helpful submission. We appreciate your coming before the committee to allow members to ask you questions. If you would like to make some preliminary remarks, please do so with a due regard to brevity, but without compromising your genuine points.

Alison Cleland (Scottish Child Law Centre): The main point that I want to make to the committee is that you are dealing with institutional inertia. The criminal justice system has worked on the basis of oral evidence for centuries and that is the way in which its practitioners want to continue. That does not mean that they hate child witnesses or vulnerable witnesses; it means that, if you do not insist that they change the way in which they approach child witnesses and vulnerable witnesses, they will continue to do what they do in the way that they currently do it.

Unfortunately, although the bill has some good principles behind it, it does not deliver that mandating of change. That means that it might well fail, which would be a dreadful shame, particularly for children in Scotland.

Scott Barrie: I was struck by your phrase, "mandating of change". I am sure that that will resonate with the committee.

You probably heard what I said to the representatives of justice for children about the importance that they place on the child witness support service. What are your views on that matter?

Alison Cleland: That follows on from my point about institutional inertia. We need to make a clear statement to the court system that the situation becomes different as soon as child witnesses or other vulnerable witnesses are used.

The Convener: Just for clarity, are you drawing a distinction between children under 12 and those over 12?

Alison Cleland: No. I am not addressing any specific issue about under-12s at the moment. When I mention child witnesses, I mean those who are under 16.

The Convener: Thank you.

15:15

Alison Cleland: As is suggested in the report "Justice for Children: The welfare of children in the justice system", as soon as a child witness is involved in a case, the child witness support service would start a process of proper support for and assessment of the child's needs. Who else would do that? Ask the fiscals, the defence agents and the courts whose job that could possibly be. No one has time to do that now.

As Margaret McKay said, a child will say that the fiscal is "my lawyer", but the fiscal is not her lawyer; fiscals are there to present the case as best they can, but they are not able to give the necessary support. We know from what children tell us that that lack of support makes it difficult for them to be involved even before they get to court. The child witness support service is an essential step towards giving that support. Without that service, no matter what measures are in place, there will not have been enough support to prepare the child for court, and we cannot be sure that justice will be done because we do not know that the child will be able to give their best evidence.

Scott Barrie: How do you envisage the proposed witness support service fitting in with existing court structures? Do you think that we need to go back to the drawing board?

Alison Cleland: At the risk of sounding as if I am slightly ducking the question, I endorse the Justice for Children report and its recommendations. It explains that the witness support service would be based within the justice service; it must be right in the heart of the justice system and not just some add-on that a witness might get a chance to go to if they happened to be in an area that has a good service. It has to be available in every case, so it must be based within the Justice Department. To be honest, I am probably better able to answer questions about evidence and the detail of the court system rather than questions about the Justice Department. I hope that that is okay.

Nicola Sturgeon: I hear the arguments for a child witness support service, and they have merit. In any case in which there are or might be child witnesses, it is important to ensure that such witnesses are identified as early as possible. One of the problems with the existing system is that it can be late in the day before that is obvious.

Previous witnesses have expressed support for placing a statutory obligation on some of the agencies, whether the police, the fiscals or the defence agents, to take steps to ensure that they identify child or other vulnerable witnesses early in the process. Do you support that view?

Alison Cleland: Yes; that makes sense.

Scott Barrie: I will move on to special measures. Do you think that the proposals in the bill give sufficient protection to the rights of children who give evidence? Do you think that their rights should be strengthened in any way?

Alison Cleland: Children's rights are not sufficient and, yes, they need to be strengthened.

Scott Barrie: In what respect?

Alison Cleland: I ask the committee first to accept one of the primary proposals in the Scottish Child Law Centre's submission, which is that we must try to keep children out of court because the adult-centred and combative court process is distressing and damaging for them, particularly in abuse cases. If we start from that principle and consider the special measures, almost nothing will be helpful.

If a live TV link is used, the witness is not in the court but the process is the same. If screens are used, the witness is in the court. If the witness has a supporter, they are still in the court. A child could be kept out of court by giving evidence on commission and by giving evidence in chief on video. However, a lot of children still go to court and are subjected to a cross-examination process. I would like to address the committee on that point later.

We need to get children out of court and allow them to give evidence on commission. I note that many respondents, including the Association of Chief Police Officers in Scotland, have said that the courts do not fully take account of children's needs in the use of special measures. Respondents have also noted that evidence on commission is almost never used.

I apologise if I sound confused, but I am a bit worried that, because of institutional inertia, courts may think that evidence on commission means simply that there is a different court in which the judge, the lawyers, the accused and the child go through exactly the same process and that it just takes place somewhere else. The difficulty with that is that it will still involve trauma for child witnesses because of the formality and the use of questioning that tries to break the child down. That is why I say that the provision of special measures will not deliver.

As the beginning of your question hinted, the bill as drafted does not provide children with a right to special measures. However, that issue could be dealt with by amendment.

Nicola Sturgeon: Do you support—I think that I read in your written submission that you do—the argument made by justice for children that there should be no judicial discretion to override the right to special measures, despite the fact that that discretion is framed in the bill in such a way as to make it quite a tough test to pass?

Alison Cleland: The bill makes that a tough test. I will answer the question but first let me describe the real test that the bill provides. The court may not make an order allowing the child to give evidence with special measures if that would give rise to significant risk of prejudice to the fairness of the trial. In my view, that is the test that will be argued in almost every case involving a child witness if the bill is left as drafted. We have seen that happen when other new, supportive measures have been introduced. I stress that that will be the real test.

Let me answer the question. I would support a system that required special measures to be provided for under 16s unless—as I think I said in my written submission—the child had particularly requested to give evidence in open court. However, as was mentioned in other written submissions, I would also say that a child may not be in a position to give an informed decision about that. As the child will not know how terrible the experience will be, if they wish to give evidence in court, the court should consider whether that is likely to be prejudicial to the child's interests.

The test should be completely reversed from what it is now: special measures should always be used unless the child wishes to give evidence and the court is satisfied that that would not be detrimental to the child's interests. As soon as we have such a test, there would be a presumption that it is detrimental to a child under 16 to give evidence in court. The way to do it would be to use that principle.

Scott Barrie: I have a great deal of sympathy with the argument that Alison Cleland has advanced. However, if everything that she has said were to come to fruition and we were to proceed in that way, how would courts, sheriffs and juries view that new way of giving evidence? Although our courts, which have historically used an adversarial process, may take into account some of the needs of vulnerable witnesses, at the end of the day such witnesses still have to give

their evidence, be cross-examined and go through everything else that creates the intimidation that has been mentioned. Even if we were able to achieve what you have suggested, how would we guarantee that we would get the outcomes that we hope for and that people would not see two different standards of evidence?

Alison Cleland: We could not guarantee the outcomes—we have to be honest about that—but at the moment we are in the worst of all possible worlds. If special measures are introduced, they will be seen as an add-on, as an extra and as something odd that the jury will immediately be suspicious about. The jury may not hear all the arguments, but it will see the suspicion of the defence lawyers, who might suggest that in some way an attempt was being made to shield the child because the child's evidence was somehow untrustworthy.

As soon as the system states that children need special support and are different, witnesses, people who are involved in the court and juries will never ordinarily see children giving their evidence live. They will not say, "That child was able to give her evidence live, but this child isn't, so there must be something wrong with this child." They will immediately accept that children are different and will be dealt with differently, and will come to expect that.

I have spoken in detail about the matter with Rita Blumrick, who is the chief prosecutor for child abuse cases in South Africa and will visit Scotland soon. I asked her that question and she said that it is amazing how quickly a principle becomes accepted once it is established. The difficulty is that we have done something in a certain way for centuries and if we do not draw a line under it and change things, people will hark back. Change will be positive.

The Convener: I want to be clear about the matter. Without reference to the type of case—which might be a sexual abuse case, a criminal case involving assault or fraud or, indeed, any case in which a child under 16 happened to be a witness—is your view that, without any discrimination, there should be a presumption that the child does not give evidence in court?

Alison Cleland: Yes. That is based on the belief that the status of a child's psychological and linguistic development is different from that of adults. I mentioned in my written submission that, in South Africa, an intermediary is used. That intermediary asks a child witness questions, as the system accepts that, if we use technical court language or even ordinary language, children and young people might not have the same understanding of it, particularly in a court setting. I would be delighted to provide the committee with literature on the subject.

The Convener: I would like to interject, as what you are saying is important. In your judgment, the deficiencies that you perceive would not be adequately addressed by the bill's provisions for supporters, for example.

Alison Cleland: That is correct.

The Convener: If a 14 or 15-year-old, for example, is giving evidence and is apparently confident in doing so, in your judgment it should not be possible for the accused or his advisers to see that individual in person to make a judgment about whether that person was being honest or deceitful.

Alison Cleland: That is correct.

The Convener: Do you see any dangers in that?

Alison Cleland: I do, but that is a matter for others to speak to the committee about. How we take a child's examination in chief and cross-examination must be carefully considered. That is important.

I have wide experience of representing children and young people who are under 16 in family court proceedings and children's hearings proceedings and have led many of my child clients as witnesses. They have given evidence that has been accepted by the court. It has been important for the court to take account of that evidence, but there is often no way in which the court can draw on experience of what the child's understanding has been of the questions or the follow-up questions.

An enormous amount of literature shows that court questioning is different from other questioning. Cross-examination is deliberately designed to put presumptions to children; it is about speculation and doing things that all our information about linguistic and psychological development tells us can be confusing.

I realise that it might be outwith the bill's scope simply to sweep away everything in respect of criminal and civil cases, but it is absolutely essential to understand the limitations of the questioning that is allowed under the current court rules. Without that understanding, we cannot logically say that we need an intermediary and that the questions must be investigated. How do we know that what we are asking the child is a real question? People talk about justice and getting to the truth. Psychologists, linguists and others might say that we can ask a child various questions, but the answers may be meaningless. Unfortunately, the courts might attach an enormous amount of meaning to the answers. That is the danger and in my view it is a very big danger.

15:30

The Convener: I do not seek to diminish your experience, but do you agree that the court forum in family-law matters is different from that in criminal trials and prosecutions?

Alison Cleland: The forum is less hostile, but I am not sure that the impact will not last for the long term and possibly be as damaging. That is my worry as a lawyer who has represented children in that process. However, I accept that the forums are different.

The Convener: Is it your belief that asking children—as defined by the bill, because we currently have no other definition before us—to appear physically in court has a damaging effect on them either in the short term or in the long term?

Alison Cleland: It is my belief that it might have. There is currently no way in which the court can have a knowledge or understanding of the effect of the experience on a child. We do not know.

Karen Whitefield: You propose the introduction of an intermediary, but might not that cause conflict? The defence agent might resent the way in which the questions are put; he or she might not like the translation and think that it alters the terms of the question. Would the issue be better addressed by training—as previous witnesses to the committee suggested—for all those who deal with vulnerable witnesses?

Alison Cleland: I think that the introduction of an intermediary would be resented by the defence counsel, but that would not necessarily be a bad thing. We must remember that the defence lawyer's job is to put her client's case to the child and see whether she can undermine the child's credibility and reliability. That is her job and she must continue to do that. Within the current rules of cross-examination, a wealth of different techniques—the type of language and questions—can legitimately be used that lend themselves to confusing children and undermining their credibility and reliability.

You are right to suggest that training might help to address the problem, but the difficulty is that it would not be enough. I go back to my point about institutional inertia. If I am a defence lawyer and I want to put my case to the child, press the child and test the child's credibility and reliability, the rules of evidence allow me to do so. The language that I use does not have to be tested.

The Convener: The presiding judge is certainly under an obligation to ensure that no unacceptable line of questioning is pursued with a child witness.

Alison Cleland: That is correct, but very often things do not happen in that way. You will be aware that, in England, there is judicial training and judges will intervene, but only to a very limited extent, because the defence team must be allowed to put its case to the child witness. Training will not be enough. We are talking about a way of thinking—a way of approaching witnesses and cross-examination—that is embedded in the system.

Karen Whitefield: If training is not enough, how will the addition of a third party help? The defence agent will want to ask their questions and pursue their line of questioning. I am not sure how introducing a third person will address the problem. I would have thought that the issue would be more appropriately dealt with through stipulating what the sheriff or the judge can consider appropriate in the court or through ensuring that acceptable language is used so that the child being questioned understands it.

Alison Cleland: I accept that there might be something in your suggestion if we had a system in which only people who were trained to communicate with children to a high level were, in certain types of cases, able to put the questions to children. The understanding in South Africa was that it was unrealistic to expect criminal lawyers, who deal with all sorts of cases, to become instant experts in child psychology and child psychiatry. Moreover, the suggestion that only certain types of lawyers could be involved in certain types of cases was regarded as dangerous. We could go down that road, but that system would work only if certain judges and lawyers dealt with certain types of cases.

The Convener: Surely there is an obvious practical difficulty, given the fact that myriad cases in which there is a child witness come before our criminal courts. Therefore, would we not arrive at an impossible position? It is in the public interest that criminal cases are processed efficiently, swiftly and, of course, fairly, with due regard to the characteristics, sensitivities and needs of all witnesses. However, if your proposition were taken to its logical conclusion, there would be an impossible backlog of cases, because we do not have enough judges, prosecuting counsel or defence solicitors with special training in dealing with child witnesses. Is not your underlying concern to ensure that, when a child is required to give evidence to a court, every possible safeguard is in place to prevent the experience from being harrowing and distressing and from causing long-term upset to the child?

Alison Cleland: Yes. You mention the difficulty of ensuring that everybody is appropriately trained when there are so many courts dealing with so many cases. That is precisely one of the reasons why the South African model, which is based on an oral evidence tradition, went down the road of

having intermediaries. That allows the courts to decide, for example, whether an intermediary to deal with language matters is required for a vulnerable child witness. Rather than trying to cover every court and every eventuality, the South African model focuses on the point at which questions are put.

The Convener: For the sake of clarity, because I know that none of us is an expert in the South African legal system—

Alison Cleland: I am not an expert, either.

The Convener: Is it your understanding that a child witness's evidence is led through an intermediary in all South African criminal and civil cases?

Alison Cleland: My understanding is that an intermediary is mandatory only in criminal cases. I think that an intermediary is discretionary in civil cases. However, I can check that.

Nicola Sturgeon: There would obviously be practical difficulties in providing appropriate training for everybody.

Alison Cleland: I appreciate that.

Nicola Sturgeon: However, I believe that the issue is more fundamental than that. I am not sure that providing training within an adversarial system for defence agents to communicate better with kids is appropriate or possible, because a defence agent could have conflicting duties. Communicating sensitively with a child might undermine the defence agent's job of representing their client and testing the evidence.

You appear to be arguing, perfectly legitimately, for a much more fundamental cultural change in the system, in which there would be a move away from the adversarial approach to something very different. I suppose that our task is to assess whether the bill is doing as much as legislation ever can to bring that about. If the bill does not do that, are there further steps that you believe must be taken to make the whole environment better for vulnerable witnesses, including children?

Alison Cleland: If the bill required special measures to apply to child witnesses under 16, court practice would quickly change. I believe that such a requirement would be helpful.

As I emphasised in my written submission, the concept of intermediaries is only one of the things that is missing from the bill, although I believe that, because of the language issue, it is the main thing that is missing. I accept that there are enormous difficulties with the idea of intermediaries—I am not naive about it. However, I think that courts are becoming more sophisticated in their appreciation that children are different.

In the cases of T v the United Kingdom and V v UK—which involved the two English boys who were accused of the murder of James Bulger—when the European Court of Justice examined the criminal processes it was not convinced that T and V appreciated that process. Although those boys were the accused and had lawyers with years of experience of representing young people around the age of 10, the European Court did not feel that they understood the process.

I realise that the committee has many other issues to consider, but as a lawyer reading child-law cases coming up this month and last month, I have noticed that the courts, particularly in family, abduction and adoption cases, are starting to say that judges should not interview children because it is better if somebody with training does so. The courts think that people should not, unless they have had proper training, discuss matters with children. Courts are beginning to understand that when a child does not have proper support, the information that they give is not always what it seems. We must consider introducing intermediaries.

Mike Pringle: We discussed the issue of age with the ladies from justice for children. You have talked about the age of 16, the bill talks about the age of 12 and other people talk about the age of 18. Where should the line be drawn and why?

Alison Cleland: My answer will be annoying for members, but I honestly think that, if we are to decide where to draw the line, we should ask young people and use their answer. At present, the age of legal capacity is 16 and a funny grey area exists between the ages of 16 and 18. The issue does not necessarily matter, except for lawyers. The United Nations Convention on the Rights of the Child states that special measures are required for children up to the age of 18. We should ask young people about that. They will have a view on how much protection, freedom and support they will want when they are older. The age does not really matter as long as we are consistent and are prepared to follow through the decision.

It is important to remember, in relation to children's rights, that, under Scots law, children at the age of 12 are presumed to be mature. Scots law has a tradition of presumptions of maturity for younger children who are involved in proceedings, which has not been the case in England. On whether the line should be drawn at 16 or 18, I say: ask the young people and, at the same time, ask them about the voting age, although obviously that is not part of the bill.

Mike Pringle: I turn to a completely different issue, which I raised with the witnesses from justice for children. Perhaps you have more experience in this matter than they have. What is your opinion of the fact that the bill treats district courts differently from sheriff courts and the High Court?

Alison Cleland: I am afraid that I do not have a useful opinion on district courts; I have no experience of them.

Mike Pringle: That is fine.

The Convener: Mr Pringle, do you wish to develop further the aspects of evidence by video and on commission or are you satisfied with what was said earlier?

Mike Pringle: The issue was pretty well covered. Does Alison Cleland agree that, as others have said, the accused should not be present when a vulnerable witness is interviewed on commission?

Alison Cleland: Yes.

I apologise for jumping the gun, but I would like to make it clear that, under the bill as drafted, after a child witness notice is lodged, the court can, in the absence of the parties, make an order to use special measures, or there can be a hearing on the matter. I understand why that provision has been proposed, but all that it will achieve is the introduction of an extra step, which will cause delays.

Under the bill as it stands, I am convinced that because of the human rights and justice issues, in almost every case, the court will not make a decision about special measures without hearing the parties—there will always be a hearing. Why not just get rid of that and require the child witness notice to be lodged much earlier, so that everybody can get their arguments marshalled and know exactly what they are doing before the hearing, at which it will be presumed that special measures will be made available? The issue will be whether there are exceptional circumstances, such as the child wanting to be heard. If there are not, what are the special measures and what should be in place?

The Convener: I will come to Karen Whitefield in a moment but, for clarification, if evidence were given by video or taken on commission, is it your view that the interrogation should be undertaken by the intermediary?

15:45

Alison Cleland: Ideally, yes. I hope that you do not think that I am being naive. You might decide simply to rethink the issue, or you could provide in the bill for the Scottish ministers to introduce intermediaries later. I realise that it is not easy. You could provide that intermediaries will be one measure, but evidence will primarily be taken from children away from the court. The presumption could be that special measures will apply and that, where possible, those special measures will ensure that the child is out of the court process, with intermediaries coming along later, if we are being realistic.

Intermediaries would assist greatly, in particular with very vulnerable children. There could be an enormous role for them in providing help to children with mild or severe learning difficulties and other children. Without wishing to be overly dramatic, experience shows that the cases of some young people with learning difficulties never get to court, because the presumption is—quite rightly—that the situation would be just too difficult and distressing for them. There are types of cases that might be assisted by intermediaries, but that might come later.

The Convener: I have a final, brief question, which touches on the earlier evidence from justice for children. Have you encountered cases in which children have been the subject of a defamation action?

Alison Cleland: No.

Karen Whitefield: Your submission touches on your concerns about time delays, and in particular the fact that decisions will be taken on special measures just a few days before cases go to court. I appreciate your view on having an automatic right to special measures but, given how the bill is drafted, how can time delays be addressed?

Alison Cleland: It would be of assistance if you required the child witness notice to be lodged no later than 28 days before the proof, and if you removed the ability of courts to allow notices to be lodged later than that. Get rid of that. Make it clear to anybody who is involved in a child witness case that if they want a child to be there, they had better lodge their child witness notice and they had better lodge it on time. If it is in the rules, I assure you that lawyers will do it, because they will want their witness to be there.

Notices should be lodged a minimum of 28 days in advance, with the proviso that the court will have a hearing with the parties who want to be present. I would get rid of the two-tier idea of considering notices

"in the absence of the parties"

because I do not think that that provision will be used. The bill should state that a child witness notice is to be lodged 28 days clear of the proof or the civil proceedings, and that, within seven days of it being lodged, the court will listen to the parties and make its decision.

It is also important that you remove from the bill the provision that allows the goalposts to be moved. At the moment, the court can make an order for special measures and then, on its own motion, decide that special measures will not be available. You cannot do that to a child witness. They must know how they are going to give their evidence and what measures will be in place, and

be prepared for that. If the situation changes close to the time, the whole point of the bill will be undermined. That provision has to come out of the bill.

The Convener: I have a wrap-up question. Did you feel adequately involved in the Executive's consultation on the bill? Do you have any comments on the consultation process?

Alison Cleland: Yes, I thought that it was inclusive. We would have liked more children and young people to be involved. We realise that it is difficult to identify those who have been involved in the courts, although the Executive did attempt to do that by asking people to be involved. I hope that we will get better at that.

The Convener: There are no final questions from members, so I thank you not just for the rigour of your evidence, but for the robust way in which you responded to questions, because I realise that—unlike justice for children—you were unsupported and were sitting very much in the hotspot yourself. The intensity of the questioning reflects the committee's obvious desire to get to the root of the principles and the elements of the bill, to which it is so important that we give balanced consideration. We appreciate your coming before us this afternoon. Thank you for your presence here.

I propose to have a comfort break for 10 minutes. There is tea and coffee outside. I reassure members that the concluding part of the agenda should be accomplished fairly swiftly.

15:50

Meeting suspended.

15:59

On resuming—

Work Programme

The Convener: Item 2 is our work programme. At the committee's away day, we made a decision to consider an inquiry into youth justice. Members should have received a paper from the clerks suggesting how we might approach that. It is a very helpful paper. Does anyone have anything to say about it?

Nicola Sturgeon: It looks fine to me.

Karen Whitefield: The clerks should be congratulated on bringing together all our various thoughts at the away day in a cohesive and constructive way.

The Convener: I think that all committee members will endorse that. Is the committee agreed that we should proceed in the way that is outlined in the paper? The clerks will produce a further paper by the end of October, if that is acceptable.

Members *indicated agreement*.

The Convener: The other aspect of our work programme that I would like to address is what we think we have agreed to following the away day. I express my thanks to the clerks for helping to bring clarity to something that is certainly not straightforward at first sight.

Members should have received a note from the clerk, and it is proposed that the committee agrees the programme as outlined in that paper. The programme comprises our obligations in respect of legislation; our interest in respect of potential new inquiries; post-legislative scrutiny; our interest in previous inquiries; our interest in petitions; European issues; and our interest in working principles for the justice committees, as set down in an annex to the paper.

On the inquiries that the two previous justice committees carried out, there was a general feeling that we might take an interest in the prison estates review and legal aid inquiries. I cannot recall whether it was suggested that we would consider the alternatives to custody inquiry—I think that the committee was perfectly content to consider the inquiry into alternatives to custody, along with the prison estates review and legal aid inquiries. We felt that the other areas might be best left to the Justice 1 Committee. I seek the committee's view on that. The Justice 1 Committee is still considering its work load, and we might need to pursue further discussions with it. Is that agreed?

Members *indicated agreement*.

Mike Pringle: So, are we going to pursue the alternatives to custody inquiry? I thought that that inquiry was definitely going to be pursued by the Justice 1 Committee, although I would be keen for this committee to consider the area of alternatives to custody.

The Convener: That is where my memory of what was decided at the away day is not clear. Perhaps the clerks can assist.

Gillian Baxendine (Clerk): At the away day, the committee expressed an interest in the area of alternatives to custody, but we recognised that we could not deal with everything. That is one of the areas in which the Justice 1 Committee has expressed an interest, although that committee has quite a long list of possible interests. The view was that one or other justice committee ought to follow up the previous inquiry, at least to the extent of securing a parliamentary debate on the report, and that we would do that if the Justice 1 Committee did not. The Justice 1 Committee will have a similar discussion to this one tomorrow.

The Convener: The areas specifically for us to follow up were the prison estates review and legal aid inquiries.

Scott Barrie: On alternatives to custody, as the clerk has just said, one of the justice committees must adopt the previous Justice 1 Committee's report. The report was published in March and an Executive response should be sought. Depending on that response, the committee could perhaps secure a committee debate in the chamber. The focus for a further inquiry—if that is felt to be appropriate—would then come out of that debate. However, we should not commit ourselves to such an inquiry without that response and debate, as there would be the potential for us to duplicate some of the work that has been done.

The Convener: Is the committee agreed that we will proceed on the basis of confirming with the Justice 1 Committee what it is doing?

Members *indicated agreement*.

The Convener: I am quite anxious to get committee members' views on another aspect of the clerks' paper. Attached to the agenda is an annex that refers to the European issues awareness system. I invite members to comment on whether we should use any of the specific options that are referred to in paragraph 16 of annex 1. Those options could help us to develop informal and formal links with the main sources of European information. The options are: conducting a videoconference, either formal or informal; receiving formal committee evidence, either oral or written; hosting a European justice and home affairs seminar; and making a visit to the European institutions. I am not suggesting that we go gallivanting all over the place—apart from anything else, we have a pretty heavy work load. However, all members identified at the away day the need to maintain our overall vision of what is happening in European law that might affect us.

Nicola Sturgeon: We should be issue led on this. The most important part of the annex is the first two pages, which outline the ways in which we will keep ourselves informed of what is happening in Europe. If those work well, we will be able to identify issues that are of particular interest or importance to us. We will then be able to say, on an issue-by-issue basis, whether it would be useful for us to have direct discussions with the European Commission or the European Parliament and whether that would require videoconferencing or a visit to Brussels.

Over and above that, there is the question of whether members feel that a general familiarisation visit would be appropriate to enable us to get a feel for the institutions and processes in Europe. However, if the system that is outlined in the first two pages of the annex works to give us the information that we need, we will be able to judge from that what issues we want to take further.

The Convener: That is a very helpful observation.

Scott Barrie: I agree. Nicola Sturgeon is entirely right to say that we should establish what issues are relevant to the committee's work. Some of the other things might flow from that. We must be issue led in our work rather than—as the convener so eloquently put it—gallivanting here and there, perhaps to no or little purpose.

The Convener: Are all members agreed on that?

Mike Pringle: I agree. I wondered how much work would be involved in hosting a European justice and home affairs seminar. One witness today told us about her experiences in South Africa. Often, talking to other people about their experiences of justice and what is happening in the justice field can help us to crystallise what we are doing and to think about whether we are doing the right things. Talking to other people—whether by going to them or by inviting them here—would be very useful.

The Convener: I am not hostile to that suggestion. However, to go back to Nicola Sturgeon's point, there might have to be a chronology to our working practice, and I suspect that that will involve our identifying issues in the first instance, especially given the committee's work load. In due course, it might be appropriate to consider a discussion of the kind that Mike Pringle suggests.

That has been a helpful discussion. I have no further comments on the paper. Do members have anything else to add?

Members: No.

The Convener: Okay. Thank you very much indeed. That brings this meeting of the committee to an end.

Meeting closed at 16:09.

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