JUSTICE 2 COMMITTEE

Tuesday 23 September 2003
(*Afternoon*)

Session 2

£5.00

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

Her Majesty's Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliamentary Corporate Body publications.

CONTENTS

Tuesday 23 September 2003

JUSTICE 2 COMMITTEE
† 7th 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)
Mrs Margaret Smith (Edinburgh West) (LD)

THE FOLLOWING GAVE EVIDENCE:

Heather Coady (Scottish Women's Aid)
Simon Di Rollo (Faculty of Advocates)
Jamie Gilchrist (Faculty of Advocates)
Anne Keenan (Law Society of Scotland)
Rosemarie McIlwhan (Scottish Human Rights Centre)
Murray Macara (Law Society of Scotland)
Hilary Patrick (Law Society of Scotland)
Rowan Steele (Scottish Women's Aid)

CLERK TO THE COMMITTEE

Gillian Baxendine
Lynn Tullis

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 1

† 6th Meeting 2003, Session 2—joint meeting with Justice 1 Committee.

Scottish Parliament

Justice 2 Committee

Tuesday 23 September 2003

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:05*]

Vulnerable Witnesses (Scotland) Bill: Stage 1

The Convener (Miss Annabel Goldie): Good afternoon, ladies and gentlemen. I welcome everyone to the seventh meeting in this session of the Justice 2 Committee. We have received apologies from Nicola Sturgeon, who is unable to be with us.

This morning, I was made aware of the fact that the Executive has launched a document entitled "Supporting Child Witnesses Guidance Pack". From the accompanying information, which includes a press release, I see that this is an initiative to announce a new dedicated central unit in the Executive that will consider the establishment of a national service of vulnerable witness officers.

As convener of the Justice 2 Committee, I find it unhelpful that such a launch should take place when the committee is in the midst of considering the Vulnerable Witnesses (Scotland) Bill, which is directly concerned with the issues to which the document relates. It is a discourtesy both to the committee and to the Parliament that such initiatives should be taken. The contents of the document are germane to the subject that the committee is considering. With the agreement of the committee, I propose to raise the matter with the Deputy Minister for Justice when we see him at our next meeting.

Jackie Baillie (Dumbarton) (Lab): I have no problem with your raising the issue with the minister. However, timing will always be a fraught question. I would have found it most unhelpful if this information had been released after the committee had completed stage 1 consideration of the bill, especially as some of the areas of questioning relate to the contents of the guidance and the press release. Although it would have been nice to have received the guidance earlier, I am grateful that it has not been issued after our stage 1 consideration. The guidance is welcome.

The Convener: I am not saying that the information is not helpful—it is. However, it is unfortunate that its release should have taken the form of a public launch. There is no reason that the information could not have been distributed to committee members as an indication of the Executive's thinking on these matters. It is important that the Executive respects and has regard to the integrity of committees of the Parliament, especially when a committee is considering actively at stage 1 a bill that is directly germane to the subject matter of a document.

Karen Whitefield (Airdrie and Shotts) (Lab): I appreciate what you are saying, but there is often a difficulty when committees consider issues and the Executive has to respond. The Executive has done a considerable amount of work on child witnesses and has recognised that there are issues that need to be addressed. The Executive is responding so that we do not ask for things at stage 1 that it knows it intends to do, and so that our stage 1 report can focus on the issues that need to be addressed at stages 2 and 3 of the bill.

The Convener: I will not prolong the discussion further. However, I reserve the right as convener to express my displeasure at the sequence of events. I am sure that the comments of other committee members have been noted.

I welcome to the committee Rosemarie McIlwhan—I hope that I have pronounced your name correctly—who is here on behalf of the Scottish Human Rights Centre. I gather that your colleague Mr John Scott cannot be with us because he has been detained at a court case.

Rosemarie McIlwhan (Scottish Human Rights Centre): He has.

The Convener: We are sorry that he cannot be present, but we are glad that you have been able to join us.

We are grateful to the Scottish Human Rights Centre for the submission that it was able to provide to the committee, which has been very helpful. I know that members would like to ask questions about a range of issues and, without further ado, I ask Colin Fox to proceed.

Colin Fox (Lothians) (SSP): Good afternoon, Rosemarie. One aspect of the Scottish Human Rights Centre's submission is the proposal to extend the definition of a child from the current age limit of someone who is under 16 to someone who is under 18. Your submission also suggests the extension of the provisions in the bill that relate to children who are under the age of 12. I have not seen such a suggestion before. Will you explain that point of view and its implications for the bill?

Rosemarie McIlwhan: We specified an upper age limit of 18 because the United Nations Convention on the Rights of the Child defines a child as anyone who is under the age of 18, and we believe that that definition is correct. From

evidence that the committee has received from other witnesses, I understand that there is a slight problem with that, particularly in relation to young adults who get married at the age of 16. The provisions in the UN Convention on the Rights of the Child allow for that. They state that anyone who gets married attains adulthood and that the provisions that relate to children no longer apply to such people, so I do not think that the extension of the bill's provisions to children up to the age of 18 would cause a problem.

The other reason for the extension of the definition is that children who are under 18 often have not attained the maturity of an adult and therefore require special measures. That applies especially to children in vulnerable situations, such as children who have been abused or who suffer social exclusion, who are often more vulnerable than others and require the protection that the bill seeks to provide.

It is necessary for the bill to allow for the extension of its provisions to any child who is under the age of 18. That protection should be provided for all children, although there could be a provision to allow those who felt that they did not need it to opt out.

Jackie Baillie: I was very interested in the Scottish Human Rights Centre's submission, especially the section about how vulnerable witnesses are defined. Are you happy with the approach that the bill takes? You mention specifically people with a learning disability or a communication problem—you say that those people, instead of falling into the discretionary category, should be included automatically as people who require protection. You also discuss the question of an accused who is not a child, but who could be a vulnerable witness. I wonder why you feel that those two categories of people should be included.

Rosemarie McIlwhan: In answer to your first question, we are not happy with the definition of vulnerable witnesses in the bill, which we feel is exclusive and could cause discrimination against potential vulnerable witnesses. We feel that it is very important that people with learning disabilities are included in the scope of the bill and that they should have an automatic right to special measures. The reason for that is that people with learning disabilities could be disadvantaged when they give evidence if special measures are not provided for them. The committee has already received evidence to that effect from Enable.

We believe that anyone who has a learning disability should have the option to have the provisions in question. That should be an automatic right, from which they can opt out. A person with learning disabilities can be anyone from someone who can read, write and communicate to a certain extent to someone who has severe communication difficulties, who would not be able to give evidence unless they had special measures. Such people should have an automatic right to special measures, to ensure that they can give evidence in the appropriate manner.

It seems illogical to provide special measures for witnesses who are vulnerable and to disadvantage the accused by not allowing them the same provisions. That might raise issues under article 6 of the European convention on human rights, which relates to a fair trial. The committee should bear that in mind, given its obligations to respect human rights.

I want to raise a further concern about definitions in the bill. People with mental health issues are defined as people who have a mental disorder under the Mental Health (Care and Treatment) (Scotland) Act 2003. For someone to be said to have a mental disorder, they have to have had some contact with the national health service. We would like the definition to be extended, so that the relevant provisions would apply to anyone who felt that they had a mental disorder, because many people suffer from a mental health disorder, even though they have not had interventions from the health service. Not allowing for that scope could prejudice people's rights.

In that scenario, I am suggesting not that someone should have an automatic right to special measures, but that a system for self-referral could kick in. That would mean that someone who felt that they had a mental disorder that would prejudice their ability to give evidence could say to the court that they felt that they needed special measures and could indicate what they needed. The court would be able to consider whether such provision would be appropriate.

Jackie Baillie: That additional information is useful. However, would that then make it a court's responsibility to judge who would be eligible for self-referral? Would the onus be on the courts to determine whether one grouping was more eligible than another?

Rosemarie McIlwhan: If the bill were to be amended as we suggest, it would be inclusive and there would be only a small need for self-referral. However, that facility should still be available. I cannot think of anyone else who would be able to judge eligibility for self-referral. A court would be able to access any relevant evidence and have a hearing, as the bill as drafted suggests. The bill suggests that if someone wants special measures, they should go to a court hearing, which would decide whether special measures were appropriate.

I suggest that most of the hearings should be abolished. They should occur only for a self-

referral when someone feels that they need special measures. Everyone else who falls within the definition of a vulnerable witness should automatically have the right to special measures.

I am sorry if my point is not particularly clear.

14:15

Jackie Baillie: No, I understood you. Your approach is an inclusive one that would abolish the hearings. You would have a finite number of hearings to cover those on the margins.

Rosemarie McIlwhan: Yes.

Jackie Baillie: Okay. That is clear.

Let me take you on to how vulnerable witnesses are identified and at what stage that is done. Obviously, people are concerned about not just the court experience but everything that leads up to it. Will the processes to identify vulnerable witnesses in good time and to provide them with the kind of support that they need be adequate?

Rosemarie McIlwhan: The short answer is no. Much more work needs to be put into pre-trial support. We need to be able to identify a vulnerable witness at the first stage, which is when they come into contact with the police as a potential witness. From that point on, they should have a tag on their file that says that the person is, or could be, a vulnerable witness and may require special measures. That should be flagged up right through the system to the procurator fiscal and others.

On ensuring that the process is adequate, all witnesses, including vulnerable witnesses, should be provided with as much information as possible about the system. All witnesses should be provided with detailed information on the process of giving evidence. Witnesses should be given the opportunity to visit a court to see what will happen. Vulnerable witnesses should have additional information about the special measures that are available and how they may be implemented.

Karen Whitefield: Should there be circumstances in which a court could overrule an automatic right to special measures?

Rosemary McIlwhan: Such circumstances would have to be exceptional. I was talking about that with John Scott, but we could not come up with any circumstance in which a court would need to overrule the automatic right to special measures. We must bear in mind the balancing of rights between an accused's right to a fair trial under article 6 of the European convention on human rights and a witness's potential article 8 right to privacy and their article 3 right to the prevention of inhuman and degrading treatment. That is a fine balance.

Article 3 has not been fully tested in United Kingdom courts, but the Napier case on slopping out will be decided next year, which should give us a definitive Scottish view on how article 3 will be applied. I would expect a court to pay more attention, in any circumstances, to the article 3 right than to the article 6 right. However, the threshold for article 3 is so high that it would be surprising if it were reached in a court case that considers evidence from a witness.

The short answer to Karen Whitefield's question is that I cannot envisage any circumstance in which a judge could legitimately overrule a request for a special measure, without prejudicing a trial. We must bear it in mind that a witness is tested on both sides, so it is in the accused's interest that the witness is facilitated to give the best possible evidence and has the best possible experience of giving evidence. Therefore, judges should be very careful about overruling special measures.

Karen Whitefield: How does that sit with the calls on the committee to consider extending the category of people who might qualify automatically for special measures? If the criteria were extended, almost everyone would automatically qualify for special measures. That would mean that we would be changing our whole courts system. What is your view on that?

Rosemarie McIlwhan: Does that give you a hint that our courts system poses major problems for witnesses and that we need full-scale reform?

The answer to your question is that the extensions that we and other witnesses suggest would not mean that everyone would be given special measures. I see no problem with the extended definition. The need to re-examine the courts system is highlighted. We must ask how to improve the system for all witnesses, not just for those who are vulnerable.

Karen Whitefield: You have expressed concern about preventing the accused from conducting their own defence in cases that are not of a sexual nature. Will you expand on why you have those reservations?

Rosemarie McIlwhan: As I said, the right to a fair trial in article 6 of the ECHR is a fairly serious right over which courts must take much care and attention. We are concerned that abolishing self-defence in other cases would be disproportionate. If special measures are implemented properly, they should give witnesses sufficient protection and allow self-defence by the accused.

Karen Whitefield: Are there any circumstances, such as cases of alleged domestic violence, in which it would be inappropriate for someone to conduct their own defence? The crime might not be of a sexual nature, but it might be very violent. In those circumstances, would the witness be as

vulnerable as a witness who was involved in a crime of a sexual nature?

Rosemarie McIlwhan: The answer depends on the special measures that are implemented. For example, in that scenario, an intermediary could be involved, or evidence could be taken on commission, so that the accused was not involved directly in dealing with the witness, so their rights would be protected. I understand that a difficult balancing act is involved in such cases, but we say that the article 6 right must be protected and that special measures would provide sufficient protection.

Karen Whitefield: Are you suggesting that it would be preferable to have an intermediary in court who translated for the witness and put their spin on things, rather than having the witness relate their own experiences under the protection of not having to come face to face with the accused, who would sit in the dock, but would not conduct their own defence?

Rosemarie McIlwhan: That is not exactly what I said. I said that the situation would depend on the special measures that were used. If an intermediary were used, that scenario could arise, but an intermediary is an independent party. They would not put their spin on the evidence. Their job is to relate the evidence that the witness gives. I would be disappointed if any court accepted an intermediary's putting a spin on evidence. An intermediary does not have to be used. Evidence could be given by closed-circuit television or by commission.

The Convener: The point is important. In principle, you do not oppose the concept of an intermediary.

Rosemarie McIlwhan: No. We do not oppose the concept of an intermediary, but I thought that we were talking about self-defence. I was exploring that.

The Convener: Do I infer that you prefer other means of giving evidence, whether it be on commission, by video or behind a screen?

Rosemarie McIlwhan: We prefer to protect the child's rights in whichever manner is appropriate to the child. That depends on the circumstances of the case and it would be for the court to decide what was appropriate. We are getting hung up on children, but the bill is about all vulnerable witnesses. If a child or any other vulnerable witness felt threatened or intimidated, or could not give evidence directly because they were unhappy about dealing with the accused, who was using self-defence, an intermediary or any other special measure could be used.

Colin Fox: I realise that we are not really talking about numbers, but do you have an idea of the number of current cases in which the accused is conducting their own defence? It has been suggested that the right for a person to conduct their own defence might be withdrawn. Why do people have that right currently, and how many people take it up?

Rosemarie McIlwhan: I cannot give exact figures but, when we looked into cross-examination in rape cases, the numbers were very small.

Colin Fox: It does not have to be just rape cases.

Rosemarie McIlwhan: Yes, but in general the number of people who conduct their own defence is very small. However, as I say, I cannot give exact figures.

You asked why people conduct their own defence and why the right is available. Article 6 of the European convention on human rights provides the right for people to conduct their own defence or to choose their own defence and have that paid for by the state if appropriate. The right is enshrined in the ECHR. Why do people conduct their own defence? Often, they have had a fall-out with a lawyer and do not bother getting another; or they have had bad experiences with lawyers and are not willing to try again. Some people cannot afford a lawyer. They are over the threshold for legal aid but do not have enough money to finance a lawyer. That is a real problem, which the committee may go into on another day. A variety of circumstances lead people to conduct their own defence, but the gist of the answer to your question is that they distrust the legal profession. That is unfortunate.

Colin Fox: We will ask the lawyers about that when they give evidence.

Mike Pringle (Edinburgh South) (LD): I accept that only a small number of people conduct their own defence, but it is a very important small number. I also accept your definition: a vulnerable witness is not necessarily a child. However, I suspect that evidence would often be heard on video or taken on commission somewhere other than in a courtroom, so how do you square that with somebody trying to conduct their own defence? How would that work if the witnesses were somewhere else?

Rosemarie McIlwhan: It would work in the same way as it would if the person had a lawyer. If someone is giving evidence by live video link, on closed-circuit television, or using any other form of special measure that has been suggested, the person who is conducting their own defence will still have the opportunity to question and to cross-examine. The right to a fair trial is therefore protected.

Mike Pringle: So—

The Convener: Sorry, I want to be clear on that point.

Mike Pringle: I will come back.

The Convener: When evidence is taken on commission, that happens, of course, in another environment. Normally, only the commissioner is present. Should the accused be present on such occasions—either the accused himself or a representative?

Rosemarie McIlwhan: We suggest that the accused should not be in the same location, but should be able to speak to the commissioner. The accused would not be physically present in the room, but would be in contact.

The Convener: There would be a concurrent presence so that the accused would know what was going on and would be able—either himself or through his lawyer—to cross-examine the witness.

I am sorry, Mike, you wanted to come back in.

Mike Pringle: I was going to follow up my question. You spoke about someone conducting their own defence, and you spoke about them having a lawyer. In some of the cases that have been mentioned, it is likely that the vulnerable witness might be happy to talk to the commissioner, or through the commissioner to some legal representative, but do you accept that they might feel seriously inhibited if they knew that they would have to speak to the person who was conducting their own defence? That person might be somebody who had committed rape, or a serious assault, or a serious offence against that vulnerable witness. Do you not see the difference between evidence being taken by the person conducting their own defence and evidence being taken by a commissioner? Do you not think that the witness would treat them differently?

Rosemarie McIlwhan: The point about taking evidence on commission is that the individual would have no contact with any of the other parties, except the commissioner. Theoretically, there should not be a problem and, if sufficient support and information is provided to the witness, in practice there should not be a problem either. For clarity, I emphasise that a person can no longer self-defend in a rape case.

The Convener: Going back to the question of appearance or non-appearance of witnesses, the committee has heard it suggested that there should be a change in the culture of children's appearances in court, with the presumption that a child should not appear in court. Does the Scottish Human Rights Centre have a view on that proposal?

14:30

Rosemarie McIlwhan: It would depend on the circumstances of the case and the wishes of the child. A 16-year-old might want to have their day in court as a way of managing what they have gone through. They might be capable of dealing with that, perhaps using a screen or a supporter to ensure that the experience is not too traumatic.

There are also circumstances where the child should not be in court. For example, a younger child might not feel up to dealing with the formality of the court situation. There should still be some discretion so that children and other vulnerable witnesses can have special measures available to them, but they should be able to go to court if they feel that they want to and if they believe that they are sufficiently supported.

Scott Barrie (Dunfermline West) (Lab): One of the key intentions of the bill is to improve the experience of all witnesses—not only those who are vulnerable—of court procedure so that they can give better evidence. Given that we have already embarked on some improvements to the procedure, particularly through the Criminal Justice (Scotland) Act 2003, is there anything more that the Scottish Human Rights Centre would like to be done to improve witnesses' experience of our court system?

Rosemarie McIlwhan: I have heard about the experiences of witnesses who have called our advice service, and the major point seems to be that they need more information at an early stage. They want information from the police and the procurator fiscal about what will happen and to be kept up to date. We get a lot of calls about delays and the fact that witnesses are not being informed why there is a delay. More communication with and information for the witnesses would make their experience better.

The bill goes a long way towards making the court experience much better and I congratulate the Executive on the bill because of that. However, some sort of pre-trial support should be included. The suggestion made by other organisations for a witness service is an excellent idea. I urge that such a service should cover all vulnerable witnesses; indeed, I would probably suggest that it should cover all witnesses, not just children. All vulnerable witnesses need such support and all witnesses would benefit from it.

Scott Barrie: I take the point that what happens before the case goes to court makes a lot of people feel let down by the system. They do not know what is going to happen and the quality of their evidence is therefore tainted.

On what happens in court, you seem to be suggesting that the bill is a good start. It addresses the position of children, but you would

like it to be extended to cover other vulnerable groups. You believe that that should be a key aspect of the bill and not on the periphery, which it is at the moment. Is that fair?

Rosemarie McIlwhan: Yes, that is correct. It is important that all vulnerable witnesses are protected in the same way. It is also important that the implementation of the legislation is monitored. The bill will not be worth the paper it is written on if its provisions are not put into practice. At the moment, the court has discretion to prevent the harassment of witnesses; if that approach worked in practice, there would be no need for the bill. There is a real need for monitoring and evaluation of how the provisions work in practice, and for clamping down and making sure that they work. A human rights commission with an amicus curiae role should be able to intervene in a case where it was felt that a vulnerable witness's rights under article 3 or article 8 of the ECHR were being breached.

The Convener: Evidence to the committee has suggested that young children and other vulnerable witnesses might be inhibited from coming forward by a fear of being sued for defamation. Have you encountered any such instances? Does the Scottish Human Rights Centre have a view on that suggestion?

Rosemarie McIlwhan: We have been contacted about a number of cases regarding defamation and the argument about qualified or absolute privilege. Our opinion is that there should be only qualified privilege and that absolute privilege should not be extended outwith the court situation. We suggest that alternative measures are needed. There has been some discussion about bullying, and, rather than say that children should have absolute privilege, I think that schools and other public authorities need to enhance their anti-bullying practices to deal with the issue.

The Convener: Do you think that the extension of absolute privilege could encourage people to make, with impunity, a flurry of malicious allegations?

Rosemarie McIlwhan: I hope that that would not be the case, but it is certainly a possibility. That is one of the reasons why we would be concerned about extending absolute privilege. One of the fundamental tenets of our justice system is that information can be challenged, and there is less chance of such a challenge with absolute privilege. There is therefore a real need to maintain the status quo while implementing better systems for child protection in other ways.

The Convener: Have you been aware of any instance where such a defamation action has been raised?

Rosemarie McIlwhan: We have had contact with one family who are considering taking such an action. I am obviously not at liberty to disclose any further details.

The Convener: I understand that.

Is the Scottish Human Rights Centre satisfied with the consultation process for the bill that the Executive has engaged in?

Rosemarie McIlwhan: From our point of view, it seems quite reasonable. Although we do not really engage with our stakeholders, you have obviously tried to do so, so I congratulate you on that.

The Convener: Thank you. Are there any other questions from committee members?

Mike Pringle: On defamation, you have implied that, if people had absolute privilege, there might be a flurry of malicious accusations. Would not those accusations be investigated and dismissed if any such maliciousness were found? At the moment, somebody might make an allegation that is then proved, perhaps because there is not enough proof, and we would then find ourselves in a situation in which some people end up in court.

Rosemarie McIlwhan: I am not sure that I followed your question.

The Convener: Could you clarify your question?

Mike Pringle: People can be sued for defamation after making an allegation because, at the moment, they do not have absolute privilege. However, it is suggested that, if they were given absolute privilege, a lot of malicious accusations would be made. You said that you hoped that that would not happen but, if it did, surely those accusations would be investigated and the truth would come out.

Rosemarie McIlwhan: In any circumstance where somebody makes an allegation against another person, that allegation would be investigated. Our concern is that more people might come forward and say things to defame a person's character, and if they have absolute privilege they cannot then be sued, even if the information is wrong. If I were a child with absolute privilege and called you something offensive and said that you were a paedophile, you could not take an action against me for defaming your character. That is wrong. If I had only qualified privilege, you could take an action against me in certain circumstances. That right needs to be retained, because otherwise people could defame people's characters without proof. Does that clarify matters for you?

Mike Pringle: Yes.

The Convener: Is there anything else that you would like to say to the committee?

Rosemarie McIlwhan: The only thing that I would like to highlight is the fact that we really

need a culture change in the justice system with regard to how we treat witnesses. At the risk of being shouted at by the witnesses who are sitting behind me, I would suggest—[*Laughter.*]

The Convener: We can see their expressions.

Rosemarie McIlwhan: I am glad that I cannot.

There needs to be compulsory training for solicitors, advocates and judges on how to handle vulnerable witnesses, and it should be part of the continuing professional development schemes that the Faculty of Advocates, the Law Society of Scotland and the Judicial Studies Committee of Scotland run. That is the only way that we will get a culture change, and some body—something like a human rights commission—must oversee the process to ensure that we are treating people with respect and as human beings.

The Convener: Thank you for coming this afternoon. Your evidence has been very helpful to the committee.

I welcome three representatives from the Law Society of Scotland. Hilary Patrick is a member of the society's mental health and disability committee; Anne Keenan is the society's deputy director of law reform; and Murray Macara is a member of the society's criminal law committee. I think that we have an apology from Michael Clancy, who is unable to be with us this afternoon.

Anne Keenan (Law Society of Scotland): That is correct. He sends his regrets that, due to a family bereavement, he cannot be here.

The Convener: We are sorry that he cannot join us.

We are grateful to the Law Society of Scotland for its full and helpful submission, which has allowed members to form views on areas about which they would like to question the society further. I will leave it to the discretion of our witnesses as to which of them answers which question. If they all pile in, we will be here for a lengthy—if scintillating—period of time.

Jackie Baillie: One of the first points in the submission concerns the early identification of vulnerable witnesses. Clearly, that is not a matter that can be laid down in legislation; it is more a matter of practice. I would be interested in your view as to how we can ensure that, from the outset, vulnerable witnesses are identified. What needs to change?

Anne Keenan: First, I thank the committee for inviting us here. We are delighted to be here and to assist in the process. We have indicated that the contextual aspects of early identification are key to the process of the identification of vulnerable witnesses. Murray Macara will say more about that.

Murray Macara (Law Society of Scotland): I also thank the committee for the opportunity to speak on this topic. I hope that we do not sound negative in the next 45 minutes, as we sincerely welcome the proposals.

In posing that question, Jackie Baillie almost answered it. Early identification is crucial. A relevant example is a custody summary trial involving a male who is accused of assaulting his partner and who is kept in custody, perhaps because of his record or the circumstances of the offence. In such a case, the witnesses—the wife and perhaps young children—are vulnerable witnesses. The trial has to take place within 40 days of the accused being taken into custody and the point of the legislation would be defeated if, as a result of a failure to identify a vulnerable witness at an early stage, proceedings were delayed. However, such situations cannot be dealt with in legislation; they must be tackled through best practice. In the case that I use as an example, the police would identify the witnesses as being vulnerable at the outset and that would be flagged up with the procurator fiscal. There is no reason why that information could not be flagged up at the point at which the accused appears in court and is remanded in custody for trial. I do not think that there is more that we could say on that matter. We agree that early identification is absolutely essential.

Hilary Patrick (Law Society of Scotland): If the witness has a mental disorder, they should, in theory, have been picked up under the appropriate adult scheme, which is a non-statutory scheme for assisting in the interviewing of witnesses with a mental disorder. That scheme has been in operation for about five years but its application is still patchy throughout the country. There can be difficulties in ensuring that non-statutory schemes are implemented throughout the country.

Jackie Baillie: Why is the experience of the non-statutory scheme patchy across the country?

Hilary Patrick: Do you want me to mention resources and so on?

Jackie Baillie: Absolutely.

Hilary Patrick: Well, it will be to do with issues of resources, training, other work priorities, police time and so on. I think that Fife has been in the forefront with a well-developed scheme, but other areas have perhaps been slower and have not made the issue such a priority.

14:45

Jackie Baillie: I wanted to tease that out for the simple reason that the early identification of vulnerable witnesses, which is so critical, could end up being patchy across Scotland. We need to learn from experience elsewhere.

I want to move on to the definition of vulnerable witnesses. In some of the evidence that the committee has taken, there have been concerns, which perhaps echo those of the Law Society, about inconsistencies in the definition of an adult vulnerable witness. First, will you comment on that? Secondly, will you indicate not only whether you want a clearer definition but whether you think that some categories of people, such as the learning disabled, should have automatic entitlement to special measures?

Anne Keenan: We agree with the way that the bill is framed in relation to children—[*Interruption.*]

The Convener: Will you point your microphone towards you and bring it a little closer to you? We are not hearing you clearly.

Anne Keenan: We agree that children under 16 should have an automatic entitlement to apply for special measures. As we said in our written submission, we are concerned about the drafting of the definition in proposed new section 271(2) of the Criminal Procedure (Scotland) Act 1995. The difficulty is that too much emphasis is placed on the quality of the evidence rather than on the vulnerability of the witness. We would like the emphasis to be more witness centred, if you like.

Let me give an obvious example. Imagine that this is a courtroom. Hilary Patrick may be able to come along and give absolutely beautiful evidence, but she may then go out and shrink into a bundle or heap—

Hilary Patrick: I almost certainly will.

Anne Keenan:—and require some psychiatric assistance. It may be that the impact of giving evidence could be reduced if special measures were afforded to her in those circumstances. Our concern is that we should look at the witness's position.

As the bill stands, if a witness would be assisted by the use of special measures such as a screen or the presence of a supporter, the first thing that I would need to be able to say to the court in applying for such measures is that there was a substantial risk that the quality of the person's evidence would be diminished if they were not provided. If I knew that the impact of giving evidence would result in potential psychiatric difficulties or problems for the witness but that the witness would be able to give beautiful evidence with no risk of substantial diminution in the quality of that evidence, I would not be able to apply for special measures under the bill as drafted.

We ask that the focus of the bill be changed so that more consideration is given to the witness and to the impact that the experience of giving evidence will have on that person.

Hilary Patrick may want to add something about the mental disorder aspect.

Jackie Baillie: That would be helpful. Your submission comments on the mental health aspects and I want to tease that out. I also want to get your view on the position that was put by the Scottish Human Rights Centre.

The Convener: I suggest to Jackie Baillie that it will guide the witness if she phrases questions on the specific area that she is worried or concerned about. What is it that you wish to elicit from the witness?

Jackie Baillie: The Law Society submission commented on the extension of the mental disorder category—I thought that my question had been understood—but I also want Hilary Patrick to comment on what the Scottish Human Rights Centre said about mental health.

Hilary Patrick: As we point out in our written submission, we believe that people with mental disorders as defined in the Mental Health (Care and Treatment) (Scotland) Act 2003 should automatically qualify to be considered for special measures in the same way that children will. We made those comments because we find it almost impossible to conceive that someone either with a learning disability or suffering from a chronic mental illness would not at the very least require their needs to be considered. We support the evidence submitted by the Scottish Human Rights Centre and Enable, which points out that issues of communication must be addressed and that the questioning process should be specifically designed to deal with a person's needs.

Apart perhaps from the Scottish Association for Mental Health's submission, the evidence that has been submitted to the committee so far does not give sufficient consideration to people with a mental illness, for whom the real issue is the stress of court proceedings. We must realise the impact that any such proceedings could have. Before I came to the meeting, I conducted a quick search on the internet. I will not give the committee the reams of paper that I printed off, but it is clear from manic depression and schizophrenia websites that there is medical evidence that stress can make a person's condition worse. For example, one website said:

"Even seemingly mildly stressful events such as a job interview … can have a devastating effect"

and can result in a person's hospitalisation.

As a result, serious consideration should be given to the question whether people with a mental illness should have special measures to avoid such stress. Some people can cope with it, and we are not saying that everyone with a mental

health difficulty should have special measures. However, our belief—

The Convener: You make it clear in your submission that consideration must be given to that element.

Hilary Patrick: It must be given automatic consideration.

Anne Keenan: Qualification under the Mental Health (Care and Treatment) (Scotland) Act 2003 essentially acts as a gateway that allows a person to apply for special measures and the court to consider that application thereafter.

Hilary Patrick: We really want to shift the balance to make it a presumption that such a case will at least be considered.

Jackie Baillie: That is very clear.

The Convener: Mr Macara, you said that early identification is essential and outlined the example of a summary criminal trial that had a domestic violence background. What are your views on the Scottish Human Rights Centre's earlier suggestion that criminal defence lawyers should be required to participate in training?

Murray Macara: Our submission discusses the issue of training. I have to say that I noted the tone of the committee's questions to Rosemarie McIlwhan. We acknowledge that training is important in this matter; indeed, Anne Keenan attended this morning's launch of the supporting child witnesses scheme, which we recognise is important.

The Convener: But should there be compulsory professional development for lawyers who find themselves working in the criminal defence sector?

Murray Macara: I think perhaps yes, because—

The Convener: Is that a yes?

Murray Macara: That is a yes.

The Convener: Thank you very much.

Murray Macara: Continuing professional development is compulsory. However, the question we should ask is what kind of CPD should be compulsory. One can imagine other areas where it would be compulsory. Although we cannot necessarily extend such training to every solicitor in Scotland, it would be reasonable to extend it to people who practise in the criminal courts.

Anne Keenan: Solicitors who undertake continuing professional development are required to show that it is relevant to their area of expertise. Clearly, training in this area would be relevant for anyone who operated in the criminal or civil courts under the legislation.

Karen Whitefield: I return to some of the issues that you raised in response to Jackie Baillie's question about the need to make a closer link between the definition of vulnerability and the stress, suffering and anxiety that are caused when a witness gives evidence. How do you anticipate that that will work in reality? In particular, how would you define undue stress and anxiety?

Anne Keenan: The important thing is the gateway principle, which I referred to earlier in relation to mental disorders. If the definition is correct and the focus is put on the witness, there then has to be a list of criteria for the consideration of the courts, as there is in proposed new section 271(2). Although every case will differ, we have a list of factors covering the areas that the courts should take into consideration. The quality of the evidence will come in at that stage. Perhaps it could be argued that "any other relevant factor" would be a genuine catch-all, as we do not have the monopoly on wisdom and there will always be cases in which unusual circumstances merit the consideration of the courts. The list of factors in section 271(2) is a good start. I would like to see some development of guidance or of a code of practice to support the list. People who work in the area need practical advice.

Before we came to the committee today, we were reminiscing about what happened when the Adults with Incapacity (Scotland) Act 2000 was passed by the Parliament. The Scottish Executive produced a ready reckoner—a small card setting out the principles that the act affected. The intention was to get people into the way of thinking that when they dealt with cases involving adults with incapacity they should apply those principles.

It might be helpful if something similar is produced when this bill is passed, so that the people who are dealing with witnesses day in, day out have a ready reckoner prompting them to ask questions such as "Is the person under 16?" "Does the person have a mental disorder?" or "Is the person vulnerable in another way?" That might get people into a culture of thinking in a way that would be helpful in the implementation of the legislation.

Karen Whitefield: I move on to your position on those who are not allowed to conduct their own defence. The Law Society's position on the matter is clear. It is similar to the line that you took during the progress of the Sexual Offences (Procedure and Evidence) (Scotland) Bill. I would like you to expand on why your position on the two pieces of legislation is consistent and why the extension is not necessary. I am particularly interested in whether you believe that if the extension does not take place, women who are the victims of domestic violence will be put at a considerable disadvantage in the court.

The Convener: Consistency and brevity are normally concomitant. You must do your best.

Anne Keenan: I think that three issues are involved. The answer to the first is yes; Michael Clancy has drummed into me that we have to be consistent. We expressed our genuine concerns in the first session of the Parliament and those concerns are repeated in our submission. We are concerned about the deviation from the traditional rules of conduct in the solicitor-client relationship, under which the solicitor tries to act in the best interests of the client. How can a solicitor do that when the client will not communicate with them or gives no instructions or gives inadequate or perverse instructions?

We were concerned about the situation in which a solicitor acting for a client might be left open to court action for defective representation because they could not obtain the instructions that would allow them to find out what the best interests of the client were. The difficulty is that our code of conduct says that the solicitor should always act in the best interests of the client, but a solicitor could be left without the instructions to do that.

The second issue concerns lack of information. A well-tested position in law is that a solicitor should not put to a witness a position that they know is not the position of their client. It would not be proper to do so. In situations in which a vulnerable witness is involved, the solicitor might have to cover a whole ambit of defences because they do not know whether the accused is thinking of making an alibi or an incrimination defence.

We accept that the position in the bill is better than is the case under the provisions in relation to sexual offences: the powers are discretionary—the courts do not have to use them in every case. There are also interests of justice to be considered.

Our real concern is that we do not know as yet how the provisions in section 288C of the amended 1995 act have bedded down in relation to sexual offences. We have carried out some research on the matter, and I am aware that those provisions have been implemented in one case. I spoke to the solicitor concerned. It turned out to be a case that was not in fact in line with the provisions of the act. The accused person came from another jurisdiction and was not aware that he was supposed to have instructed a solicitor, and he was happy to co-operate. We do not therefore know how things work in practice in relation to those provisions.

15:00

Karen Whitefield: So you do not have any practical experience of those provisions not working.

Anne Keenan: That is very true, although we had concerns initially. In fairness, we came up with another idea. I think that Scott Barrie has heard me speak ad nauseam about the amicus curiae proposal, under which we thought that we could protect the witness by putting a solicitor in the court. They could be a physical presence there to protect the witness and to intervene on appropriate occasions. We suggested that having that person there might be helpful.

Karen Whitefield: You have said that you have no experience of the provisions causing difficulties. However, you did not address my point about women who are the victims of domestic violence being disadvantaged. Should that consideration be taken into account?

Anne Keenan: Clearly, we are concerned about victims in that category, as we are about all victims. I hope that the special measures in the bill will assist in that process. If our idea of having an amicus curiae were picked up, those witnesses would have a representative in court with them, looking out for their interests. That would offer a way to address your concerns about such witnesses.

The Convener: Mr Macara, you are a solicitor experienced in criminal defence work. The bill proposes that an accused person must be represented. Does that confront you, as a practising lawyer, with a practical problem?

Murray Macara: Absolutely. The relationship between solicitor and client should be based on trust, and the client should have confidence in the solicitor. The client co-operates with, puts their position to and instructs the solicitor. The proposals in the bill represent a radical departure from that. An accused person, who might be stubborn in some way or see himself as principled, and elects to defend himself, will not necessarily co-operate with a solicitor appointed to represent him by the court and will not give instructions to that solicitor. How, then, is the solicitor to defend that person properly? I do not think that he can. That solicitor leaves himself vulnerable and open to criticism. He leaves himself open to the possibility that, at a further stage in proceedings, be that in the court of criminal appeal or in a civil court, he will be held accountable for defective representation, simply because he has not put the true position of the accused to the witnesses and the court. In such a situation, the solicitor might have to guess what the accused's defence is. He might have to base his approach to the case on inferences to be drawn from the evidence.

In a way, we are considering the bill from a selfish point of view. We are considering it negatively in the sense that we are looking at it defensively. We are asking ourselves how we can properly and adequately represent an accused

person under the circumstances. It is to be hoped that it will not be necessary to use the power to insist that the accused be represented. Controversial cases in which accused persons elect to conduct their own defence are very rare.

As Anne Keenan has mentioned, and as our research on the implementation of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 has shown, there has been only one instance to date when a court has seen fit to appoint a lawyer to represent the accused—and he was only too happy to be represented by a solicitor.

Fortunately, that legislation does not appear to be necessary—I am not saying that it is ineffective. We have to adopt a consistent position. We did not appreciate the passing of the 2002 act. The position introduced by the bill is somewhat different, because there is an element of discretion on the part of the court, but it is one that I, as a defence solicitor, feel decidedly uncomfortable about. I listened with care to the comments that Rosemarie McIlwhan made a few minutes ago. There are clearly human rights issues involved. The right of an accused to represent himself is enshrined in the European convention on human rights.

Colin Fox: You have partly answered my question with your reference to the accused rarely choosing to conduct their own defence. However, I am struck by the fact that the Law Society is opposing measures that seek to take away that right. That seems extremely generous, given that you are probably putting some of your members out of work with that proposal. You say that the right is rarely exercised, but in your submission, you say that, depending how the prohibition in the 2002 act operates, we should in future consider extending it. Do you understand my point? You say on the one hand that you are against the extension of that prohibition, but you also say, "Let's see how it operates and we might come back to it."

Murray Macara: If other cases arise in relation to sexual offences, we would be extremely interested to learn of everybody's experience. We would be interested to learn how the case proceeds, how the court-appointed solicitor reacts and what the judge's view is of how the system operates. Whenever the prohibition in relation to sexual offences operates, we would like to know and would like feed back on how the system operates.

The Convener: I do not think that the Law Society has commented specifically on the proposal in the bill to abolish the competence test. Does the society have a view on that?

Anne Keenan: We are happy with the proposal on the competence test. We accept that merely asking a witness whether they know the difference between truth and lies does not mean that they will necessarily tell the truth.

The Convener: The bill proposes abolition. Are you happy with that?

Anne Keenan: Yes.

The Convener: Thank you very much.

Scott Barrie: The Law Society supports the proposal that, before special measures are authorised, there should be a hearing. We have had evidence over the past couple of weeks that such hearings would delay the process. Given that we have heard that one of the great anxieties about the court process at the moment is unnecessary delay, how can you square that with support for such hearings?

Murray Macara: It is a difficult balancing exercise. It would be a tragedy and an irony if the bill were passed and it were to result in greater delay. I read the evidence that was given on 2 September, when the question of appeals against decisions of hearings arose. We would not be particularly happy about the prospect of an appeal arising out of a hearing that did not go the way that a particular party wanted it to, because that would inevitably lead to further delay.

However, delay need not arise. In summary trials, an intermediate diet takes place one, two or three weeks before the trial. With proper judicial training, judges will flag up the need to take special measures and will ask parties whether special measures are necessary in respect of vulnerable witnesses. In sheriff and jury trials, a first diet takes place approximately two weeks before the trial takes place. The appropriate time to flag up the need for special measures and address the judge on it is at that stage. In the High Court, once Lord Bonomy's proposals are implemented, there will be preliminary diets. Such issues may be addressed at that stage.

There will in every case be a preliminary hearing at which one of the issues that should be addressed is what measures are necessary to address the needs of vulnerable witnesses. I hope that delay will not arise, because the matter can be dealt with at a preliminary stage, long before the trial takes place.

Scott Barrie: I appreciate and welcome your comments that you do not anticipate that the proposal would lead to any delay. However, it seems to me that procedural reforms that have taken place, particularly in criminal cases over the past 10 or 20 years—such as some of the instances that you have already mentioned—which have often been geared towards making the court process work more efficiently, have actually had the opposite effect. People's experience is

that they do not lead to greater efficiency. By solving one difficulty, we seem to create at least another one if not another two. Notwithstanding what you have said, I wonder whether we might be building something into the system that could be exploited and lead to delays.

Murray Macara: I can only express the hope that that does not happen. Let me give an example of what happens at the moment. If the Crown feels that it is necessary to make a screens application so that a vulnerable witness can give evidence behind a screen shielded from the accused, that is invariably dealt with one or two weeks before the date that is set down for the trial. From my experience, I cannot think of an instance in which the need for a screens application has delayed the trial because the Crown or someone else thought about it only as an afterthought. The system tends to work fairly well. The application is made at a point sufficiently far in advance of the trial that it is not a cause for delay of the trial.

Scott Barrie: Unless the trial has been changed at a very late date to a different court. That has happened.

Murray Macara: If arrangements are made in one court and the trial is transferred to another court, the arrangements made in the original court would carry forward to the subsequent court.

Scott Barrie: I do not mean to prolong this discussion, but some of our courts have practical difficulties with such arrangements. The case might well have been cited in a different court for that very reason. There have been examples in which that has not been able to happen, but that is perhaps a side issue.

Anne Keenan: We hope that if the hearing is held well in advance of the trial, everybody should be clear on what the position is on issues such as how the evidence is to be taken. If that is canvassed at an early stage, parties will not be faced on the day of the trial with situations that they had not anticipated. Our hope is that the hearing will address such matters and have them aired well in advance so that the trial does not need to be put off at a late stage.

The Convener: Does the Law Society have a view on whether significant changes will be necessary to the physical infrastructure within our criminal courts for the implementation of measures necessary for vulnerable witnesses? Obviously, that will have a resource implication.

Murray Macara: I imagine that there will not be a difficulty for the High Court in Glasgow or Glasgow sheriff court, but there will clearly be a difficulty for Lochmaddy sheriff court, which sits perhaps two or three days a month. The proper implementation of the scheme will have resource implications, which I suspect are a matter for the Scottish Court Service to address. I see that the issue has been addressed in earlier submissions. It would be a matter of concern if the provisions were extended to the district court given the major implications that they would have on the proceedings in the district court. For example, I think that the district court in Helensburgh sits two days a month. I do not know that the bill should properly be extended to the district court. I say that mainly because of the resource concerns.

The Convener: I want to turn to one or two technical issues. I apologise if I have missed these in your written submission. The bill provides for a presumption that the accused will not be present when evidence is taken on commission. What is the Law Society's view on that?

Anne Keenan: We cannot imagine a situation in which the accused would be present for that. The accused would need to have the facility to see and hear the evidence, but I think that that is built into the bill. We cannot come up with a situation in which we could see that it would be appropriate for the accused to be present when the evidence is taken on commission.

Murray Macara: We also discussed the issue this morning with another colleague who has been a solicitor for 30 years. In the criminal sphere, I have simply not come across evidence on commission. I can imagine taking evidence on commission from somebody who is seriously ill, where it might be necessary to go to hospital to take the evidence from them so that that evidence is preserved. In practice, solicitors who practise in the criminal sphere do not have great experience of doing that. Those who practise in the civil sphere will have more experience of it.

Anne Keenan: In the criminal sphere, it would seem a bit bizarre to have the accused in the same room when the evidence was being taken on commission, although we would preserve the accused's right to hear and see the evidence being taken.

Hilary Patrick: Evidence on commission is always going to be rare, as it is not the best kind of evidence because the person cannot be cross-examined on it. Such evidence is never going to be the first choice and would be taken only in fairly exceptional circumstances—for example, if somebody was ill or could not cope with the cross-examining process.

15:15

The Convener: The suggestion has been made, today and at other committee meetings, that there should be a change in culture regarding the physical presence of children in our courts. One suggestion is that we should change the culture around the presumption that children will not give

evidence in a court environment. What is the Law Society's view on that?

Anne Keenan: Murray Macara referred earlier to the launch of the "Supporting Child Witnesses Guidance Pack", which we were involved in producing. Along with several agencies, we participated in drafting the guidance on questioning child witnesses. On the first page of that document, reference is made to the fact that children should not be required to be witnesses in a case unless it is absolutely necessary. That is set out as one of the first tenets and we agree with that view. In every situation, we should consider whether it is necessary to cite the child witness in the first place and what the best way for the child to give their evidence is—whether by way of remote television link, outwith the presence of the court, or by any other means. We should consider the best interests of the child in the specific circumstances of each individual case.

The Convener: So, you favour the presumption that the child should give evidence outwith the court.

Anne Keenan: It would be necessary to consider the circumstances of every individual case.

The Convener: You would prefer the flexibility of discretion being applied.

Anne Keenan: Yes.

Murray Macara: I listened to what Rosemarie McIlwhan said. The circumstances of a 15-year-old giving evidence in relation to assault and robbery are significantly different from the circumstances of an 11-year-old giving evidence as the complainer in a sexual case. The court must identify the specific needs of the individual witness, and their degree of vulnerability must be taken into account.

From my perspective as a criminal defence solicitor—and, I suspect, from the perspective of a jury that is trying to evaluate evidence and judge the demeanour of witnesses—if a witness can give evidence in court, they should do so subject to whatever special measures require to be taken. However, there are clearly circumstances in which the normal rule would perhaps be eroded.

The Convener: You, too, prefer the flexibility of discretion and the treatment of each case on its merits. Does the Law Society have a view on the possibility of children and other vulnerable witnesses being inhibited from giving evidence because of the fear that an action of defamation could be raised?

Anne Keenan: None of the members of the Law Society who are here today has any experience of that. I am sorry that we cannot assist further.

The Convener: Are you satisfied with the consultation process in which the Executive has engaged on the bill?

Anne Keenan: Yes. It has been very inclusive. We have consulted both the Executive and the bill team a great deal and we are delighted with the level of consultation.

The Convener: Do committee members have any further questions to ask or points that they would like to make?

Members: No.

The Convener: On behalf of the committee, I thank all three of our witnesses for appearing before us. You must forgive us if, at times, our questioning seemed unusually fastidious. We were trying to tease out specific responses on technical issues, and we are grateful to the three of you for providing such full answers.

On behalf of the committee, I welcome to the meeting Mr Simon Di Rollo QC and Mr Jamie Gilchrist from the Faculty of Advocates. It might be helpful for committee members if one of you gives a brief synopsis of the faculty's view on the bill, because I do not think that I was alone in finding it difficult to transpose the faculty's response to the original "Vital Voices" consultation paper, which you copied to the committee, to the actual content of the bill. Could one of you briefly summarise what you find favour with in the bill—if anything—and what your concerns are?

Simon Di Rollo (Faculty of Advocates): We welcome the fact that measures are to be taken to assist vulnerable witnesses, but we have a number of concerns about the bill and the way in which it has been drafted. As I understand it, it had been intended that the Faculty of Advocates should be given the opportunity to comment on the bill, but for some reason we did not get that opportunity, hence the lateness of our response.

There are some points that we want to make about the bill. First, it is difficult to identify a vulnerable witness, apart from a child and apart from the mental health criteria. That is a serious problem that we are concerned about. Secondly, we are concerned about some of the drafting in relation to its effect on the fairness of the trial and the decisions that the court has to make. Thirdly, there is in the bill no opportunity for the person or the party against whom the vulnerable witness is being called either to object to that witness being categorised as a vulnerable witness or to have an input into what the appropriate special measure might be. We think that that is wrong. The party against whom the witness is being called should have that opportunity to be heard as a matter of right. That is very important.

As far as the provision in relation to children under 12 is concerned, the committee will see that

the provisions will apply to a child under 12 in some categories of case but not in others. We think that the same provision should be made in all cases. We see no point in making a distinction. In fact, the provision would be more difficult to apply in practice if a distinction were to be made. It should be the same across the board.

We have certain concerns about the commission procedure and how it will work. We are concerned about the right of the accused to be present at a commission. We do not think that it should be within the gift of the commissioner whether an accused person is present; that should be up to the court to decide.

We are concerned about the detail on the giving of evidence-in-chief in the form of a prior statement; I will expand on that in due course. We are also concerned about the provision on expert evidence in relation to a witness's credibility and reliability. That is a fairly radical departure from the law as it stands, and may have important repercussions on how evidence is treated in future cases. It is an inroad into an important principle, which requires to be considered carefully.

We consider that the provision in the bill that will entitle the Scottish ministers to introduce new special measures by way of statutory instrument is wrong. That should be done by primary legislation. In other words, an extension of the special measures that are available should go to the Parliament in the form of primary legislation, rather than by way of statutory instrument.

We think that vulnerable witnesses should not, under any circumstances, be called in the district court. The provisions should not be extended to the district court. The section on the option of extending the provisions should be deleted.

Those are our concerns about the detail of the bill. I am happy to go into each or all of them in detail.

Jamie Gilchrist (Faculty of Advocates): There is a paper that attempts to summarise those points. We hope that you have received it.

The Convener: I have just been made aware of that paper. It will be circulated to committee members. I do not think that it was received in sufficient time for the clerks to effect a distribution.

Mike Pringle: When did we get that paper? It would have been useful to have read it before today. Clearly, not having read it puts us at a disadvantage.

Simon Di Rollo: You could not have read it before today because it was e-mailed to the clerk this morning. Sorry about that.

The Convener: It is all right, we are glad to have it. While members are glancing through the paper, I ask you to expand on the point that you said was causing you concern and to which you said that you would return. Was the aspect that concerned you the giving of evidence-in-chief in the form of a prior statement?

Simon Di Rollo: That is one aspect. I think that Mr Gilchrist wants to deal with that.

Jamie Gilchrist: One of our concerns in that regard is that, although the explanatory notes refer to a previous statement being

"reliably recorded on video or in some other way",

that safeguard does not appear to have found its way into proposed new section 271M.

In the interests of preserving the right to a fair trial, it is important that the defence should have an opportunity to challenge the admissibility of the evidence that is being tendered in that way. It is conceivable that the statement might have been generated by, for example, improper questioning. As I understand it, in England, where a version of this proposal operates, there is an opportunity to challenge the admissibility of such statements. Indeed, the consultation document refers to a potential problem being the exclusion of some or all of these statements as inadmissible on the basis that they have been unfairly obtained. Paragraph 4.13 of the consultation document addresses the specific point.

As the safeguard has not made its way into the provision, one can imagine a situation in which there would be no record of how evidence that was being tendered by way of a written statement had been obtained. Particularly important in that regard are the questions that were asked of the witness in order to prompt the evidence.

The Convener: Is it your fear that a prejudice would arise to the accused because neither he nor his agent could cross-examine properly?

Jamie Gilchrist: It would certainly be impossible to cross-examine effectively. However, the problem is more fundamental than that, because one can envisage a situation in which one would properly object to the evidence-in-chief being admitted at all whereas the best that can be done in this circumstance is that evidence that might be unfair would be admitted and would be subject to challenge only by cross-examination.

The Convener: You are arguing that, without the inclusion of the safeguard, the normal right of a criminal defence lawyer to consider the admissibility of evidence that might be led in chief and to have a debate before the presiding judge on that issue would be removed by the statutory conferment of the right to introduce evidence-in-chief by way of a prior written statement.

Jamie Gilchrist: Without the safeguard of having a record of how the evidence had been obtained, that would be a possibility.

Simon Di Rollo: The concern is that proposed new section 271M, as drafted, does not require the way in which the statement was obtained to be transparent; only the statement would be produced. Leading questions are not permitted in court and they should not be permitted in the process of obtaining a statement to be produced in chief.

No doubt the problem can be dealt with by redrafting the section.

The Convener: I thank you for drawing attention to that matter. Members have particular areas of interest that they want to ask you about.

Jackie Baillie: I was interested in your presentation and will catch up with the written submission. However, something jumped out at me from the first page, which mentions the "truly vulnerable" witness. How would you define a witness who is truly vulnerable, as opposed to vulnerable?

15:30

Simon Di Rollo: I do not think that I can give such a definition. It is difficult to identify a vulnerable witness by criteria, although it can be said that somebody is a particular age or has a certain medically certifiable illness. It is difficult to identify a vulnerable witness or a truly vulnerable witness, or whatever words one wants to use.

I have concerns that relate to a method of giving evidence that is understood to be how things should be done in the normal course of events. If there is to be a departure from that course of events and an exception is to be made, the person against whom a decision is made should have the opportunity to be heard, as it is difficult to define the circumstances in which such a departure should take place. That is a real concern of mine.

Another concern about the definitions that are contained in proposed new section 271 relates to the behaviour of the accused. Nothing in the bill will help the court to determine how to identify whether the accused has behaved in a particular way. Does the court need to investigate that matter? Is not the accused entitled to be heard in that respect?

Jackie Baillie: Is your position that nobody should be automatically entitled to be considered for special measures and that the matter is ultimately at the discretion of the judge?

Simon Di Rollo: I have no difficulty with children and with objectively verifiable criteria, but I have much more difficulty with other types of witness. There should not be automatic measures; the court should be addressed and should make decisions about the criteria. That process exists in the current legislation.

Jackie Baillie: I am trying to tease out the distinction between categories of vulnerable witnesses who should be given automatic rights to be treated as vulnerable witnesses and discretionary special measures that should apply. I am unclear whether you are saying that there can be automatic categories as long as there is discretion to define what special measures would be appropriate.

Simon Di Rollo: I am sorry, but the unclearness is probably my fault. I have no difficulty with saying that certain types of witness should have special measures and with proceeding to decide as a matter of discretion what those special measures will be, but I have difficulty with trying to define a vulnerable witness with reference to the criteria in proposed section 271 in respect of non-children and non-mentally ill people. That would be an extremely difficult exercise to carry out.

Jackie Baillie: If you were rewriting the section, how would you do so?

Simon Di Rollo: I would find it difficult to change or improve the wording or the criteria.

Jackie Baillie: So you just do not like the section at all.

Simon Di Rollo: It is not a question of not liking it, but of having a problem with the exercise that is being carried out, which is inherently difficult. The criteria include the risk that the quality of evidence will be diminished by

"fear or distress in connection with giving evidence at the trial."

That applies to almost every witness who gives evidence and could certainly apply in most rape cases, for example. I cannot think of a rape case in which the complainer could not be described as a vulnerable witness. The definition has a very wide application, which is no doubt good on one level, but there would be a big change from the accused person's point of view. Should not they at least have an opportunity to address the court about whether the witness is truly a vulnerable witness in the circumstances?

Jackie Baillie: You mentioned "objectively verifiable criteria", but the submission from the Faculty of Advocates Criminal Bar Association questions whether teachers, social workers and others provide an objective view. Whom would you have provide an objectively verifiable view on whether somebody should be considered for special measures?

Simon Di Rollo: I do not agree that social workers or teachers are not capable of giving a view that the court can take into account. What I am saying is that it is difficult for the court to reach a decision without hearing from everyone who has an interest. That is what should happen.

Jamie Gilchrist: You are focusing on the distinction between entitlement and discretion. It is worth saying that even under the present procedure—which, obviously, is discretionary—it is extremely rare in my experience for an application for special measures to be refused. It is also extremely rare for an application even to be opposed, unless it is manifestly unfounded. The fear that I perceive to be behind the concerns is, in reality, rather overstated.

Scott Barrie: I do not know whether you have had the chance to review the evidence that we received last week, but in the past few weeks we have received what I would suggest is persuasive evidence that a major difficulty lies in the adversarial nature of our court system. That affects all witnesses, but vulnerable witnesses in particular are affected. I am well aware that the Faculty of Advocates has expressed severe concerns about moving too far away from a presumption of innocence and towards the overprotection of witnesses. Where should the line be drawn? Are you suggesting that the current system is adequate, or do we need to do something? I take Mr Di Rollo's point that he finds it difficult to offer us a satisfactory definition, but we have to do something to protect witnesses who find the adversarial nature of giving evidence too traumatic.

Simon Di Rollo: We have to do a great deal to protect vulnerable witnesses. A lot is done at the moment and a lot more could be done and no doubt will be done. The bill will help, but in our paper I suggest certain ways in which it could be improved. Special measures will no doubt assist in many cases, which is a good thing. I have no difficulty with that whatsoever.

I think that the Executive and everyone else agree that we are stuck with the adversarial process in the criminal courts—unless we move to an inquisitorial system, which nobody is proposing. We have the adversarial process and it is a question of making it work as effectively as we can. We must balance the right of the accused to a fair trail—everybody agrees that the accused must have a fair trial—with the need to ensure that the witness is properly protected before they get to court and while they are at court. Legislation can help with that, but all the practitioners have to be properly trained. They must all play their part. The judges have to ensure that the practitioners conduct themselves properly, as part of the whole process.

Scott Barrie: You said that "we are stuck with" the system that we have, which is a slightly pejorative phrase. Do difficulties arise because of people's experiences with the adversarial process in court?

Simon Di Rollo: There are advantages and disadvantages with the adversarial process. We have seen some of the advantages in London in the Hutton inquiry: when it becomes adversarial, it becomes more helpful in getting at what actually happened. I have no doubt that there are disadvantages as well, but I would suggest that the adversarial process has some advantages.

With respect, however, that is not what we are here to discuss. We have to use the system that we have and make it work as best we can or find ways of improving it. I have no difficulty with the provisions in the bill that are, generally speaking, designed to that effect. I am concerned about certain features of it.

If the accused is a vulnerable witness, the Crown cannot be heard with regard to whether the court should treat the accused as a vulnerable witness. That is wrong. We cannot have one rule for the Crown and a different one for the defence. That is another reason for saying that both sides should have the opportunity to be heard on the question whether someone is a vulnerable witness and what the appropriate special measure might be.

The choice of special measure is important. Some of the special measures, such as the commission procedure, would make an important change to the way in which the evidence would be heard. In that scenario—as things stand—the evidence would not be heard in the presence of the accused and the jury would not be able to see and hear the witness. That is extremely important, because the jury is supposed to assess credibility and reliability in the flesh and it is useful for the jury to see how the witness reacts to certain questions and answers. The reaction of the accused to the questions that are asked of the witness and the responses that the witness gives are important in any criminal trial. If it is decided that two of the special measures—the video link and the commission procedure—should be taken, the jury will not see the witness in the flesh.

The Convener: Do you take the view that, in that context—even allowing for the facility of judicial direction to the jury to dismiss all those aspects as in any way reflecting on the accused and not to take the measures into account—there will be a prejudice in the minds of the jury against the accused?

Simon Di Rollo: That is potentially the case. In a situation in which all witnesses of a certain type are treated in a particular way, it is much easier to say to the jury that everybody is treated like that.

I have no difficulty with the measures' being taken; all I am saying is that the person against whom the witness is being tendered should have the opportunity to have their say before that decision is made. The accused or the Crown—whoever is going to be facing the vulnerable witness—should be allowed to be heard on the subject.

The Convener: I was struck by your comments about the accused because, of course, the bill does not make provision for the fact that the accused might be a vulnerable participant in the process. Is it your submission that, unless there is available to the accused a defence or plea of insanity—

Simon Di Rollo: No. The bill says that the accused can be treated as a vulnerable witness. My concern in that regard is that, in such situations, the Crown would not have an opportunity of saying to the court that no special measures should be taken in relation to the accused person because it was nonsense to say that they were a vulnerable witness. That is a fundamental problem with the way in which the legislation has been put together.

The Convener: Sorry. I misunderstood what you were saying.

Simon Di Rollo: The situation can be put right quite easily, however.

Colin Fox: I would like to follow up the line of inquiry relating to special measures. Some of the measures already exist, such as screens.

Simon Di Rollo: They all exist.

Colin Fox: What has been your experience of the effect of those measures on the quality of evidence that is given in the court?

Simon Di Rollo: Speaking as a prosecutor, I have had favourable experiences of the use of any special measure, whatever it might be. There is no legislation on whether someone can accompany the witness, but the court can allow that, and it can work extremely well. Screens and CCTV can also work well.

15:45

Colin Fox: Does the use of special measures affect detrimentally the jury's opportunity to see the witness giving evidence and the accused's response to that evidence? Do the measures in any way detract from that process?

Jamie Gilchrist: I think that they can detract from the process, which is another reason why I stress that, in an ideal world, if the process will not upset the witness, it would be better if the witness gave evidence in court. I am also a former prosecutor and I can think of cases in which, because the witness's evidence was given on CCTV, it made less of an impression on the jury than it would have done if the witness had been in court.

Colin Fox: Is that true generally, or only in certain instances?

Jamie Gilchrist: I am saying that it can happen, not that it does happen. We ask witnesses to give evidence in court because it is thought that, in our system, doing so provides the best opportunity for a jury to assess whether the witness is credible or reliable. Any step that takes the witness away from the jury might have an impact on that.

Scott Barrie: Is not the reason for that impact the image that is projected that the right way to give evidence is the traditional way in court? Last week, the Scottish Child Law Centre gave us persuasive evidence that we need to move away from that view. The difficulty lies with people who take such a view, which, I realise, means juries. The fact that we provide special measures in some cases while, in others, young children are persuaded to give evidence in court promotes that image. If there were a presumption that all evidence from children would be given through special measures, your argument would be diminished.

Jamie Gilchrist: I do not have a difficulty with the presumption that children, particularly young children, should not have to give evidence in court. I am all in favour of that. I do not know how juries think—we are not allowed to inquire into that. I was simply saying how the use of special measures seemed to me, as a prosecutor, to affect certain cases.

Scott Barrie: Surely we must listen to children's experiences. The vast majority of children who have given evidence in court think that it was a bad experience, irrespective of the outcome.

Jamie Gilchrist: I do not disagree with that. I am simply saying that I have experience of cases in which the witness's evidence had less of an impact than it might have done on the people who had to decide the case. The committee must be alive to that potential downside of the bill.

Scott Barrie: That downside is a result of the nature of our system.

Jamie Gilchrist: Yes.

Mike Pringle: I want to explore some issues that other witnesses have raised. Both of you have been prosecutors. What is your view of the fact that a child witness might decide not to give evidence if they have to stand up in a witness box in court? If that happened, the witness would be lost. Other committee witnesses have mentioned the huge reluctance among people to give evidence in court. Would not it be better for witnesses to give evidence on commission—which

would be at least something—rather than not at all?

Jamie Gilchrist: I do not have a difficulty with that, again subject to the fairness of the evidence. I go back to the first point that I made about the potential difficulty that I have in relation to admitting prior statements as evidence. I do not have a difficulty with the proposal if the fairness of the trial is preserved in the context of whatever special measure is being used. It is better to have the evidence than not to have the evidence.

Mike Pringle: Will the bill, if it is passed, improve the way that our courts operate or hinder the court system? We have heard that people are worried that some of the measures might delay what happens in court.

Simon Di Rollo: It is difficult to give a clear answer to your question. The bill is a demanding piece of legislation for everyone and every time that such legislation is passed, people have to absorb what it says, consider it and deal with the new situation that emerges. Certain features of the bill are capable of assisting the process. Most of the bill's provisions are already in existence. There seems to be a perception that more needs to be done to ensure that the courts make the right decisions in certain cases. I hope that the bill will improve matters, but I suggest to the committee that certain aspects of it need to be considered more carefully and that it could be improved in a number of ways.

Jamie Gilchrist: In general, our approach is that the thrust of the bill is good and that it is a worthwhile exercise. We have focused on areas where we think there are problems. One example is the provision on expert evidence as to the credibility and reliability of the complainer. That provision will cause real problems.

Mike Pringle: Which section is that?

Jamie Gilchrist: It is section 5, which will insert proposed new section 275C into the 1995 act.

That provision could cause all sorts of difficulties. It raises the prospect of vulnerable witnesses being examined by a number of experts even before they come to give evidence. I can see trials becoming bogged down in battles between experts as to whether an adverse inference ought or ought not to be drawn. We believe that there are problems with specific provisions in the bill, but that is not to say that its whole thrust is misguided.

Mike Pringle: So you think that, as the bill stands, it might delay things more than they are currently delayed.

Simon Di Rollo: Certain problems are going to arise, such as the issue of resources. Not all sheriff courts can deal with the special measures—not all have CCTV facilities, for example. Witnesses will have to be moved to other courts and evidence will have to be dealt within other courts. That will cause delays in cases.

Evidence on commission is another potential difficulty, because all the important material must be disclosed to the defence. A witness might be the most important witness in the case, and the defence needs to know that and everything else about the case before evidence on commission is taken. The trial cannot proceed until the commission has taken place, and the commission will not be able to start until the defence has all the material that it requires in order to cross-examine the witness. That may involve a certain amount of delay. I am not saying that that necessarily means that there will be a delay, but demands will be made on the prosecutors to get their act together so that they can provide the defence with the material. There is nothing wrong with making those demands—the public is entitled to expect that they will be made—but, as I said earlier, the system will place demands on everyone. Perhaps that is as it should be.

Colin Fox: You have said that you think that the bill will be a demanding and complex piece of legislation and your submission mentions the need for training and advice to be available to all the agencies involved. Perhaps I can give some advice to the mathematician at the Faculty of Advocates: the paragraphs in the faculty's submission are numbered 1, 2, 3, 4, 5, 5 and 7—6 has been missed out.

Simon Di Rollo: Oh well—thank you very much.

Colin Fox: That will be 500 guineas. [*Laughter.*]

I want to explore the issue of training for all the agencies involved. Where specifically should training be targeted and who would be included in it? Who would provide the training and advice? Many of the submissions have mentioned the adversarial character of the court system. How do you envisage training and advice being given to defence counsel on leading their evidence, so that they are made aware of the vulnerability of the witnesses whom they cross-examine?

Simon Di Rollo: We have had a programme for trainee advocates since the early 1990s. There is a need to consider whether that training deals adequately with vulnerable witnesses in particular. I think that we should consider ways of improving our training. No doubt, the faculty will have to consider and implement improved training for us all in dealing with vulnerable witnesses, and that needs to be a continuous exercise.

For a while now, we have been providing training on taking evidence from witnesses. We simulate court cases and practise taking evidence, and those who undertake that training are

reviewed and videoed. Such training programmes are, however, quite new in the world as a whole. They have not existed in most common-law jurisdictions—including Scotland—for very long, but we have started them, we will continue to do so and we are getting better at them. No doubt, we can get better still. We can improve our coaching and training of advocates.

Colin Fox: So the Faculty of Advocates conducts its own training of trainee advocates.

Simon Di Rollo: Yes.

Colin Fox: Who do you envisage providing the training for the other agencies involved in the process, such as solicitors and the police? Do you draw on outside agencies to help you with the training of trainee advocates?

Simon Di Rollo: We have worked with expert witnesses, including doctors and accountants, for certain types of cases. As far as vulnerable witnesses are concerned, we have worked with certain medical practitioners and have practised doing drills with them. That involves a mock case, with trainees practising taking their evidence. That has the effect of training the doctor in answering questions and training us in asking them—it helps us both. Aside from that, we have not so far considered involving outside agencies to any great extent. However, there is no reason why that could not be considered.

Colin Fox: My colleagues have mentioned that cases sometimes take a long time to reach court. Might it be appropriate to train advocates who get involved in cases involving vulnerable witnesses? Of course, training might be general, rather than about the specifics of a case. Should training take place for advocates who are not involved in cases with vulnerable witnesses? Do you take my point?

Jamie Gilchrist: Any advocate going into a trial involving vulnerable witnesses ought to have received training, which would include the handling of those witnesses. That is part of our job.

The Convener: You say "ought to", but is it part of the faculty's disciplinary regime? Is some check done on the training that has been provided to advocates?

Jamie Gilchrist: It is part of the training programme that everybody now undergoes before they are even allowed to call as a practising advocate. Many of the suggestions in "Guidance on the Questioning of Children in Court", which was launched today, are mirrored in the advocacy training that our trainees now get.

16:00

Karen Whitefield: I have questions about your children's justice section proposals, but before we move on to that, I have a final question about training. You said that you train with doctors and accountants—professional people, just like advocates—but it strikes me that many of the people who go to court are not professionals and, unlike advocates, are not used to going to court. It would perhaps be helpful if advocates, whether acting for the Crown or for the defence, had an opportunity to engage with Victim Support Scotland and Scottish Women's Aid to take on board their experiences from the other side of the legal system of what it is like to be a witness in court. That would assist your training process, so will you consider doing it?

Simon Di Rollo: I do not see any reason why not. It is obviously difficult to practise on a real vulnerable witness—no one would contemplate doing so. However, there is no doubt that we can learn from people with experience of dealing with such witnesses and I have no difficulty at all with your suggestion.

Jamie Gilchrist: We have held seminars for our members on how to deal with child witnesses. People who are recognised as being particularly good at that have come to share their experiences and I hope that we have built up a knowledge pool on that basis.

Karen Whitefield: In your response to "Vital Voices: Helping Vulnerable Witness Give Evidence", which the Executive issued, you suggested that it would be helpful if a children's justice section were created within existing structures. What do you anticipate to be the main benefits of your proposals, and what are the possible negative effects? Will they take up resources and add unnecessary layers of bureaucracy, which already appear to exist?

Simon Di Rollo: I find it difficult to deal with that question just now as I was not involved in preparing the response. I do not feel capable of giving you an answer that does justice to the thinking behind our proposals. Perhaps it would be all right to come back with a written response in due course.

Jamie Gilchrist: I am afraid that I am in the same position.

Karen Whitefield: We were given a copy of your response to "Vital Voices" as your evidence to the committee. I spent considerable time wading through "Vital Voices" and measuring it against your response, so it is unfortunate that you are not in a position to give the information and detail that is required. A written response would be helpful, particularly on whether your proposals on the children's justice section would increase bureaucracy and take up unnecessary resources.

The Convener: Can that information be made available in writing?

Simon Di Rollo: I am sure that it can.

The Convener: That would be helpful.

I turn to more technical aspects. I notice the faculty's reservations about the bill's proposals for evidence on commission. In your experience has taking evidence on commission been a rare occurrence?

Simon Di Rollo: It is rare.

The Convener: Given that taking of evidence on commission could arise, are you concerned about the bill's proposals for it?

Simon Di Rollo: Only two things concern me. The first is whether the accused should or should not be present. That should really be left to the court to decide; I do not see difficulty with leaving that decision to the court. If the witness is vital—the main witness in the case, for example—then to exclude the accused from hearing and seeing that witness would be an important change. The court should make the decision and there should not be automatic provision that the accused be not present. It is a basic feature of criminal procedure that the accused is present at the trial. That is in section 153, I think, of the Criminal Procedure (Scotland) Act 1995. It is a very important principle. Having a commission is fine and not having the accused present is also fine, if it is justifiable. However, that should be left to the court to decide.

The Convener: Do you mean it should be left to the judge?

Simon Di Rollo: Yes—it should be left to the judge and, I should add, not to the commissioner, which is what the proposal suggests at the moment.

Jamie Gilchrist: The other aspect to consider is who will ask the questions. It is not entirely clear from the provision as it is framed whether what we understand to be the traditional way of conducting a commission would operate. The traditional way is that the commissioner acts qua judge as referee, and the two parties ask the questions. In the consultation document, there is at least a suggestion that the procedure might be used in the expectation that the commissioner himself or herself would ask the questions—on behalf, I presume, of both parties. If that is the intention, it is a radical step and it is difficult to imagine how it would work in practice. It is difficult to imagine how the parties would be able to communicate to the commissioner the line or the approach to questioning that they wished to take, or to see how they could be sure that the commissioner understood that and was able to deal with it effectively.

The Convener: I note your profound concerns over expert evidence on the credibility and reliability of the complainer, as covered in section 5 of the bill. I gather that your principal concern has to do with what you see as the one-sided nature of the provision.

Simon Di Rollo: It is one-sided—there is no doubt about that. Only the complainer can take advantage and the provision does not seem to allow the accused to lead evidence in the opposite direction, which is a problem. For example, it allows the Crown to lead a psychologist to say that the complainer is telling the truth, but it is usually the jury that decides whether a witness is telling the truth. It should be for the jury to decide that, and not for some expert witness. With the provision in its current form, if the defence wanted to lead evidence—which the Crown has led—to say that the expert was wrong, it would not be permitted to do so. Proposed new section 275C(2) says:

> "Expert psychological or psychiatric evidence relating to any subsequent behaviour or statement of the complainer is admissible for the purpose of rebutting any inference adverse to the complainer's credibility or reliability".

The way I read that, it would not allow the accused to lead evidence to contradict what the Crown expert has said.

The Convener: You are also concerned about the absence of a definition of expert. Is that because of concerns over restricting the right of the accused to question the validity of the—

Simon Di Rollo: The problem is that we do not have any system in Scotland for accrediting experts. Anyone can come along to court, say that they are an expert in a particular field, and give their evidence. It is for the fact-finder to decide whether they are prepared to rely on that evidence or not. Once you allow expert evidence to be introduced in order to decide whether somebody is telling the truth or not, potentially you allow expert evidence from just about anybody to say that a particular witness is to be believed or not. The bill uses the phrase "psychological or psychiatric evidence". My concern is that psychological evidence covers a multitude of sins. I am not entirely sure what kind of expert the bill would sanction. What kind of psychologists are we talking about? What qualifications would they have? What professional bodies will they be members of? What expertise will they have?

The provision is designed to address an unfortunate problem that arose in the Grimmond v HMA case, which is mentioned in the policy memorandum to the bill. The provision will address that problem, but it will create a number of other problems. The basic rule has been that only the jury or, if there is no jury, the judge can decide matters of credibility and reliability. To alter that rule will make an important change to an important principle, which will have important ramifications.

The Convener: So, would your preference be for proposed new section 257C to be swept away?

Simon Di Rollo: Yes.

The Convener: Would you also prefer to rely upon the conventional position of the jury making its own determination as to credibility or reliability.

Simon Di Rollo: That is my personal view, but there is room for a different view, which is that we should have expert evidence. If we are going to do that, we should be careful about the way in which we go about it; I do not think that the provision as framed is adequate.

Colin Fox: I tend to perk up a bit when the word "radical" is mentioned. I want to press you on one thing. You may have answered this, but so that I am absolutely clear about it, are you uncomfortable about plans to prevent the accused's being present when evidence is given on commission, unless a judge in court has said that he is happy with it? Are you saying that you are unhappy about taking away the right of the accused to be present, unless the court has decided that it should be taken away?

Simon Di Rollo: That is right.

Colin Fox: That is an important distinction for me. I have some sympathy with the idea—I am sure that we all do—that the legal rights of the accused are very important. You are saying that it is important that those rights be preserved, but if the judge says that the accused does not have to be present, you are quite happy with that.

Simon Di Rollo: Absolutely.

The Convener: I want to ascertain your view on the competence test. You say in your earlier paper that you want it to be retained, but the bill proposes to remove it. I do not see anything on that in your current paper.

Simon Di Rollo: You must understand that the Faculty of Advocates is 400 people, and if you ask each one of them you may well get slightly different views on certain things—we all have different experiences. We are doing our best to represent a view, and to help to give you some assistance in relation to these matters. For my part, the competence test is not particularly helpful and I am in favour of getting rid of it. That said, one thing that will happen is that the defence may well cross-examine the witness and ask them whether they know the difference between the truth and telling lies, or questions to that effect. I do not think that we could do anything about that, but it might happen.

The Convener: At the moment, I presume that it is a judicial decision as to whether, on the submission of arguments by the parties, someone is competent or not.

Simon Di Rollo: That is right.

The Convener: That leaves the flexibility to be applied by the court, whereas the removal of the competence test will mean, I presume, that the individual will be brought into court and may or may not be subject to special measures.

Simon Di Rollo: I think that that is right.

The Convener: The issue will not be whether the person is competent, it will be, "You are in court. Do you merit special measures as a vulnerable witness?"

Simon Di Rollo: That is right.

The Convener: Even so, that person might end up giving evidence whereas, in the present situation, a judicial view might be reached that the person is not capable of giving evidence and should not be in court.

Simon Di Rollo: Yes, that is right.

Mike Pringle: I want to come back to the commissioning of evidence. Clearly, you have some doubts about the way in which the bill is framed at the moment. Will that lead to defence agents' delaying things, or claiming that their clients are not getting the best? I suppose that I am asking whether the provisions will, at the end of the day, help or hinder the bill. Will defence agents end up having rights of appeal against decisions because they have not been heard?

The Convener: That is not in the bill.

Mike Pringle: No. I am wondering about the taking of evidence on commission.

Simon Di Rollo: The short answer to your question is that the commission procedure could help, provided that it is used properly. However, difficulties might arise in practice with ensuring that the defence can put all the questions that it wants to put at the commission, and that we do not have to return to the witness after the commission is concluded to ask questions in the light of matters that turn up later. If things are done as they should be, that should not happen. All that I am saying is that a demand to use the procedure properly is being made of those in the system who are responsible.

16:15

Jamie Gilchrist: That is a difficult practical problem. I understand that one purpose of pushing for evidence to be taken on commission is to record the evidence of a vulnerable witness earlier. In an adversarial process and in the process that we have, the defence does not know the Crown's case until late in the day, so it cannot participate in the commission.

Mike Pringle: That is my point.

Jamie Gilchrist: Unless we change the disclosure rules to allow the defence to be told the Crown's case much earlier, the evidence will not be successfully recorded earlier.

Mike Pringle: Therefore, problems and delays could be caused.

Jamie Gilchrist: That could happen.

Mike Pringle: I have one more question that combines two points. Your submission says specifically that proposed new sections 271H(1)(f) and 271N of the 1995 act "should be deleted". The provisions concern subordinate legislation and the district courts. Those are only three words, so will you expand on why you say that?

Simon Di Rollo: We say that because we think that special measures should be introduced by the Parliament, rather than by the Executive through subordinate legislation. Proposed new section 271H defines special measures as a number of procedures and

"such other measures as the Scottish Ministers may, by order made by statutory instrument, prescribe."

Special measures are so important that they should not be left to secondary legislation, which does not receive as much parliamentary scrutiny as a bill does. Perhaps that is not the most important point that we make, but it is still important.

Mike Pringle: It is obvious that you feel strongly about it.

Simon Di Rollo: As for the district court, if a case that involves a vulnerable witness is worth prosecuting, that should be done not in the district court, but as a summary case in the sheriff court or in a higher court.

Mike Pringle: If the procurator fiscal decided that a case should go to the district court and you, as a prosecutor, thought that you had a vulnerable witness and that the case should not go to the district court, who could change the procurator fiscal's decision?

Simon Di Rollo: That decision could not be changed.

Jamie Gilchrist: I understood from the Crown Office's evidence to the committee that fiscals do not put cases with vulnerable witnesses into district courts, so that problem should not arise.

Mike Pringle: Although it should not arise, it could. I sat in a district court for several years, and I heard evidence in two cases from vulnerable witnesses—there was no question about that. There must be a way to ensure that that does not happen.

Simon Di Rollo: Identification of the witnesses in advance is important. The committee discussed that with Mr Macara. There is a limit to what legislation can achieve. We must ensure that the people who are responsible for those decisions make them properly.

The Convener: The bill envisages only the possibility that the provisions might extend to the district court. As it stands, the bill does not apply to the district court.

Simon Di Rollo: That is correct.

The Convener: I do not want to agonise over evidence on commission, but I am struck by your concerns about the process. I see no provision for appeal by the accused under proposed new section 271I. Does that section create a danger of contravening the European convention on human rights? For example, the accused might be excluded because the commissioner—against representation—had decided not to have him present and the presumption under that section would be that the accused would not be present. Representations might be made, but the commissioner apparently has the power to reject those representations. Where would that leave the accused, if he feels genuinely that he has been denied natural justice under the process?

Simon Di Rollo: I am not sure whether such a rejection of a representation to be present is contrary to the ECHR. I have not applied my mind to that particular question. However, I do not think that it is fair, whether or not it is contrary to the ECHR. The accused should at least be entitled to tell the judge that they want to be present. The judge should then make a decision on that. The other party should be able to satisfy the judge that the accused's presence is not justified or not required, and that it should be dispensed with. If there is justification, the court will decide that the accused will not be present or, if there is no such justification, it will not.

Karen Whitefield: Most witnesses so far have said that the Executive has been quite open in consulting them on the bill. You hinted at the start of your presentation that you had not been consulted. Is that the impression that you were trying to give?

Jamie Gilchrist: That was not intended. We were concerned that the committee had not received an advance written response from us on the bill. When we were asked to give evidence by the Faculty of Advocates, we became aware of that and we tried to do something about it—we tried to find out why that response had not been provided. We could find nobody among the faculty's officials who had any record of having received a request for a response on the bill.

Karen Whitefield: Do you believe that the Executive has consulted effectively on its proposals?

Simon Di Rollo: We were given an opportunity to respond to "Vital Voices", which I think is the most important point. There has, however, been a problem with giving the committee the information that we want it to have, and we are sorry that it has been late in arriving. I am not sure why that was. Something seems to have gone wrong somewhere.

Jamie Gilchrist: I hope that we have at least partly cured that by turning up here this afternoon.

The Convener: I think that, from the committee's point of view, you have ably cured that by turning up this afternoon. Do the witnesses wish to make any further points?

Simon Di Rollo: There is one quite sophisticated point concerning item 2 in our submission, which we have not discussed in detail. I am sorry that our numbering was incorrect, and I am grateful to Mr Fox for pointing that out; we are not very numerate in the Faculty of Advocates, obviously.

Our submission highlights certain wording in the bill, which is repeated several times. It relates to certain exercises that are to be carried out by the court under a number of different circumstances, which we are concerned about. Proposed new section 271A(11), which is on page 4 of the bill, states:

"The court may make an order under subsection (10)(b) above only if it is satisfied"

that

"the use of any special measure for the purpose of taking the evidence of the child witness would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and … that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order is made."

That phraseology is used not only at that point in the bill, but in other places, which we have listed in our submission. You will note that that applies to proposed new sections 271A(11), 271B(3), 271D(4) and 288E(3) of the 1995 act and sections 8(3) and 9(4)(b) of the bill. You will further note the circumstances in which the court is to exercise its discretion under those criteria. I am concerned that those criteria seem to say to the court that it should take a decision even though there is a significant risk of an unfair trial. That is not a decision that the court should be asked to make. Those criteria are inappropriate and I suggest that they could be contrary to the right to a fair trial.

I appreciate that this is a difficult point to get across, especially at this time in the afternoon, so I am sorry if I do not make myself terribly clear. In proposed new section 271A, the court is asked to produce a child witness notice. If the court decided that it wanted to hear from the parties, there would have to be a hearing and the court would have to make a decision based on the criteria in section 271A(11). The court is being asked to make an order for special measures not only because there is a significant risk of prejudice to the fairness of the trial, but because

"that risk significantly outweighs any risk of prejudice to the interests of the child witness".

The court is therefore being asked to say that although there is a significant risk of an unfair trial, it is satisfied that it is in the interests of the witness to sacrifice that fairness. That cannot be right because the accused has a right to a fair trial that cannot be sacrificed in the interests of witnesses.

The Convener: So you are saying that the inclusion of that phraseology is perhaps an expressed, if inadvertent, direction not to have a fair trial.

Simon Di Rollo: Almost.

Jamie Gilchrist: It is the second part of the section 271A(11)(b).

Simon Di Rollo: If, as we suggested,

"that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order is made"

is deleted—

The Convener: A fair trial is a fair trial.

Simon Di Rollo: Correct.

The Convener: That must be the determining factor.

Jackie Baillie: Given that many members do not believe that that is the intention, I suggest that we clarify the matter with the ministers.

The Convener: We will certainly seek ministers' view on that.

Simon Di Rollo: Very good.

The Convener: Do you have any other comments?

Simon Di Rollo: I hope that we have made ourselves clear on the points that we wanted to make.

The Convener: I thank the witnesses for being present this afternoon. From the length of time that we have taken over your evidence, you will see that we value your input. We appreciate that you have done a technical appraisal of the bill as it stands; it has been of great assistance to the members. Thank you for your forbearance.

Simon Di Rollo: Thank you for that and for giving us the opportunity to come to the committee.

Colin Fox: I will send you my bill.

The Convener: In the interests of the comfort of committee members I announce a five-minute

break. I hope that our next two witnesses will understand and be sympathetic as we have been sitting here for two and a half hours.

16:28

Meeting suspended.

16:36

On resuming—

The Convener: I welcome back committee members and, on their behalf, I also welcome Rowan Steele and Heather Coady from Scottish Women's Aid. I apologise to them for the slight delay in bringing them forward to give evidence. As they will have gathered, the discussion with the previous witnesses was rigorous but important and the committee felt that it needed time to explore the issues. We are pleased to have the witnesses here and we appreciate their submission. Without further ado, we will crack on. We will try to finish the meeting at around 5 o'clock.

Jackie Baillie: The session with the previous witnesses demonstrated that we have a robust and, perhaps, adversarial justice system. Some people have argued that the system needs a fundamental cultural change. Do you subscribe to that view? If so, what steps should be taken to effect that change, while protecting the concept of the inherent fairness of trials?

Heather Coady (Scottish Women's Aid): A cultural change is needed. We welcome the bill, but attitudes must also be changed. One of the steps that we request, which has been mentioned in other evidence, is the provision of more training to increase awareness. Scottish Women's Aid is mostly concerned with domestic abuse, which is a complex, difficult issue. In cases involving domestic abuse, there is even more need for greater awareness that witnesses might not be able to give the best possible evidence in court.

Mike Pringle: In what way would more training be beneficial? Who should provide the training and how should they do it?

Rowan Steele (Scottish Women's Aid): Training on issues such as domestic abuse must be made more widely available, because a greater understanding of the issues that affect women, children and young people who experience domestic abuse is needed.

It was interesting to hear Simon Di Rollo talk about training for advocates, but there are much wider issues to do with judges, solicitors and the individuals from the court who come into contact with women and children who fall into—or may fall into—the vulnerable witness category. Such training could be made much more widely available. A number of agencies, such as Scottish Women's Aid and its local networks throughout Scotland, can provide that necessary training. As the lead agency as far as domestic abuse is concerned, we would want to be heavily involved in that and would welcome the opportunity to be part of it.

Colin Fox: Under the bill, special measures will be automatically conferred on children, but they will be discretionary for adults. Should they be extended so that they are automatic for everyone? Is there inconsistency between the automatic rights and the discretionary rights? Have you thought about the big question, which is on the balance between extending the rights of potentially vulnerable witnesses and buttressing or protecting the overall right to a fair trial for everyone?

Heather Coady: I can understand why it would be difficult to extend special measures to everybody. Our view would be that, certainly in cases of domestic abuse, special measures could perhaps be automatic. I can understand why the bill extends such rights to children but not to other categories of witness. However, it would be good to use special measures in cases of domestic abuse, as it is a complex matter that involves many issues to do with safety for women and children. The current system does not always protect women and children, and there is a case for saying that they should fall into the category to which special measures are automatically extended.

Colin Fox: You think that victims of domestic abuse should be given the same automatic entitlement that is extended to children.

Heather Coady: Yes.

Colin Fox: Jackie Baillie made a point about the adversarial character of the court. The other side of the question whether to extend the rights of witnesses is the issue of protecting, at the same time, the overall integrity of the trial so that there is fairness for everyone. Have you considered that side of it?

Heather Coady: The bill demonstrates that the balancing act between the rights of witnesses and the rights of the accused is difficult and will not always be straightforward. It is a difficult choice to make, but if one can accept that children are inherently vulnerable I cannot understand why one cannot extend the rights of witnesses in special cases such as domestic abuse, where there is a high chance of intimidation and of some retribution afterwards.

Jackie Baillie: I want to explore further whether victims of domestic abuse should have an automatic right to be treated as vulnerable witnesses. Anybody could come along and say, "We should have automatic rights to be treated in

this fashion." The courts will have discretion to consider "fear or distress", which is quite a wide category. Is that not sufficient to encompass people who have been subjected to domestic abuse and who may be vulnerable?

Heather Coady: It might well be, and it is a good provision in that sense. Our concern is that, because it is discretionary, we will rely on a certain amount of awareness of the issues. I cannot say that, on the whole, that level of awareness is always present.

Jackie Baillie: Do you have any evidence of the courts not using discretionary measures that are available in other circumstances relating to domestic abuse?

Heather Coady: Can you give me an example of what you mean?

Jackie Baillie: Your argument seems to be that a measure that is discretionary might not be used: is there evidence to support that view?

Heather Coady: There is definitely evidence—of course, it is anecdotal—from women and children who have spoken to us. We hear from local groups that such witnesses often do not feel supported or looked after and do not have a very good experience. Their needs and wishes are often not taken into consideration. One example is that of a sheriff who said to a young person who had asked for special measures, "Oh no, you'll be fine." The assumption was that the young person looked okay—they looked like they would be able to handle the situation.

Jackie Baillie: I will move on to the identification of vulnerable witnesses. The earlier that that is done, the better. What is the ideal stage at which identification should happen? Do you envisage there being a role in that for the voluntary sector and, in particular, for Women's Aid?

16:45

Rowan Steele: The process of identifying a potential vulnerable witness should start as quickly as possible.

I will take you back to the point that you made about women who have experienced domestic abuse not being in a separate category. A big issue for us is that the burden therefore falls on women to justify the fact that they need those special measures. Women may have suffered years of abuse, but they have managed to get to the stage where they want to take the matter further. They want both to leave their abuser and the abuser to be punished for what has taken place. That is the right thing to do, and they have been convinced of that. However, they go to those lengths only to find that they have to justify the fact that they need special measures in order to protect themselves. They are often not in a position to be able to do that well themselves, and rely on their lawyer to do a good job and represent them fully. That is an issue, because I do not think that they are always represented as well as they could be. We are concerned that it comes back to the individual to prove that they need the special measures.

The Convener: Is that in the context of possible criminal proceedings, rather than civil proceedings?

Rowan Steele: Possibly in both circumstances. That is an interesting point. In relation to issues of contact and residence, a woman may be involved in civil proceedings but might not necessarily want to stand in front of the abuser and discuss in that setting what has taken place in the home. She may need some protection. There is definitely an issue about intimidation, although the evidence on that point is also anecdotal.

As I said, the answer to Jackie Baillie's original question is, "As quickly as possible." The police have a crucial role to play in the identification of vulnerable witnesses. Should the bill become law, the police will have to understand the nuances of the bill and its provisions. There is a responsibility on the police to recognise that they may need to highlight at an early stage a woman who is a vulnerable witness, so that everybody who has dealings with her is made aware of that.

One of the issues that the police talk about is women who withdraw their evidence. The police get frustrated about women who make a complaint and then withdraw it. However, that is often related to intimidation—there is fear of the repercussions and fear of standing up in court and having to face the abuser. Women are also concerned about the impact on their children. We very much welcome the fact that in the bill children are included in the category that requires special measures, but we feel that women who have experienced domestic violence should also be included in that category.

Jackie Baillie: I have a very specific question; a yes or no answer will do. Do Women's Aid, the voluntary sector and Victim Support Scotland have a role in that early identification and support?

Rowan Steele: Absolutely. Yes.

Karen Whitefield: Your written submission indicates that you would like to see a prohibition on the accused conducting their own defence in a trial. You state that that should not be a matter for the court's discretion in cases of domestic abuse; it should be prevented. Why is prohibition necessary?

Heather Coady: That would be a very difficult situation for any vulnerable witness to be in. What we have heard from witnesses—I imagine this is

the reason for the bill—is that their experience in court is such that they say, "I am not doing that again. I would not put myself through that again." We do not want that situation to arise. We want people to be able to go to court and have confidence that they will not feel mistreated, that they will be able to give their evidence in the best possible way and that the outcome will be fair.

Karen Whitefield: The Scottish Human Rights Centre, in both its written submission and the oral evidence that its representative gave today, indicated that it believed that any further extension of the kind that is being proposed by Women's Aid could seriously undermine the right of the individual to a fair trial. How does Women's Aid, with all its experience of dealing with women and children who are vulnerable and who are the victims of domestic abuse, respond to that? Do you believe that the right to a fair trial would not be protected if the prohibition were to be extended?

Rowan Steele: I would ask how a trial can be fair if it involves a witness who is not able to give evidence honestly, or to contribute to the fairness of the trial, because they feel intimidated.

I can see where you are coming from on the ECHR and the natural justice element, but if the issue is handled correctly there is no reason why there should not still be a right to justice and equitable treatment. There must be an acknowledgement that a witness can give a full and frank statement, and be a valuable part of the legal process, only if they are duly protected.

Colin Fox: How many cases of domestic abuse, or cases involving women who have been subject to violence, are you aware of in which the accused has conducted their own defence? In your experience, are there many such cases? You have been here for so long that you might have heard me ask the representative from the Scottish Human Rights Centre the same question. She said that she thought there were very few such cases.

Heather Coady: I cannot answer that. The only thing that I can say in my defence is that the legal issues worker who worked on our submission was not able to be here today.

Colin Fox: I am not trying to press you. The likelihood is that there are very few such cases. I just wondered whether you might have thought that there were more of them.

Rowan Steele: Would it be possible for us to find out about that and respond to the committee? I have a funny feeling that the number might be higher in civil cases, as opposed to criminal proceedings, but I would like to check on that.

The Convener: It would be helpful if you could do that. We do not want to put time-scale pressures on you, but the sooner we have any information, the easier it will be for us to digest it. We are in your hands.

Rowan Steele: We will get back to you as soon as we can.

The Convener: The bill as it stands does not provide for self-referral in relation to vulnerable witnesses; an application must be made by either side in a case. Is that undesirable? Do you think that some form of self-referral should be provided, so that a witness is in control of deciding whether to ask the court to be treated as a vulnerable witness?

Heather Coady: That would be a step in the right direction. The nature of domestic abuse means that it can be very difficult to have someone argue on one's behalf. The fact that the situation is tricky has to be kept in mind when an application is made. It would be easier if we could make the system as flexible as possible for witnesses who felt that they would be in a vulnerable position.

The Convener: I appreciate that it might be difficult for you to answer my next question, as it might not be within the ambit of your experience. In dealing with cases of domestic abuse—whether they take the form of a criminal prosecution or whether they involve going down the civil route to seek orders, maintenance and so on—is it your impression that most women in such difficult domestic situations can probably cope with the court appearance and the rigours of giving evidence if they are given support? Do those women perceive the whole experience to be alien and, in a sense, difficult to understand? Is that what is deterring them?

Heather Coady: That definitely plays a large part, but it is not the only reason. There are a great many issues, strands and reasons why women do not come forward and give evidence. An element of that is the experience in court, but many women who have not given evidence in court before do not know what to expect. Our experience is that they expect that they will be treated well and that they will get a fair outcome. However, once they have been to court, it is common for them to say that the experience was horrible, that they would not do it again, that they did not feel safe and that they feel even more vulnerable.

The Convener: Do members want to raise any other issues that we have not touched upon?

Members: No.

The Convener: It seems that everyone has exhausted their flow. Before the witnesses leave us, are there any points that they would like to make in conclusion?

Rowan Steele: There are only a couple of points that have not been touched upon, although they were covered in the evidence-taking session with the Faculty of Advocates. The first point is the special measures that need to be put in place in civil proceedings and how they are to be paid for; that includes the question whether the special measures would have to be paid for by the person who was bringing the case.

In most civil proceedings, there is an expectation that the payment will be made by the person who is bringing the case. However, if the special measures that are to be put in place had to be paid for by a woman who was experiencing domestic abuse, for example, the financial burden could prevent her from using the special measures that would allow her to defend her case properly.

We are also concerned about expert evidence.

The Convener: You referred to that in your submission.

Rowan Steele: Yes. There are definite pros and cons to the use of expert witnesses, but expert evidence can be essential, especially when domestic abuse is involved. In some situations, a woman's past behaviour can affect her evidence in court, despite the fact that her behaviour was dictated by the abuse that she experienced. Her behaviour needs to be explained in the light of her experience. That relates to our other points about the special measures for women who have experienced domestic abuse. Scottish Women's Aid should be able to give expert evidence in such cases.

The Convener: You heard the observations that were made by the Faculty of Advocates about the provision of expert evidence. As long as there is fairness to both sides, the faculty has no problem with the giving of expert evidence other than a concern about what "expert" is. In the bill as drafted, the facility to lead expert evidence is given only to the complainer. Do you want the provision to be drafted in that way or do you accept the reservations that were expressed by the Faculty of Advocates?

Rowan Steele: Was it concerned that that might affect the fairness of the proceedings?

The Convener: Yes. The Faculty of Advocates pointed out that the right was given to only one side. That point probably strikes a chord with some of us in terms of natural justice. The committee agreed to put the point to the minister for clarification. Are you concerned that, in order to provide balance, the right could be extended to the other side in the case?

Heather Coady: That is a difficult question. We are in two minds about the issue. We can see that the current provision could be good, because it is useful to use expert witnesses in certain cases. One example is the children's support worker in Fife who was called to give expert evidence in a contact and residence case. Her evidence gave an insight into how the abusive behaviour was impacting on the children.

However, difficulties could arise if expert evidence were to be called by one side and then by the other side. The situation could escalate and slow everything down. We were clearer about our position in our submission, but we can now see both sides to the argument.

The Convener: I thank the witnesses for appearing before the committee. I apologise again for the delay and thank you for your forbearance in accommodating our needs. Your evidence was very helpful. We appreciate your making time to come and speak to us this afternoon.

Petition

Public Bodies (Complainers' Rights) (PE578)

17:00

The Convener: The remaining agenda item concerns petition PE578. I thank the clerks for the helpful background paper to the petition, which gives members the history of the subject matter of the petition. The options that are available to us—in essence, there are three—are summarised on page 2 of the paper. First, as the Deputy Minister for Justice is due to appear before the committee next week, we could raise the subject with him. The other two options are that we take further advice on the ECHR issue or take no further action.

I am inclined to say that, given the proximity of the minister's appearance before us, it could be helpful to use that opportunity to raise the matter with him. Do members agree to that suggestion?

Mike Pringle: Would that preclude our taking action on the second option? We should take up both options.

The Convener: We could do both. I am not sure what other members feel, but I think that it might be premature to take action on the second option until we hear what the minister has to say on the matter. If the minister had something informative to tell us, that could be sufficient for the committee's purposes. If Mike Pringle agrees, my inclination is to let the minister make his comment before we decide on further action.

Mike Pringle: Okay. It was just a suggestion.

Colin Fox: I am happy with the convener's suggestion. However, the issue will be one of many that we will take up with the minister when he comes before us. That is said by way of an observation.

The Convener: As a courtesy, we will give the minister notice that we want to raise the issue with him.

Mike Pringle: Will we also tell the minister about the question that was raised by the Faculty of Advocates?

Karen Whitefield: By the time that the minister comes before us, he is likely to have a good idea of what we are going to ask. I suspect that a note will be taken of what was said at today's session—indeed, the minister might have someone at the committee today, taking a note for him. I think that the minister will be well briefed.

Mike Pringle: Good.

The Convener: The clerk is giving us some very helpful advice, which is that we should give the minister notice that we want to have a word with him about the petition. We have always recognised that petition PE578 is not unconnected to the bill that we are scrutinising. However, having listened to the minister, we might decide that the matter is not germane to the bill for our present purposes. If so, we could decide that the petition should be given further consideration on its own merits. I suggest that we leave the matter at that. Let us see what the minister can tell us next week.

Members *indicated agreement*.

The Convener: That is all the business on today's agenda. I thank members very much indeed. It has been a long but fruitful meeting.

Meeting closed at 17:02.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Friday 3 October 2003

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75
Special issue price: £5
Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0870 606 5566 Fax 0870 606 5588

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF12BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0131 348 3415

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178