JUSTICE 2 COMMITTEE

Tuesday 30 September 2003
(*Afternoon*)

Session 2

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CONTENTS

Tuesday 30 September 2003

JUSTICE 2 COMMITTEE
8th 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)
*Colin Fox (Lothians) (SSP)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Mike Pringle (Edinburgh South) (LD)
*Nicola Sturgeon (Glasgow) (SNP)

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)

*attended

THE FOLLOWING GAVE EVIDENCE:

Barbara Brown (Scottish Executive Justice Department)
David Cassidy (Scottish Executive Legal and Parliamentary Services)
Sharon Grant (Scottish Executive Justice Department)
Hugh Henry (Deputy Minister for Justice)
Daniel Jamieson (Scottish Executive Justice Department)
Lesley Napier (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Gillian Baxendine
Lynn Tullis

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 2

Scottish Parliament

Justice 2 Committee

Tuesday 30 September 2003

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:01*]

Interests

The Convener (Miss Annabel Goldie): I welcome members to the eighth meeting this session of the Justice 2 Committee and I particularly welcome Maureen Macmillan, who is joining us as a new member. I thank her predecessor Scott Barrie for his efforts; he has been confronted with diary clashes and has had to resign from the committee. Maureen, we are very glad to have you on board.

Maureen Macmillan (Highlands and Islands) (Lab): Thank you. Do I have to make a declaration of interests?

The Convener: If you wish.

Maureen Macmillan: My husband is a practising solicitor. Apart from that, I have no other legal connections.

The Convener: That prompts me to say that Nicola Sturgeon and I should perhaps make a similar declaration. I am a practising, if inert, solicitor.

Nicola Sturgeon (Glasgow) (SNP): And I am just an inert one.

The Convener: After those introductory remarks, I remind members to turn off any mobile phones or pagers.

Item in Private

14:02

The Convener: Item 1 on the agenda is whether to take in private item 6, under which we will review evidence and consider our approach to the stage 1 report on the Vulnerable Witnesses (Scotland) Bill. Do members agree that we should take item 6 in private?

Members *indicated agreement*.

Subordinate Legislation

Title Conditions (Scotland) Act 2003 (Consequential Provisions) Order 2003 (Draft)

14:02

The Convener: I now welcome to the meeting the Deputy Minister for Justice, Hugh Henry. He is almost here for a love-in, given the length of time for which he will be with us and the items for which we require his attention. We are very glad, minister, that you have been able to join us and we thank you for making time available. I also welcome the minister's colleagues from the Scottish Executive. Joyce Lugton is from the Justice Department and Norman Macleod is from legal and parliamentary services. They are here as advisers to the minister.

The first item on which we require the minister's participation is subordinate legislation. Members will have received among their papers the draft Title Conditions (Scotland) Act 2003 (Consequential Provisions) Order 2003. Procedurally, the committee requires to take certain action in relation to the instrument, which is subject to the affirmative procedure. I refer members to the note from the clerk, which raises a number of points. Before I ask the minister to speak to and move the motion, it might be helpful if members asked any questions on matters that concern them. Members might want to ask about one or two technical issues. [*Interruption.*]

Minister, the clerk advises me that you might want to make an opening statement. Given that you are going to speak to and move the motion anyway and that we are always delighted to hear from you, would that be sufficient for your purposes?

The Deputy Minister for Justice (Hugh Henry): I am entirely in your hands, convener. It would be a brave convener who ignored the advice of a clerk—you would do so at your peril.

The Convener: Do you want to make a brief introductory comment about the order?

Hugh Henry: Okay. In the previous session, I managed to avoid the delights of the Title Conditions (Scotland) Bill. Jim Wallace was in charge of its passage through the Parliament; the fact that I was not able to go into the intricate detail of the bill was one of the grave disappointments of the previous session.

The Title Conditions (Scotland) Act 2003 is a complicated piece of legislation. Today, we have some consequential changes to make to it. We always realised that some changes would be

needed, such is the technical complexity of the act. We accepted that we would have to correct any anomalies or problems that arose.

I will go through some of what the order contains. It is made under section 128 of the act and aims to correct some of the defects that have been identified. The amendments are all minor. The first links the act's provisions on compulsory purchase to the Lands Clauses Consolidation (Scotland) Act 1845, which, I think, is only slightly before the convener's time. The amendment to the Abolition of Feudal Tenure etc (Scotland) Act 2000 rectifies an anomaly over the status of conditions following a determination by the Lands Tribunal for Scotland.

The following alterations are made to the Title Conditions (Scotland) Act 2003. A provision on neighbour discharge of burdens is amended to allow burdens to be identified by reference to the deed in which they are created, rather than being set out at length.

The Convener: Is that an inadvertent dismissal of that monument, the Conveyancing (Scotland) Act 1924? Heavens above! The sooner that is rectified, the better.

Hugh Henry: We did ponder how to break that news to you, convener, because we realised that it would give you some sleepless nights. I am sure that you will adjust your social calendar accordingly.

Several changes relate to decisions by the Lands Tribunal. One removes the superfluous possibility that the tribunal might order compensation in circumstances where there is no loss to compensate. Another allows the tribunal to create new, replacement burdens where a model development management scheme is being disapplied. The rules on notifying interested parties of a proposal are also modified to exclude non-owners such as tenants.

Several other modifications are made in respect of compulsory purchase orders. There is a transitional provision for existing CPO procedures and there are modifications to the notification of applications to ensure consistency and practicality. The change to the Compulsory Purchase by Public Authorities (Inquiries Procedure) (Scotland) Rules 1998 (SI 2313/1998) is consequential and results from the 2003 act's extension of the categories of person who are to be notified of a CPO.

There is a change to the Housing (Forms) (Scotland) Regulations 1974 (SI 1982/1974) to reflect some of the changes made by the 2003 act and the rules on advertisements are altered to take account of the lamp post notices that are used under the 2003 act. I am sure that that is a big issue in some communities.

The amendments are technical. Notwithstanding that the Parliament considered the legislation only recently, we all—committees and Executive—realise that such were the complexity and technicalities of the act that changes would have to be considered. Hence the order that is before the committee.

The Convener: Before I ask the minister to speak to and move the motion, I invite members to ask any questions that they have.

Maureen Macmillan: Having sat through the consideration of the Title Conditions (Scotland) Bill in the previous session, I never thought to see the legislation come back again. I find that I remember the matters that are mentioned only vaguely, except for the notices on lamp posts. Will you explain how proposed changes will be advertised, if notices cannot be affixed to lamp posts or buildings? You say that you want consistency in advertising, but how will that happen?

Hugh Henry: The act provides for lamp post notices to be used in certain circumstances to notify owners of proposed changes under the mechanisms in the act. The change ensures that notices can be put up without the need for express consent from local authorities. The issue is one of consent.

Maureen Macmillan: So notices will still be fixed on lamp posts.

Hugh Henry: Yes.

The Convener: As there are no other questions, I invite the minister to move the motion and to speak to it, if he desires.

Motion moved,

That the Justice 2 Committee recommends that the draft Title Conditions (Scotland) Act 2003 (Consequential Provisions) Order 2003 be approved.—[*Hugh Henry.*]

The Convener: As no member wishes to contribute, I invite the minister to wind up this short debate.

Hugh Henry: Everything has been said, convener.

Motion agreed to.

The Convener: We must now report to Parliament accordingly. The report needs only to be a short statement of the committee's recommendations, although it can be fuller if the committee thinks that that is appropriate.

I thank the minister for his assistance. I also thank the minister's advisers for being present—they may now vacate their seats.

Criminal Justice Bill

14:12

The Convener: The next agenda item is on the Criminal Justice Bill that is before the United Kingdom Parliament. I welcome Sharon Grant, Daniel Jamieson and David Cassidy, who are here to assist the minister.

In December of last year, this Parliament considered the bill and agreed to proceed using the Sewel procedure. The minister is here to give evidence to the committee on the bill's progress. I refer members to the note from the clerk and the accompanying Executive memorandum on the bill, which is helpful. I thank the minister for his letter informing me of the background to the Sewel motion, which will go before the Parliament. Do you want to make any introductory remarks, minister?

Hugh Henry: Yes. The Criminal Justice Bill is a large and complex piece of legislation. Since the Scottish Parliament initially debated the bill on 5 December 2002, there have been developments, which, the Executive believes, require further consideration by the Parliament. That is in keeping with the approach set out in the Executive's memorandum on Sewel procedures to the Procedures Committee on 22 January. Our memorandum on the bill endeavours to give a comprehensive explanation of the new and updated provisions as they affect Scotland, but I will highlight a few of the most important issues. I reiterate the point that I made to Parliament on 5 December that, given that the bill is about the reform of the criminal justice system in England and Wales, it does not impact directly on Scotland, other than in some limited areas, which are specified in the memorandum.

The bill now includes new provisions governing the release of adult mandatory life prisoners in England and Wales, following a recent judgment of the House of Lords, which found the current arrangements under which the Home Secretary fixes the punitive period of life sentences to be non-compliant with the European convention on human rights. To allow such prisoners to continue to be transferred to Scotland on an unrestricted basis, it is proposed that appropriate modifications be made to section 10 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. That will simply allow the existing prisoner transfer regime, prescribed in the Crime (Sentences) Act 1997, to continue to operate with regard to that class of prisoner.

It is also proposed that we take the opportunity to amend an aspect of the Crime (Sentences) Act 1997 to remove an anomaly that has arisen due to the fact that certain provisions under that act in relation to release supervision orders in England and Wales have been repealed. It is desirable to tidy things up to make the necessary changes now.

14:15

With regard to the transfer of suspended sentence orders, community sentences and custody-plus orders to Scotland, the provisions in the bill that impact on Scotland relate to the arrangements that are necessary to allow the individuals to transfer to Scotland where appropriate. As with the transfer of adult life mandatory prisoners, the provisions that are proposed will allow the current transfer regime to continue to operate not automatically, but where it is appropriate for an individual to move to Scotland. Of course, in all those areas, reciprocal arrangements are in place where it is thought appropriate for an individual in Scotland to transfer to another part of the United Kingdom.

On reporting restrictions, some of the amended provisions update arrangements in existing legislation to take account of the amendments to procedure made by the bill. Others reflect small changes to provisions in legislation that were agreed by the Scottish Parliament last year, but they do not alter the principle behind the provisions or the way in which they will apply to Scotland. The overall purpose of the restrictions is to ensure that matters that might be prejudicial to on-going proceedings are not reported before it is appropriate.

Although we are not moving the Sewel motion today, I hope that the committee will agree that the provisions in the bill that apply to Scotland are sensible and worthy of inclusion as part of the overall package of measures. I think that the provisions can be characterised in the main as being designed to allow current reciprocal cross-border arrangements to be maintained and updated to take account of the reforms that are included in the bill.

The Convener: Thank you, minister, for that helpful explanation.

Nicola Sturgeon: Paragraph 36 of the memorandum says that, in relation to reporting restrictions on retrials for serious offences, no new issues of substance are raised by changes to the bill. However, one of the changes referred to on page 3 is, in effect, the creation of a new offence in Scots law for breach of those reporting restrictions. That may be quite technical, but it is an offence that does not currently exist. Is not that a matter of substance that the Scottish Parliament ought to scrutinise?

Hugh Henry: I would not argue that it is a matter of substance. You are referring to retrials and that would apply to England and Wales but not to Scotland.

Nicola Sturgeon: I am not referring to the substantive issue of retrial. I am referring to the reporting restrictions in such cases.

The Convener: If there is a breach of those restrictions in Scotland, there would be a new offence in Scotland under the bill.

Hugh Henry: There are currently circumstances in which it would be an offence in Scotland to report on trials in England in Wales. Similarly, there are certain circumstances in which reporting in England and Wales on procedures in Scotland would be an offence. I do not believe that the substance has changed. The issue is specifically to do with retrial and the introduction of a new offence, but it is not my understanding that there is a change in principle.

Daniel Jamieson (Scottish Executive Justice Department): That is correct. With regard to retrial for serious offences, the reporting restrictions that were initially proposed in the bill, which made it an offence to report in Scotland, were altered as the bill proceeded, because provisions were no longer made automatically. Instead of there being an automatic statutory offence, the reporting restrictions were to be made at the discretion of the Court of Appeal. However, the English Court of Appeal does not have jurisdiction in Scotland. The proposal is to reinsert in the bill the statutory offence provisions as they were when it was printed, to take account of the fact that the Court of Appeal in England does not have jurisdiction in Scotland.

Nicola Sturgeon: I understand the reason for doing that. I am simply making the point of principle that a new offence in Scots law is being created. It may be very similar to offences that already exist, but when we create a new offence in Scots law the Scottish Parliament should have a greater opportunity to scrutinise that than is afforded by a Sewel motion. I am sure that we could debate that point all afternoon without reaching agreement, so I will not press it.

The Convener: The minister has endeavoured to respond to your question as best he can.

My question relates directly to the substantive issue raised by Nicola Sturgeon. From paragraph 8 of the memorandum, I was not sure which court in Scotland was intended to deal with reporting restrictions. In England, the Court of Appeal will be responsible for that, but what will be considered the competent criminal court in Scotland?

David Cassidy (Scottish Executive Legal and Parliamentary Services): The offence would be prosecuted in an appropriate court, depending on the view of the procurator fiscal to whom it was reported and, ultimately, the Lord Advocate. The initial order that introduces the restriction is a matter for the English courts.

The Convener: So it will be left to the discretion of the Lord Advocate to decide which criminal court in Scotland has the right to determine whether there has been a breach and, if there has been a breach, what should happen.

David Cassidy: The changes that have been made to the bill will create a situation in which the English court will decide whether there is to be a reporting restriction. Applying that restriction will trigger a provision in the act that makes breach of the restriction a criminal offence. That offence will apply UK-wide. If there is a breach in Scotland, it will be prosecuted in the usual way in Scotland.

The Convener: How seriously would such a breach be regarded? Would it be prosecuted in the sheriff court or would it be a High Court matter?

Daniel Jamieson: The fine would be a level 5 fine—a fine of £5,000.

David Cassidy: That is the maximum fine on the standard scale, which indicates the seriousness of the offence.

Nicola Sturgeon: You have answered my question, which was about the penalties for the offence. You have said what the fine will be. Is the level of the fine laid down in the bill or is it determined elsewhere?

David Cassidy: The level of fine is not indicated in the bill at the moment, but an amendment to that effect will be made.

The Convener: I would like to ask a couple of technical questions about restricted and unrestricted transfers. Is someone who is serving a minimum term in England susceptible to earlier release or must they serve the minimum term before making an application? If prisoners serving a minimum-term sentence in England are transferred to Scotland, where there is no minimum term but where sentencing provision includes a punishment part, will they be treated with the same robustness in Scotland as in England?

Sharon Grant (Scottish Executive Justice Department): As far as I am aware, they will. I can confirm that to you in writing.

Hugh Henry: We understand that that is the case, but we will clarify the matter for you.

The Convener: I understand that in England people must serve the minimum term before applying for parole, whereas in Scotland they may be susceptible to earlier release under the

punishment part of the sentence. Does anyone know the answer to my question?

Hugh Henry: We will clarify the matter for you. We do not intend to allow the situation that you describe to happen.

The Convener: Scotland would not welcome the prospect of prisoners from England coming up here because it looked a better bet for sentencing.

Hugh Henry: That would not be the case. Only a small number of transfers to Scotland take place and that is almost balanced by transfers to England. A case must be made for transfers; they are not automatic. Determinations must be made on the basis of circumstances, such as the ties and background of prisoners. The proposal is not that someone who thinks that there is a softer option in either jurisdiction should be able to decamp.

The Convener: It rather depends on the overall framework for sentencing in Scotland.

Sharon Grant: If an offender is transferred on an unrestricted basis to Scotland, they become subject to the laws of Scotland.

The Convener: Indeed, and we do not have minimum-term sentences.

Sharon Grant: I will confirm with you that such offenders will be subject to the same release and supervision arrangements.

The Convener: Okay. My final question to the minister is on the proposed repeal of the supervised release order provision. I notice that the provision was introduced in 1995 to protect the public from serious harm. The provision was intended to operate with release supervision orders in England and Wales, but those orders in fact never went ahead. From a Scottish standpoint, I am slightly troubled as to whether repeal is sensible. The policy memorandum to the Westminster bill says that repeal will

"not significantly affect the powers of the Scottish Ministers".

From that I infer that repeal would affect the powers of the Scottish ministers to some extent. How will it affect their powers?

Hugh Henry: My understanding is that supervised release orders would still be in force in Scotland in relation to violent offenders.

Sharon Grant: In Scotland, supervised release orders are still in force under the Criminal Procedure (Scotland) Act 1995 for violent offenders or offenders who might pose a risk to the public. We talk about violent offenders because sex offenders are treated differently.

The Westminster bill will repeal the provision that allows a person coming to Scotland on an unrestricted basis to be treated as if they were on a supervised release order. There are two reasons why we think that that provision should be repealed. If an offender comes to Scotland and is treated as if they were subject to a supervised release order, they may be at a disadvantage—they may not be a violent offender but would be treated as if they were. That would mean that, if they breached their order, they would go back to court and subsequently be imprisoned for a term of up to about 12 months for that breach. The original offence may not have put them into the category of violent offender or offender who might be a risk to the public.

The provision was put in place to mirror in Scotland the release supervision orders in England and Wales and to allow reciprocal transfer arrangements with both types of order. However, now that release supervision orders do not exist in England and Wales, there is no need for ministers to have the power to treat offenders who travel north as if they were subject to supervised release orders.

The Convener: Minister, are you satisfied that the repeal of that provision will not affect public safety?

Hugh Henry: Absolutely.

The Convener: As there are no further questions, I thank the minister very much for dealing with our inquiries.

Having listened to the minister and his advisers on the issue, I remind members that there is no formal procedure for consideration of Sewel motions in committee. We can report our conclusions to the Parliament in advance of the motion being debated by the Parliament in October. Do members have any specific comments that they would like to be included in the report to Parliament? I suggest that we ask the minister to confirm the point at issue on the different treatment of sentencing in Scotland and England. That is fairly important to our considerations. Subject to that, are members content with what is being proposed?

Members *indicated agreement*.

The Convener: I thank the minister and his officials for their help. Some of the officials will leave now, but the minister will remain tightly adhered to his seat for the next agenda item.

Hugh Henry: Convener, you are aware, of course, that there is a football match on tonight.

Jackie Baillie (Dumbarton) (Lab): Do you think that you are getting to it?

The Convener: Given the majority presence on the committee, minister, you are on dangerous ground.

Hugh Henry: Aye.

Vulnerable Witnesses (Scotland) Bill: Stage 1

14:30

The Convener: We move to agenda item 4, which is the committee's stage 1 consideration of the Vulnerable Witnesses (Scotland) Bill. We are very grateful for the minister's presence this afternoon. We realise that this is a hefty agenda for him, but dovetailing timetables in this way has been a great help to the committee.

Minister, you will be aware that we have been busy taking evidence on the bill from a variety of individuals, parties, organisations and other groups and I know that the committee is now anxious to raise with you certain issues that have arisen. However, you might have been following the evidence that has been given and have some thoughts about the bill. Please feel free to make some introductory remarks.

Hugh Henry: I have followed the committee's deliberations and the discussions that have taken place in the Finance Committee, and it is clear that there is overwhelming support for the bill's intentions and principles. Indeed, it could be argued that the bill is long overdue. We—and everyone concerned—hope that there is an improvement in the way in which witnesses, particularly vulnerable witnesses, are treated in the court system.

However, any such improvement must always be made in the context of the need for justice to be done and to be seen to be done. It would not be desirable to consider any measures that would weaken other aspects of the justice system. That said, it is right to ensure that the justice system takes into account the interests of witnesses who are most in need. I realise that, during consideration of the bill, people will come at the matter from different perspectives; make different points of emphasis; and put forward different arguments about certain parts of the bill or the groups that will be affected. However, from the deliberations so far, there appears to be a consensus that the bill is the right way to proceed.

We know that giving evidence is often a stressful and, in some cases, traumatic experience. If justice is to be done, witnesses must be able to give the best evidence that they possibly can. It is in the interests of those who are accused, never mind anyone else, that that evidence comes out.

It is also right that anyone who performs the very important civic function and duty of being a witness and giving evidence should expect to be treated humanely by the system. We accept that some witnesses might not, for whatever reason, be able to give their best evidence without some assistance. We intend that the bill should enable those vulnerable witnesses to access that help in a way that makes their evidence all the more meaningful.

We need to strike the right balance between the rights of all parties in the case and the interests of vulnerable witnesses. The Executive conducted an extensive consultation on the proposals that are contained in the bill and, as I have said, it is clear that there are differing views and emphases among the organisations that represent the different groups in society.

The bill's current provisions are intended to enable support to be given to witnesses in need without undermining the accused's right to a fair trial. That aspect must remain fundamental. It is important to state that the party that does not call the witness will not be prevented from questioning the witness adequately. All that we seek to do is to enable the vulnerable witness to speak up and give their evidence to ensure that all evidence can go before the court. I argue that that is in the interests of justice.

It is critical to have flexibility in deciding who should be able to access help. There are several arguments for that, not least of which is that we do not wish anyone to be denied help simply because they do not fit the legal definition. We have provided some flexibility within broad parameters, which should allow the broadest range of those who require that help to access it.

Children in general will need extra support, because of their age and level of maturity. That is self-evident and is why children will be automatically entitled to use the special measures. There are many reasons why an adult might be vulnerable and need additional help. The reason could be an adult's mental capacity or the fact that they will have to give sensitive and distressing evidence that could have a profound effect on them. A person might be terrified or have come through an episode in their life that they would rather forget, but must give evidence on so that justice is done.

We felt that it would not be helpful to categorise particular vulnerable adult witnesses, as that would give the impression that some categories of adult witnesses were more vulnerable than others. Some people who otherwise display no vulnerability in their lives might, at that critical juncture, be vulnerable and need support. It would be right to extend that support to them. Rather than categorising adult witnesses, we want each witness's needs to be considered on their own merits. That is the best way to ensure that help is directed to the witnesses who need it.

The bill makes it clear that it is the responsibility of the party calling the vulnerable witness to ensure that they receive the help that they need. It is right for a party to the case to ensure that their own witness's needs are met and to undertake the necessary work in submitting applications and appearing at any hearing. No one who calls a witness should do so lightly. Anyone who calls a witness should be aware of their responsibility not only to the court, but to the witness as an individual.

The bill has added safeguards to ensure that witnesses' needs are met, such as an obligation on the court to find out from the parties whether any witness is vulnerable. Although we place the responsibility on a party to the case, we also place a duty on the court to ask the parties whether any of their witnesses is vulnerable. The court will be obliged to make that double check for vulnerability. It will also be open to the court of its own accord to decide that a witness should be able to use a special measure when they give evidence.

The bill contains many other supplementary provisions that complement the aim of ensuring that witnesses' voices are properly heard, such as the abolition of the competence test. The court should have the best evidence, and the barriers that many regard as artificial and which prevent a vulnerable person from speaking up must be removed. The voice of a vulnerable person is every bit as valid in a court as any other person's voice is. It is not right that vulnerable people should have to subject themselves to a competence test for their voice and evidence to be heard.

It is clearly in the interests of justice that the court hears the best evidence, and we firmly believe that the bill strikes the right balance in achieving that objective.

The Convener: I remind members that the minister is with us until about 4 o'clock. We have much material to cover, so if members' questions are as succinct as possible, that will greatly help us to cover as much ground as possible.

Mike Pringle (Edinburgh South) (LD): We have heard much evidence from witnesses about the definition of a child. In view of the international legal definition and what is regarded as the definition in Europe, quite a few people have asked us to extend the definition in the bill to under-18s, but you have chosen the age of 16. What is your view on that?

Hugh Henry: We believe that there are good reasons in Scots law for sticking to 16 as a critical age. At 16, a young person can get married, take up employment, join the armed forces and set up house. They can take many decisions that an adult would take and they would expect to be treated as adults. We think that 16 is the right age. We would create confusion if we said that for some purposes the person is regarded as a child, but for other purposes they are not.

In certain circumstances, a person could be entitled to special measures beyond the age of 16 if that were felt to be appropriate. We think that 16 is probably the right age and that there is sufficient flexibility to protect those who are older than 16 and require additional help.

Mike Pringle: The bill contains proposals that specifically protect children under 12. Have you considered whether—if you are sticking with the age of 16—those proposals should be extended to children up to the age of 16, so that all children under 16 are covered by the same provisions?

Hugh Henry: We considered that option. Twelve seems to be recognised by experts as the age at which a child's development allows them to start to play a more responsible and fuller part in whatever is going on around them. They begin to understand issues more clearly.

The evidence that we have examined suggests that very few children under the age of 12 come to court unless their appearance relates to something very serious. More children come to court when they are over the age of 12. The few children who have to come to court under the age of 12 are still very vulnerable, are at a sensitive stage in their development and might not fully comprehend everything that is going on around them. It is right to give those children automatic protection when, for example, there has been a sexual or violent incident.

The bill has not built in an automatic level of protection beyond the age of 12. That is because there is evidence that children sometimes want to give evidence, and when a child beyond the age of 12 wants to give evidence we think that, if they have that understanding, they should be allowed to do so. Again, the system is flexible enough to build in support for that child; the support could be extended in the same way as would automatically prevail for a child under the age of 12.

The proposal reflects some of the other debates that the Parliament has had over the past four years about such things as the age of responsibility and understanding. It also reflects the pattern of evidence about the age at which children start to attend court in critical numbers and what type of evidence might be expected from them.

The Convener: In the case of witnesses who are under 12, the distinction is made that they must get special measures—including preferably not appearing in the court or in the building in which the court is located—in certain serious cases. Is there any intention to extend that

provision to the range of cases in which young people under the age of 12 would appear?

Barbara Brown (Scottish Executive Justice Department): We felt that restricting the rule to children under 12 who give evidence in sexual or violent cases was sufficient, because that will cover most children under 12 who appear in court. As the minister said, where a child who is under 12 appears in a different type of case, the person who calls the witness can make an application for the child to give evidence outwith the court, if they feel that the child would benefit from doing so. There is not a firm rule that that should be the presumption in such cases, but we do not exclude applications for any child, if that is considered to be in the child's best interests.

14:45

Hugh Henry: The statistics show that very few cases involving child witnesses who are under 12 come to court. There is flexibility. If children who are under 12 come to court for other reasons, an application for them to give evidence outwith the court will be considered, although they will not automatically have the right to do so.

Mike Pringle: We have heard a lot of evidence about the definition of a vulnerable witness—that also relates to the discussion about age. I think that the Faculty of Advocates said that the definition is too wide, but others thought that the definition is not wide enough and should specifically include disabled witnesses and those with mental disorders. Is the Executive considering any changes, or is it happy with the bill as it stands? Given the evidence that we have heard, will the Executive reconsider the definition of a vulnerable witness?

Hugh Henry: We think that our proposals are sufficient and flexible enough to cover the widest possible range of people. We are concerned about introducing tight definitions of vulnerability, which would categorise some people as vulnerable, but not others. We do not want to exclude people who might be temporarily vulnerable. The definition of mental disorder in the Mental Health (Care and Treatment) (Scotland) Act 2003 would be a useful starting point, but we are worried about creating precise definitions of exactly who is classified as vulnerable. That might categorise people in an unhelpful way and might also exclude—stigmatise is not the right word—certain people. Our proposals strike a balance between identifying certain issues up front and allowing a degree of flexibility for others to be considered.

We must bear it in mind that any witness whose ability to give evidence or whose evidence might be diminished by fear or distress can be considered for special measures. Distress could mean anxiety and fear of the surroundings in which a person finds themselves when they have to give evidence in public. Distress could be caused by a person's lack of confidence or inability to express themselves. I have reflected on the debate, but I do not think that there is any great purpose in changing the current proposals.

Jackie Baillie: I want to pursue one small point before I move to the issue of consistency of application, which will develop the convener's point. The Disability Rights Commission Scotland wrote to us at the beginning of the process and, I believe, spoke to Executive officials about the adoption in the bill of the definition that is set out in the Disability Discrimination Act 1995. Does the Executive intend to do that?

Barbara Brown: We are considering that issue, although our feeling is that the definition in the Disability Discrimination Act 1995 is in some ways narrower than the form of words in the bill.

Lesley Napier (Scottish Executive Justice Department): We have arranged to meet the commission to discuss that point with it.

Hugh Henry: Once the officials have met the commission, we will reflect on the matter. If we believe that there is something worth pursuing, we will keep the committee informed.

The Convener: I am obliged.

Jackie Baillie: You are keen to preserve flexibility in the arrangements, but some would say that that comes at the expense of consistency. How will you ensure that decision making is consistent throughout Scotland, with particular regard to the treatment of adult vulnerable witnesses?

Hugh Henry: Much of that will be a matter for the courts. The legislation will be in place, training will be provided and guidance will be issued. However, it will be for individual courts and judges to decide who is considered a vulnerable witness and whether the definition should be applied in particular cases.

Jackie Baillie: Many groups are concerned that there will not be consistency. I accept entirely that you do not want to list everything and that you want to retain discretion. However, as a former Deputy Minister for Health and Community Care you will be aware that the condition of people with a learning disability is not very visible. Do you think that people in that category should be entitled automatically to be treated as vulnerable witnesses, although entitlement to special measures might be discretionary?

Hugh Henry: I do not think that the one follows from the other. I honestly think that what we are proposing, the obligations that we are placing on the court and the guidance and training that will be

provided will be sufficient to ensure not only that there is awareness but that the legislation is applied. We cannot say with 100 per cent certainty that there will never be a bad decision and that there will be no inconsistency. However, the way in which we are proceeding will generally allow for consistency. It will enable the widest possible group of people who need protection and support to have that protection made available to them.

It would be wrong to say that everyone who has a learning disability will automatically need to access help. Some may not, and some may not wish to. Rather than excluding those people by regulation or legislation, we want to allow them to give evidence in the same way as others in society, if that is their decision.

Jackie Baillie: The point at issue is not whether people use a special measure, but whether they should automatically be considered for such a measure because of the nature of their disability.

I am mindful of the convener's injunction to us to be brief, so I will move on. How is the court expected to apply and assess the fear or distress test, which has given rise to some comment?

Hugh Henry: We do not want a test that is so wide that it becomes meaningless. Equally, we do not want a test that is so tight as to rule out a host of people. Vulnerability could be based on an individual's medical condition at a particular stage in their life. It could be the result of domestic circumstances that may even relate to the court case. It may be related to a phobia—some people may not be able to cope with being in the surroundings of a court. Others may feel that they are not articulate enough to get their message across. Flexibility is important. That means that decisions should be made by judges in individual cases, based on individual circumstances.

I stress that it is not the person's behaviour that needs to be assessed, but simply whether the witness's evidence may be diminished by fear or distress. That is probably a greater safeguard. The witness does not need to demonstrate fear or distress. The issue is whether the evidence would be diminished because the witness suffered fear or distress. It is probably right that that has to be proved on the balance of probabilities.

Jackie Baillie: I imagine that it would be difficult to prove that in advance, so you are resting on the fact that it will be up to individual judges to make a determination, subject to guidance.

Hugh Henry: Yes, on the balance of probabilities.

Jackie Baillie: Concerns were raised, in particular by the Scottish Association for Mental Health and the Law Society of Scotland, about the nature of the evidence that the court would require to assess whether a witness had a mental disorder, and whether that evidence would be made public.

Hugh Henry: We are aware of those concerns, which are legitimate, and we worry about them. We will give some consideration to that issue and deliberate on it. If it is necessary for us to produce further guidance or changes to the bill, we will do so, because we would not want confidential information and evidence about a person's personal or medical circumstances to be displayed. That issue is worthy of further consideration.

Jackie Baillie: That is helpful.

Colin Fox (Lothians) (SSP): I realise that we have a lot of things to get through, but I want to press the minister on one thing. The issue is striking the right balance and I take the minister's point about flexibility. The minister said that it is the responsibility of the party calling the witness to ensure that its witness gets the special measures. He also said that there is a duty on the court to identify the vulnerable witness first.

There is a difference between the automatic right of the witness to pursue something and the discretion of the judge or the court to grant it. What are your concerns about extending the automatic rights to people between 16 and 18 and to people in the categories to which Jackie Baillie referred? Are you afraid that too many cases would come before the courts, or are you afraid about the cost, or is it that if the measures are more widespread—you mentioned that in reply to Jackie Baillie—that might undermine existing court practices? Do you understand the question?

Hugh Henry: Yes, I do. Those points are valid. We are concerned about a combination of those issues. We are concerned that if we extend the rights too far and to too many, there will be so many people in that category that the system will find it hard to cope. Clearly, there would be financial considerations, but that is not the only issue. There are issues to do with the efficiency and effectiveness of the court system.

In addition—this comes back to a point that I made earlier—we need to continue to bear in mind the need to strike the right balance, because it is not only witnesses who have rights in court; others have rights as well. We do not want—if the situation were to be taken to its extreme—the accused to be the only person who actually ends up in court. Clearly, that would be absurd.

We recognise that there are some people whose evidence is as important as anyone else's and who, for whatever reason, are unable to give that evidence, and that they need some support. Let us recognise that and deal with it but, at the same time, let us not interfere with the fundamental way

in which our courts operate. We may need to consider financial and organisational issues, but it is important that we do not lose sight of the way the courts work, or of the fact that there are rights on all sides in court, not just on one side.

15:00

The Convener: I have a technical question, which perhaps your advisers can answer. Because of the discretionary nature of vulnerable adults' entitlement to special measures, there is no provision in the bill for the court ex proprio motu to intervene if it becomes aware that a vulnerable adult might be a witness. The court may have a legitimate concern about that witness's ability to give evidence. Is that where the saving provision under proposed new section 271G would come in? Would that provision enable a judge to take action ex proprio motu if he had concerns about the efficacy of the evidence that the witness was to give?

Hugh Henry: I will ask the officials to answer that question in detail, but it is certainly our intention, as Colin Fox indicated, to put the onus on parties to cases to identify vulnerable witnesses. We will then require the court to ask whether any of the witnesses are vulnerable. However, you are right that the opportunity exists to identify vulnerability that has not previously been picked up, as the court proceedings go forward.

Lesley Napier: I confirm the minister's point. The review provisions in proposed new section 271D will enable the court or the party calling the witness to review the current arrangements at any stage if vulnerability comes to the court's attention. For example, where a vulnerable witness application has not been made but it comes to the court's attention that a witness could be considered to be vulnerable, the court will be able to review provision for that witness under the section. That can be done at any time before or even during the trial.

The Convener: I presume that that does not depend on a previous order's having been made.

Lesley Napier: That is correct.

The Convener: Can the court at that point step in as of new and on its own initiative?

Lesley Napier: Yes.

The Convener: That is helpful.

Hugh Henry: It is not inconceivable that, as a case develops, a witness might develop some vulnerability that could affect the evidence that is to be given.

Nicola Sturgeon: Some witnesses have raised concerns about the stage in proceedings at which vulnerable witnesses are identified. You have said that the bill puts the onus on the party calling the witness to identify witnesses as being vulnerable, and that there is a safeguard measure that would allow the court to intervene. The problem that has been flagged up, which probably applies particularly to Crown witnesses, is that procurators fiscal and courts encounter witnesses late in proceedings, either close to or—in the court's case—at trial. It has been said that there is a need for much earlier identification of vulnerable witnesses so that they get support throughout the experience. How will you ensure that witnesses are identified as early as possible in proceedings? Is there any need to place an obligation on any other agency in the bill? For example, if the police perceive weakness or vulnerability when they interview a witness, they could be obliged to notify the fiscal of that.

Hugh Henry: At the very least, we would expect two weeks' notice, but we would prefer much longer notice than that. That would allow not only for identification, but for the witness to be briefed on how the proceedings will develop and on what support is available to them, and for discussion with those concerned about whether there is a need to access any special support or assistance. If measures that allow early identification and early exchange of information can be taken in dealing with the various agencies, we would consider such measures. The more the parties to the case know, and the earlier they know it, the better. We will look at that matter again, but it is certainly our view that identification of vulnerable witnesses should be made at least two weeks before the court case, and preferably much earlier.

Nicola Sturgeon: I am sure that there are changes that would be required in the operation of the Crown Office and Procurator Fiscal Service, but you know that the fiscal who conducts the trial will probably meet the witnesses for the first time on the day of the trial. It might be precognition agents who meet the witnesses before that. How will you ensure that vulnerable witnesses are identified early enough in the process for the provisions of the bill to work properly?

Hugh Henry: We are aware of certain difficulties in the Crown Office and the Scottish Court Service and we will have further discussions with those bodies. They are very keen to ensure that as much as possible is done at the earliest stages; however, Nicola Sturgeon has identified a legitimate area for concern. That is something that we will continue to discuss both with the Crown Office and with the Scottish Court Service.

Nicola Sturgeon: It has been put to us that it might be a good idea to allow witnesses who think that they are vulnerable to refer themselves as

vulnerable witnesses. Is that something to which you would give consideration?

Hugh Henry: That is a difficult question. We are aware of the debate that has taken place; a number of good points have been raised. At this stage, I would not automatically say yes or no to that question because we need to reflect on the debate. I can envisage certain circumstances in which one could argue easily that it would not be appropriate for witnesses to refer themselves as being vulnerable, but some cases have also been identified in which it might be helpful. At some point, we will need to strike a balance, but the discussions so far have been helpful in drawing out the arguments. We will go back and look at those arguments again and, if necessary, come back with proposals for change.

Maureen Macmillan: I would like to raise the question of civil proceedings in which a matrimonial interdict or an interdict under the Protection from Abuse (Scotland) Act 2001 is sought. Although there might not be any question of vulnerability, if an interim interdict is contested, a woman who has been subjected to domestic violence might have to appear in court and be confronted by the person for whom she is seeking the interdict. Such matters are handled according to a very tight time scale, so that people do not have to wait for weeks and weeks to have an interdict confirmed. Could people who were seeking interdicts because of domestic violence be considered automatically for classification as vulnerable witnesses, or will agents automatically make those applications?

Hugh Henry: I do not know how agents or others will proceed in the future, but such classification would not be automatic. Classification would come down to the same list of conditions or checks that I mentioned earlier—the responsibility on the party and the responsibility on the court—with no automatic inclusion. We believe that the definitions are wide enough and we hope that the understanding is clear enough to ensure that it would be taken for granted that a woman in such circumstances would expect to be treated in the way that has been suggested.

Barbara Brown: I assume that Maureen Macmillan was talking about proceedings in the sheriff courts.

Maureen Macmillan: Yes, I was.

Barbara Brown: As you will see from the bill, we have left to be made in rules many of the details of how the provisions will work in the sheriff courts. That is because there is a body called the Sheriff Court Rules Council which has responsibility for making rules for the sheriff courts. There is a similar body for the Court of Session.

The Sheriff Court Rules Council will have to look at the provisions and consider how the rules can be made to take account of all situations that might arise. If the committee is expressing that concern, I am sure that we can take that back to the council so that it is aware of that when it considers the appropriate rules for civil proceedings.

The sheriff court is generally able to adapt its proceedings. Civil courts have the power to be quite flexible in adapting their proceedings to meet a range of circumstances. If something has to be done as an emergency, it should be possible for the court to hold a hearing at short notice and to make the appropriate arrangements. I think that there is sufficient flexibility in the sheriff court rules at the moment, but we can certainly bring the issue to the attention of the rules council, which can consider the issue when it examines the bill in more detail.

Maureen Macmillan: I would appreciate that.

Jackie Baillie: Are you saying that the Sheriff Court Rules Council could create an automatic category? Have I picked that up correctly?

Barbara Brown: No. It would be a procedural change. The rules council creates procedural rules that support the basic policy and intention of legislation. The rules cannot change the legislative framework, so they would not create automatic entitlement. However, they could put in place accelerated procedures for dealing with applications where that was necessary.

The Convener: Before we leave that subject, I seek clarification. Am I correct in understanding that proposed new section 271C(2), which deals with vulnerable witness applications, would not require the application to include information about why the party citing the witness thinks that the person is a vulnerable witness?

Barbara Brown: Again, that will be determined by the rules that will be made to support the applications. We would expect that an application would contain sufficient information for the court to make a decision on it. Our intention is that the applications should be dealt with in chambers.

The Convener: I am surprised about that because section 271C(3) goes on to say what the vulnerable witness application ought to contain. It seems strange that the application need not mention the most important thing, which is the reason why the individual should be deemed to be vulnerable. It seems to me that the court could be denied information at what might be a critical stage. Should not that be in the bill?

Barbara Brown: I thought that it was implied that the information would be in the application.

Hugh Henry: We will certainly consider that issue, convener. I am not convinced that it is absolutely necessary, but we will go back and look at the issue again to see whether anything further is required.

Colin Fox: We have received many written submissions that have welcomed the idea of establishing a child witness support service, which was recommended by the Lord Advocate's group. What consultations have you had on that? Has there been any feedback? How does the child witness support service relate to last week's announcement about the establishment of vulnerable witness officers?

Hugh Henry: The reference to vulnerable witness officers in last week's announcement was part of a commitment to set up a new unit within the Scottish Executive that will bring together all the strands in the Justice Department into a dedicated co-ordinated team. From 2004-05, we will invest an extra £1 million in that service. A number of practical measures will flow from that. In essence, we want to ensure that the child's needs are taken into account and that the right arrangements are made. People will act as champions of good practice across the system.

There is still work on child witnesses that is not complete. However, last week's announcement was an important commitment to take that work forward and it cannot be seen in isolation from what we are discussing today. We are putting in resources to back up that commitment. Bit by bit, we are creating a framework that will protect children who are subject to the courts system in whatever capacity, and which will allow them to give the best possible evidence.

Colin Fox: Will the child witness support service be part of the new unit?

Hugh Henry: Whatever comes from the Lord Advocate's deliberations will be considered closely. In the Scottish Executive Justice Department—separate from the work of the Lord Advocate—we are pulling together everyone who deals with vulnerable and child witnesses. Progress has been made on the range of recommendations from the Lord Advocate's working group on child support. That is part of our continuing work as we slowly but surely make progress to ensure that we support those who are most vulnerable in the courts.

15:15

Karen Whitefield (Airdrie and Shotts) (Lab): I want to ask about applications for special measures. We have already touched on the fact that the court can intervene, if it thinks it appropriate, in the operation of special measures. However, some witnesses have expressed the concern that there is no right of appeal if an application for special measures is rejected or not granted in the terms requested by the applicant. Would you be willing to look into that?

Hugh Henry: There is a dilemma. We are proposing something for the best of reasons, in order to ensure that justice is afforded to everyone in a court case. As I have said, we accept that some people need extra support. We have to balance that against the rights of the accused. We do not want to destroy the system of justice. However, how do we cope with persistent complaints that trials take too long, that they are adjourned or are put off, and that witnesses come to court only to be sent away? What happens if the system allows either party the right of appeal—whether it is the right of appeal for someone who has been denied special measures, or the right of appeal for someone who does not think that the other party should be in the special measures category? Should we introduce another element of delay that would allow appeal after appeal? Not only would that add to the burden on the courts and to the costs, but it would add to the pressures, fears and anxieties of witnesses. I do not know how we can easily resolve that. Our proposal is probably right in the circumstances. I wish that I could say that there would never be a problem and that no one would ever be treated unfairly, but I could not give that guarantee. However, I would be worried about introducing a set-up that led to a continuous process of appeals that would add to everyone's burdens.

Karen Whitefield: Last week, the Faculty of Advocates argued quite strongly that there should be hearings for applications to do with special measures. Would allowing such hearings, at which all parties could argue their cases, address the problem of appeals?

Hugh Henry: If the court is not satisfied with an application, there could be a hearing—that is provided for. I suppose that that is slightly different from an appeal.

Karen Whitefield: The Faculty of Advocates argued very strongly that hearings should not take place only when a court was dissatisfied. The faculty believed that the Crown would be seriously disadvantaged on occasions when it did not have the opportunity to have a hearing. The faculty also believed that defence agents could have legitimate concerns and that questions could arise over whether a trial was safe.

Hugh Henry: We have to try to strike a balance. As I said, if a judge were in any doubt about a notice or application, a hearing would be held at which the other party had a right to be heard. We would be concerned about an automatic right to object, because it could be abused and could create delays and uncertainty. We want to try to

change the culture in our courts and to make people more confident about appearing in courts. We would have reservations about introducing further impediments to a speedy solution. It is also right to say that evidence would be questioned and that special measures would not be prejudicial. I wish that I could give you an easy answer, but there is not one.

Karen Whitefield: Last week, the Scottish Human Rights Centre's representative told us that she could not imagine a circumstance in which special measures would be revoked. Do you agree that that is likely, or can you imagine such circumstances? If so, what would they be?

Hugh Henry: My officials and I discussed that before the meeting. It is difficult to identify such circumstances. If we engage in speculation, that will lead us in a direction of its own. I cannot add anything on that that would be useful to the committee's deliberations.

Mike Pringle: The Faculty of Advocates gave evidence to the committee last week and one of its concerns was about proposed new section 271H(1)(f) of the Criminal Procedure (Scotland) Act 1995, which refers to

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

The Faculty of Advocates said that special measures were so important that they should not be left to secondary legislation and that extra measures should receive as much parliamentary scrutiny as the bill does. The faculty is concerned that that provision allows ministers to add measures that should come to the Parliament for discussion.

Hugh Henry: Such measures would be discussed by the Parliament. An order that was made under that section would require an affirmative resolution, so the Parliament would have the opportunity to discuss the matter.

Maureen Macmillan: The Law Society of Scotland suggested that the bill should emphasise more the impact of giving evidence on the witness, and not just the impact on the quality of the witness's evidence. Do you see a distinction between those two matters? What is your view on the Law Society's proposal to strengthen the bill's provisions on the impact of giving evidence?

Hugh Henry: I do not quite follow you.

Maureen Macmillan: I understand that the fact that a witness must go to court to give evidence can have an impact on them—the witness might not even want to go to court. However, the bill places more emphasis on the quality of a witness's evidence. I do not know whether a distinction exists; the Law Society made the distinction.

Hugh Henry: We are talking about defining someone's vulnerability, which relates to the impact that fear or distress might have on the quality of the evidence that is given. We are not attempting to eliminate the need to give evidence or the opportunity to question and challenge evidence. Denial of that opportunity would have significant legal implications.

Maureen Macmillan: The inclusion of the "fear or distress" element in the bill addresses the question of the impact of giving evidence.

The Convener: In your introduction, minister, you mentioned your concern that fairness of trial should be paramount in proceedings. However, the Faculty of Advocates expressed significant concerns about the difficulty of weighing the risk of prejudice to the fairness of a trial against the risk of prejudice to the interests of the witness. It argues that as drafted—in particular with respect to the insertion of proposed new section 271A(11)(b), which deals with child witnesses, into the Criminal Procedure (Scotland) Act 1995—the bill could require the court to proceed with a potentially unfair trial.

Hugh Henry: It is always the court's responsibility to ensure that a trial is fair. In our view, none of the bill's special measures is prejudicial to the interests of the accused. We believe that they all enable the defence to cross-examine the vulnerable witness adequately. However, we accept that the significant risk test is an additional safeguard.

That said, the court would have to weigh up the risk to fairness of the trial against the risk of any unfairness to a child's interests. On the one hand, people are concerned about potential unfairness to the accused; however, others have said that we are not going far enough in that respect. As I said earlier, we have to strike a balance. It is right that we place an onus on the court and the judge to ensure that there is a fair trial and that nothing is done to prejudice that.

The Convener: Is there a risk that if the bill as drafted were passed it could interfere with such judicial discretion?

Hugh Henry: No, we do not believe so.

The Convener: Is not it paradoxical to ask judges to ensure that the interests of justice are paramount and then say that they can depart from that if they think that certain circumstances apply? That is what the Faculty of Advocates is concerned about.

Hugh Henry: I do not believe that that is paradoxical at all. It is still—and has always been—the court's responsibility to ensure that there is a fair trial; the bill will not change that. Indeed, some have criticised the bill because of that. A judge who feels that a trial is being

prejudiced by the way in which evidence is being given will clearly retain the right to decide how that evidence is given.

The Convener: Some witnesses have called for provision to be made that makes it possible for a supporter to be a witness in the case. Apparently, the current practice is to take the evidence of a supporter who is a witness in a case before the evidence of the witness who requires support. Is the Executive considering any such change to the bill?

Hugh Henry: That was the point that Nicola Sturgeon raised. It is clear that there are arguments on both sides, and we will go back and examine the matter. I would certainly not want to indicate our position at this stage. After listening to some of the arguments that both sides have made, I can see problems with such proposals, but I can appreciate some of the reasons why the arguments have been made. However, as I said, we will reconsider the matter.

Maureen Macmillan: The problem that I foresee centres on the question of who will support the vulnerable witness if all her friends and family are giving evidence. We have to reach a stage at which someone must be allowed to sit in court with a vulnerable witness.

Hugh Henry: That is a fair point.

Nicola Sturgeon: Will you outline the problems in that respect? After all, someone who has already given evidence in a trial can then sit in the public gallery and listen to the rest of it. What is the problem with having that person sit next to a person who is giving evidence, if the bill already seeks to preclude them from prompting or helping the witness in any way?

Hugh Henry: We want to be absolutely sure that there is no possibility of influence being exercised in any way, shape or form. The last thing that we want is to do something with the best of intentions but to find that we have left ourselves open to challenge from another direction. As I have indicated, opposing arguments have been put and we will re-examine the matter.

15:30

Colin Fox: I hope that the minister does not get paranoid about constant references to the Faculty of Advocates. If it is any consolation, representatives of the faculty were here longer last week than you have been.

One of the issues that they raised and on which we questioned them was that of witnesses' giving evidence on commission, away from cross-examination in court. From last week's evidence, I know that such experiences are relatively rare; I am sure that you are aware of that. What do you see as the significant differences for witnesses between giving evidence on commission and doing so under cross-examination during a trial?

Hugh Henry: It can be useful for evidence to be taken from a vulnerable witness on commission. The accused would not be allowed to be present when that evidence was given. However, the lawyers from both sides would be able to listen to, challenge and debate the evidence, without the witness's being confronted by the accused. The role of the commissioner would be to ensure that there was fairness and equity and that evidence was taken in a balanced and objective way. Colin Fox is right to say that evidence is not often taken on commission, but in some cases it may have a contribution to make.

Colin Fox: It may not surprise you to learn that the Faculty of Advocates was keen for this matter to be left to the discretion of the judge and the court, rather than for evidence taking on commission to be introduced as a right through legislation. [*Interruption.*] I was just having a go at the Faculty of Advocates—there was no need for the minister to take advice on the issue. If evidence is taken on commission in a separate part of the trial, is there not a danger that the trial as a whole and justice will be delayed so that the defence may be properly prepared, see statements in advance and develop its line of inquiry?

Hugh Henry: I will ask Barbara Brown to address that point in a minute. Evidence on commission does not often take place, although there may be good reasons for such evidence to be taken. Although in another context I highlighted worries about delays caused by frivolous appeals, in this context it is useful for evidence to be presented properly and challenged. Evidence taken on commission could expedite the court case, without the accused's necessarily being present. It would enable the testing of evidence, which the court would find useful.

Barbara Brown: We do not envisage that the procedure will be used very commonly. An application for evidence to be taken on commission is most likely to be made shortly before a trial, at the point where both parties have had an opportunity to prepare their cases. There may need to be a short delay so that arrangements can be made, but the benefit of taking evidence on commission is that a witness's involvement in a case will have been captured. Because proceedings are videotaped, the witness's evidence, cross-examination and re-examination will have been obtained in a oner. That evidence will be available for the trial when it goes ahead.

The advantage of the procedure for the vulnerable witness is that if the trial is delayed

later on they should not in ordinary circumstances need to give evidence again, so they can step away from the trial. The procedure will be useful in a limited number of cases, because it will allow witnesses' evidence to be captured and ensure that they do not need to be involved in the trial thereafter.

Colin Fox: Okay. That brings me to the other part of the question, which is about the right of the accused to be present at the trial. The accused is obviously there when a cross-examination takes place, including when screens are used. Are there plans to remove the possibility of the accused being present when evidence is being taken on commission? I will put it another way. The bill talks about the possibility of removing the right of the accused to be present.

Hugh Henry: No. The bill allows the accused to watch and listen by some means—for example, by a live television link—while the witness's evidence is taken. I ask Barbara Brown to clarify.

Barbara Brown: The general rule would be that the accused would not be present at the commission, but that, as the minister said, he would be allowed to watch by some means or other. The general rule that the bill lays down, which is the current rule for evidence on commission, is that the accused is not present. We have left the possibility in the bill that the accused will be allowed to be present. I can understand the concern about that, but it is the exception to the rule, and there would therefore need to be a good reason for the accused to be allowed in before that would happen.

Hugh Henry: The judge would probably apply the same strength of evidence as he would when considering whether a witness has to appear for the full court hearing rather than have the special measures applied to them. The same circumstances would influence the judge's decision whether to allow the accused to be present.

Colin Fox: Who makes that decision just now? Does the commissioner or the judge make it?

Barbara Brown: Under the bill as drafted, the commissioner would make that ruling. We drafted it that way because we felt that the commissioner was in the best position to make the judgment, depending on the circumstances on the day, because he would presumably have met the accused and would have a better idea of what would be appropriate. We are aware that some people have said that it would be better for the judge to make that judgment. We can consider that.

Hugh Henry: I would want to consider that point. I can see that there are good reasons for leaving that decision with the commissioner but, equally, I do not want to do anything that would undermine confidence. I also want to avoid any potential disputes between the commissioner and the judge. Without prejudice to the conclusion, we will consider that matter.

The Convener: It was felt that there would be a risk of inconsistency if the judge has been determining delicate issues, such as who is a vulnerable witness, which measures are appropriate and whether measures should be revoked or changed, when suddenly those decisions fly out of his control and are made by an anonymous commissioner. That is the concern that was expressed.

Hugh Henry: It is a valid point.

Mike Pringle: From what has been said, I think that it is agreed that the taking of evidence on commission is a fairly rare event, and Barbara Brown said that the accused would be allowed to be present only in exceptional circumstances. Therefore, we are talking about an extremely small number of occasions. Why, then, have that provision at all?

Hugh Henry: Probably for the same reason that the bill allows a judge to decide that such is the risk to a fair trial that he has to change the way in which evidence is being taken. I suppose that the provision exists to prevent situations in which there is an accusation of an unfair trial, leading to a challenge and appeal. The provision allows the possibility of the accused being present, but it still leaves the responsibility with the judicial process. We will consider that when we come back to the point that the convener and Colin Fox have raised about who makes that determination.

The Convener: I am grateful for that. Time is cracking on. We have about seven other areas to cover, so I ask members to be mindful of that and to keep their questioning to about two and a half to three minutes each. The time will vary depending on the substance of what is being covered.

When evidence-in-chief is given in the form of a prior statement, how will it be ensured that the prior statement, including the questions asked, has been recorded accurately?

Hugh Henry: Those who obtain the evidence and information are responsible for ensuring that it has been recorded accurately. When a statement gets to court, the onus is on the judge to consider the information. The Criminal Procedure (Scotland) Act 1995, which applies to the provision, sets out the types of statement that can be admitted and requires such statements to be authenticated. Any prior statement that is admitted will be subject to the general rules on admissibility of evidence. In that respect, the prior statement is no different from other evidence.

The Convener: If the evidence is in the form of a statement, how will the accused challenge its admissibility? How can the accused test the veracity and accuracy of the evidence? I am not sure where the accused is left.

Barbara Brown: The prior statement is the equivalent of the evidence-in-chief and therefore the normal cross-examination process applies.

The Convener: So the prior statement does not exclude the witness from appearing.

Barbara Brown: No. That is true of evidence on commission, which covers the whole process—the two procedures often get confused. A prior statement takes the place of the evidence-in-chief. Instead of the witness's being questioned on the witness stand by the person who is leading evidence from them, the evidence is led in the form of a prior statement, which normally involves a video recording of the statement. The questions are on the recording, which forms the evidence-in-chief. However, the witness is still subject to normal cross-examination on what was said in the statement.

The Convener: That cross-examination might or might not be done using special measures.

Barbara Brown: Yes—that depends on the circumstances.

Nicola Sturgeon: Section 5 relates to expert evidence about subsequent behaviour that might affect a complainer's credibility or reliability and is a change from the general rule that juries should determine reliability or credibility. Given that the bill departs from that general rule, why does it limit the departure to cases involving sexual offences and why does the provision relate only to the complainer and not to other witnesses?

Hugh Henry: The bill attempts to overturn the decision made in the Grimmond case, which was a sexual offences case. We are concerned about widening the provision further, because we do not think that it is necessary to do so. The issue is specific and we feel that it must be addressed.

Lesley Napier: The provision is limited because the aim is simply to overturn that decision. We do not want courtrooms to become battlefields for the experts; we want to limit the use of expert evidence to where it is needed. In this case, expert evidence is needed because the subsequent behaviour of a complainer in a sexual offences case will not generally be within the knowledge of the judge or the jury. It is important to note that it will be possible to introduce such evidence only if the defence has chosen to lead evidence that creates a negative inference against the complainer's subsequent behaviour. The evidence will not be introduced as a matter of course; it is dependent on the evidence that is led by the defence.

Nicola Sturgeon: As I have not practised law for a wee while, will you say briefly what the Grimmond case was about?

Lesley Napier: As I understand it, the case involved two young boys who, it was alleged, had been subjected to child abuse. Their coming forward and telling the appropriate authorities what happened to them took place over a period of time—it was a staged disclosure. I understand that, during the court case, the defence made a negative assertion against the fact that they did not come forward with all the allegations at once, but that they did so over a period of time. The defence tried to undermine their credibility by saying that the fact that they did not make all the allegations at once showed that they probably were not telling the truth. It would not be appropriate to lead expert evidence to show that a particular complainer is a credible witness. The expert evidence would be led to show what would be a normal—or abnormal—way for such victims to act if they had been subject to that type of crime.

15:45

Nicola Sturgeon: So the provision is quite narrow and the complainer would have recourse to it only if the defence led evidence about subsequent behaviour.

I would like clarification on one further point, although I think that I can tell from the way in which the bill is drafted what your answer will be. Would it then be open to the defendant to instruct expert evidence of his or her own to say that the behaviour of the complainant was not normal—in essence, to support the adverse inference as well as to rebut it?

Lesley Napier: We have to accept that that could be possible.

Nicola Sturgeon: That would be possible?

Lesley Napier: Yes.

Nicola Sturgeon: The bill says that such evidence

"is admissible for the purpose of rebutting any inference adverse to"

credibility, but in those circumstances it would be almost as if the defendant were supporting the adverse inference. Would that really be possible?

Lesley Napier: It would be for the court to decide whether to admit such evidence.

Nicola Sturgeon: Section 6 deals with the prohibition of personal conduct of defence. In relation to sexual offences, there is already an automatic prohibition. The prohibition added by the bill in cases involving other vulnerable witnesses is discretionary, not automatic. Why is that prohibition automatic for sexual offences but only

discretionary in cases where other vulnerable witnesses are involved?

Barbara Brown: We did not feel that it was necessary to have a blanket rule for all other types of cases. Sexual offence cases are very distressing, and at the time of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 it was felt appropriate to limit that prohibition to sexual offences. During the consultation process, some people expressed the view that there should be scope for widening that prohibition to some other cases, but we felt that there was no necessity to make it a blanket rule and that discretion was adequate. There has not been a great number of sexual offence cases in which the rule has had to be applied by the court, and we are not aware of it being a significant problem in other types of case. We therefore felt that discretion was sufficient to deal with any problem that might arise.

The Convener: What if the accused simply refuses to instruct a solicitor?

Barbara Brown: The situation would be exactly the same as with the 2002 act; the court would take a view as to whether such behaviour was appropriate.

Jackie Baillie: The risk of defamation action has been raised as a possible barrier to vulnerable witnesses coming forward. What protection is currently available, and do you think that there is a need to extend absolute privilege to individuals who are particularly vulnerable, such as children?

Hugh Henry: Cathy Jamieson recently answered a parliamentary question from you on that very matter. We have no plans to change the law on defamation. There is currently a distinction between the absolute privilege that is available to MPs, judges, advocates and witnesses and the qualified privilege that somebody making a complaint would be entitled to. This bill would not be the vehicle for changing the law on defamation and we have no other bills in the pipeline that would be suitable vehicles for such change. As things stand, it is not our intention to alter the law on defamation; doing that would have significant implications. We understand that it is a matter of balance, but as things stand at the moment the Executive has no intention of introducing any changes.

Maureen Macmillan: One of the main concerns is whether good practice will be consistent across Scotland. The extent to which that is the case will prove whether the legislation is successful. What are the Executive's plans for training and guidance to support the implementation of the bill? Who will be required to undertake training? Will it be mandatory?

Hugh Henry: Clearly, guidance and training will be critical. We will expect all the key parties to ensure that they avail themselves of training. We have already had a positive response from the Crown Office and the Faculty of Advocates. I know that Sheriff Morrison, who is the director of the Judicial Studies Committee, has announced that that committee is developing training on dealing with child witnesses and vulnerable witnesses. That guidance will be used for the questioning of children in court.

At the moment, all the relevant organisations and agencies build training into their activities as a matter of course, so we do not believe that a statutory requirement is necessary. We want to build on, develop and share good practice. We believe that the best way forward is probably to use co-operation rather than to make training a statutory requirement.

Maureen Macmillan: Will that be sufficient to get the kind of culture change that we positively need in order to deliver?

Hugh Henry: In and of itself, no. However, a change in the legislation in and of itself would not necessarily change the culture either. There is a much bigger job to be done. Training, changing legislation, providing more resources and examining current practice are all part of trying to shift the practice.

The legislation that we are introducing is about encouraging a change in culture, but culture change is also about considering who we employ in the various agencies and organisations and ensuring that there is equality of opportunity for everyone who wants to engage in those professions. We need to ensure that no one is disadvantaged from working in those settings and, equally, that no one is disadvantaged when they come to give evidence in court. The issue of culture change goes much wider than simply introducing legislation and training, although those are often needed to shift the culture.

Maureen Macmillan: Perhaps there is a core problem that has to be addressed. I presume that the minister will monitor that as the bill is implemented.

Karen Whitefield: I want to move on to consider resources and implementation. The bill will be effective only if courts provide the facilities to allow the implementation of special measures. The Executive has indicated that it intends phasing in the implementation of the bill's provisions. What is the time scale for that phased implementation? How will you ensure an even and fair spread of facilities across courts in Scotland to minimise the need for people to travel to courts? How will you ensure that everybody has an opportunity to take advantage of the facilities?

Hugh Henry: For the first phase of the implementation, we are aiming for April 2005. We

have structured the implementation in such a way as to ensure that resources will be available for an even and sustainable introduction of the measures. After the first year or two of implementation, bids will need to be built into the next spending round to ensure that there are adequate resources in future. We are confident that that will be the case.

On evenness and fairness, perhaps the biggest concern is with some of the remoter and smaller courts. I accept that those will have issues about the suitability of premises and the availability of equipment. We will need to consider what can be justified in courts that deal with only a relatively small number of cases.

We will have to consider other ways of supporting those facilities—for example, with mobile closed-circuit television units. We will have to consider how we can use new technology and whatever other resources are available. The issue is sensitive. We do not want to create a situation where a vulnerable witness in Edinburgh or Glasgow would have support, but a vulnerable witness in Dingwall or Fort William would have a problem. We are aware that that could happen and the Scottish Court Service is already considering the issue.

Karen Whitefield: How will the Executive monitor the phased implementation of the proposals to ensure that problems do not arise in specific areas?

Hugh Henry: We will consider the evidence that comes back to us on the number of cases that have been dealt with in this way. We will pay close attention to any areas of contention. We will not simply ask about the numbers; we will continually ask whether challenges have been made or concerns raised. It would not be in anyone's interests to leave problems to build up, so we will regularly monitor implementation.

Karen Whitefield: My final question is about evidence that was given by the Scottish Legal Aid Board to the Finance Committee, during that committee's deliberations on this bill. SLAB raised concerns about the possible financial implications of the use of the bill's provisions by defence witnesses. SLAB felt that the financial memorandum to the bill was unclear about whether such costs had been considered. SLAB also expressed concerns that the financial memorandum contained no estimated costings on the legal aid fund. Was that an oversight on the part of the Executive, or have the estimates actually been included in consideration of the financial implications of the bill?

Hugh Henry: We believe that we have calculated properly and that there is no significant cause for concern. We note the Finance Committee's useful recommendation about continued dialogue between the Scottish Executive and the Scottish Legal Aid Board. The recommendation is about ensuring a balance between modernising practice and maintaining appropriate remuneration. We will continue that dialogue because significant differences of opinion arise—over how legal aid should be paid out; over who qualifies for it and in what circumstances; over what the level should be, and so on. In recent years, considerable changes have been made to much of the legal aid system. That refinement and improvement will, I think, continue. The Finance Committee's recommendation is useful and we will also bear in mind the points that Karen Whitefield has raised. We will ensure that there is dialogue.

The Convener: I call Mike Pringle for a verbal four-minute mile.

Mike Pringle: We have already dealt with one of my points on subordinate legislation. The Subordinate Legislation Committee was concerned that the powers that allow phased implementation should be subject to parliamentary scrutiny rather than relying on a commencement order. Will you comment briefly on that?

Hugh Henry: We do not believe that there is any great problem. We believe that adequate powers of scrutiny are available and that confirmation will take place through the proper procedures in this Parliament. I do not expect any problems.

Mike Pringle: My other question relates to the district courts. Various points have been made about the district courts and there was considerable debate in the Subordinate Legislation Committee.

At the moment, it is rare that a vulnerable witness comes to the district court. The Faculty of Advocates—I am sorry for referring to it again—suggested in its evidence last week that if there were any suggestion that a vulnerable witness would be called in a case, that case should go automatically to the sheriff court or a higher court as a summary case, and should not be tried in the district court. In light of that, is proposed new section 271N needed? What is your view?

Hugh Henry: There are a couple of issues. As you indicated, it is unusual for children to appear in district courts, and it would be unusual for the type of serious case where there is vulnerability to appear in district courts. At the moment, it is Crown Office policy not to call child witnesses in district courts, although it is possible for the defence to call a vulnerable witness. This afternoon, we have been discussing serious cases that normally would be dealt with in higher courts.

16:00

On the wider question of proposed new section 271N, the McInnes review on summary justice is on-going. We prefer to wait until that review is complete before deciding whether any provisions in the bill will apply to district courts. The best way forward is to have a power in the bill to allow the bill's provisions to be extended if appropriate and if required, rather than make something mandatory. Let us wait and see what the McInnes review comes up with.

The Convener: Finally, minister, on terminology, proposed new section 271(2) contains a whole list of factors that the court should take into account, some of which may not have a legal definition. Do you wish to comment on the use of such factors? Would you be open to suggestions for more appropriate terminology?

Hugh Henry: To which section did you refer?

The Convener: Proposed new section 271(2), which contains a list of circumstances that the court should take into account in determining whether a person is a vulnerable witness. If terms do not have a legal definition, it may leave the courts in doubt as to where they should focus their attention when assessing the vulnerability of witnesses.

Hugh Henry: That is a cracker to keep for the end, Annabel. I do not see where the problem would be. With proposed new section 271(2) we are saying that the court shall take into account a number of things. It is sufficiently descriptive and prescriptive to ensure that the widest possible range of issues is considered. Your argument is about whether some of those descriptions have legal definitions. Is that correct?

The Convener: A number of the phrases do not have legal definitions. Are you just leaving it to the court to make its own assessment?

Hugh Henry: Absolutely. It would be a matter for the court to interpret them in those circumstances.

The Convener: On behalf of the committee, I thank you and your advisers, minister. I apologise to your advisers, whom I did not introduce to the committee, but I will do so belatedly. They are Barbara Brown and Lesley Napier. I thank you for being here this afternoon. We all agree that your presence has been extremely helpful in enabling us to address some of the issues that have arisen in the course of taking evidence. We are grateful to you for your extensive presence with us this afternoon.

I will declare a break of 10 minutes, because we have some outstanding work beyond this item, and it is best for committee members to have a degree of comfort before we proceed to it. We will break for 10 minutes and reconvene at quarter past 4.

16:04

Meeting suspended.

16:13

On resuming—

Petition

Public Bodies (Complainers' Rights) (PE578)

The Convener: I reconvene the meeting. Agenda item 5 is on petition PE578, which emanates from Mr Donald MacKinnon. The petition is on public bodies and complainers' rights. We decided at last week's meeting to raise the petition's issues with the minister when he came before us today, which we managed to do.

Members will be familiar with the petition's content. I certainly got the impression from the minister that the Executive has no intention of changing the law in the way that the petition calls for. Equally, the Executive considers that it would be inappropriate to try to do so within the Vulnerable Witnesses (Scotland) Bill because the bill is concerned with other issues altogether.

16:15

Having considered the petition and listened to the minister, committee members must decide what they want to do. There are three options. First, we could seek further information from the Deputy Minister for Justice. However, given what he said today, I do not know whether that option would be particularly fruitful. Secondly, we could get further advice on the European convention on human rights aspects of matters that Mr MacKinnon's petition mentions. Thirdly, the committee may be minded to take no further action at this stage. I am happy for members to contribute their views.

Jackie Baillie: In my previous existence on the Education, Culture and Sport Committee, the issue came before us. I cannot recollect which bill passed before us—it seems such a long time ago—but we were told at that stage that it was not the appropriate legislative vehicle for what the petition wanted. We were clearly told the same today. I support that position, but there is an issue about the balance between protecting a vulnerable person's rights, particularly a child's, by granting them absolute privilege, and recognising that there could be malicious intentions towards people and that perhaps qualified privilege would be more appropriate.

I take from what the convener said earlier that we do not know the scale of the problem to which the petition refers. Given that the Executive answered a parliamentary question from me on the subject—I apologise for neglecting to bring it—it might—

The Convener: Can you summarise that answer for the committee?

Jackie Baillie: We ask so many PQs, I am unable to do so. Basically, what the minister said earlier summarised the answer to the PQ, which is that the Executive has no plans to afford the rights of absolute privilege to children or vulnerable people, as the petitioner wants. Therefore, we must consider whether we can test the Executive on anything. I wonder whether it would be appropriate, as a follow-up to today's session, to write to the Deputy Minister for Justice and ask him whether he can identify the scale of the problem.

The Convener: Do other members care to comment on that suggestion?

Nicola Sturgeon: It seems reasonable.

Mike Pringle: It is a reasonable suggestion. I have a great deal of sympathy with the petition and I believe that there is something to it. I have no idea whether the case to which the petition refers is a one-off case or whether there are many such cases, or whether people are being prohibited from making complaints or whatever. However, the petition merits further investigation. If we continue the petition, we should perhaps ask the appropriate person to give us an opinion on whether the ECHR is an issue. There is no reason for not continuing the petition.

The Convener: We have two positive proposals. Jackie Baillie's is that, notwithstanding what the Deputy Minister for Justice said in evidence earlier, we should write to him and seek to probe further what information the Executive has on the issue. It might have information of which we are unaware. Mike Pringle's suggestion is that we take advice on the ECHR aspects of matters that the petition covers. The two suggestions are not mutually exclusive and seem to be perfectly capable of going forward in tandem. Depending on the responses to those two lines of inquiry, it might be possible to determine how we wish to respond to Mr MacKinnon. Do we agree to write to the Deputy Minister for Justice and to seek advice on the ECHR implications of the petition?

Members *indicated agreement*.

The Convener: We now move into private session for item 6.

16:19

Meeting continued in private until 17:22.

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