JUSTICE 2 COMMITTEE

Tuesday 1 November 2005

Session 2

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JUSTICE 2 COMMITTEE
† 28th Meeting 2005, Session 2

CONVENER

Miss Annabel Goldie (West of Scotland) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
Colin Fox (Lothians) (SSP)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Mr Stewart Maxwell (West of Scotland) (SNP)
*Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

COMMITTEE SUBSTITUTES

Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Carolyn Leckie (Central Scotland) (SSP)
Mr Kenny MacAskill (Lothians) (SNP)
Margaret Mitchell (Central Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Gerard Brown (The Law Society of Scotland)
Simon Di Rollo (Faculty of Advocates)
Anne Keenan (The Law Society of Scotland)
Norman McFadyen (Crown Office and Procurator Fiscal Service)
Fiona Scott (Crown Office and Procurator Fiscal Service)
John Service (Procurators Fiscal Society)

CLERK TO THE COMMITTEE

Gillian Baxendine
Tracey Hawe

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Steven Tallach

LOCATION

Committee Room 4

† 27th Meeting 2005, Session 2—Joint meeting with Justice 1 Committee

Scottish Parliament

Justice 2 Committee

Tuesday 1 November 2005

[THE DEPUTY CONVENER *opened the meeting at 16:01*]

Police, Public Order and Criminal Justice (Scotland) Bill: Stage 1

The Deputy Convener (Bill Butler): Good afternoon, colleagues, and welcome to the 28th meeting in 2005 of the Justice 2 Committee. Apologies have been received from Annabel Goldie and Colin Fox. Carolyn Leckie is substituting for Colin Fox and I am convening the meeting in place of the convener.

Item 1 on the agenda is the Police, Public Order and Criminal Justice (Scotland) Bill. We will take evidence on the bill from two panels of witnesses. On behalf of the committee, I welcome the first panel: from the Law Society of Scotland, we have Anne Keenan, the deputy director of law reform, and Gerard Brown, the convener of the criminal law committee; and, from the Faculty of Advocates, we have Simon Di Rollo QC.

I am sorry for the late start to the meeting, but we will attempt to be precise and concise in our questioning; if you could reciprocate, that would be appropriate and welcome.

Maureen Macmillan (Highlands and Islands) (Lab): I will kick off by asking about the proposals for the appointment of a police complaints commissioner. The Law Society of Scotland did not say much about that in its written submission. The proposal is for a police complaints commissioner for Scotland to be tasked with overseeing non-criminal complaints against the police, although the police would still carry out the investigations of such complaints. The Crown Office and Procurator Fiscal Service would retain its role in the investigation of complaints alleging criminal conduct.

I know that the Law Society has spent a great deal of time and angst thinking about how to modernise its complaints system to ensure that the public do not just perceive it as a process that involves lawyers investigating lawyers. Do you have any thoughts about the proposal for the police complaints commissioner? Do you think that it is the best way forward? If not, can you suggest something else from your knowledge and experience?

Gerard Brown (Law Society of Scotland): We had no representations on that aspect of the bill from members of the profession or criminal law committee members. Despite our members' dealings with the criminal justice system, we have no specialist knowledge in that area. In the circumstances, we did not think that comment from us would be helpful. Those who are part of that system are far more able to comment on the proposal than we are. We are dealing with a number of issues in our own complaints procedure, which currently occupy our time and will continue to do so in the future.

Maureen Macmillan: That is it then, is it?

Anne Keenan (Law Society of Scotland): I think that we mentioned at the beginning of our submission that we had confined ourselves to comments from the criminal law committee. As you know, Gerry Brown and I often give evidence to the Parliament on behalf of that committee. People in other parts of our building deal specifically with the complaints process and with our internal regulation. I would not feel qualified to comment on any matter regarding another body's complaints process or, indeed, to give evidence on it, because our time is pretty much taken up in dealing with matters affecting criminal justice.

Maureen Macmillan: Well, thank you for being so frank about that. We obviously have to accept your position. Can the Faculty of Advocates give any views on the issue, or is it in a similar position?

Simon Di Rollo (Faculty of Advocates): We are in exactly the same position, I would say. I have nothing to add to what was said on behalf of the Law Society. I think that we are in the same boat.

Maureen Macmillan: Well, there we go, deputy convener.

The Deputy Convener: That is all right, because we are starting off with specific questions and expect brevity of response.

The bill provides for the making and enforcement of football banning orders, which are to be introduced as a means of preventing football-related violence and disorder. It will be possible to impose an FBO following a conviction for a football-related offence or an application by a chief constable to a sheriff for a civil order. Does the panel think that the use of FBOs for conduct that falls short of violent behaviour could be seen as a disproportionate response in some cases?

Anne Keenan: When dealing with civil orders, the court would have to consider proportionality. In its response to the consultation, the criminal law committee made it clear that there would have to be proof that there had been an instance of violence. In that case, it would be clearer to the committee that the restrictions imposed under an FBO would be proportionate and appropriate.

Where the conduct is not violent, the court would have to be satisfied, in fulfilling its duties under the European convention on human rights, that the imposition of an FBO was proportionate to the conduct that was brought before the court. That would be a matter for the sheriff to consider at the appropriate time.

A clear definition is given in the bill of what will constitute disorder. The bill makes it clear that in certain circumstances sectarian and racial abuse constitute disorder. In such circumstances, it may be appropriate for the court to impose an FBO. However, sheriffs would have to consider that fully in applying their judicial discretion.

We have raised some issues about section 48(4), which states:

"A sheriff may make a football banning order if satisfied that—

(a) the person against whom the order is sought has at any time contributed to any violence or disorder in the United Kingdom or elsewhere".

It appears to us that that is not linked to football or football-related violence or football matches. However, we accept that there is provision in section 48(4)(b) to the effect that the court has to consider that

"there are reasonable grounds to believe that making the order would help to prevent violence or disorder at or in connection with any football matches."

We notice that the link between violence and football that is made in the criminal order is not made in the civil order. We wonder whether there is a reason for that, as the provision would apply to any violence and would be extremely wide in the civil context.

Gerard Brown: We have some concerns with section 64. The offences specified under subsections (1) and (5) seem to be absolute offences. However, we believe that there should be a defence of reasonable excuse, because people can, in good faith and through no fault of their own, sometimes not be available to comply with the requirements of the banning order. It is extremely unusual to have absolute offences in our system.

The Deputy Convener: Perhaps, for my benefit and for the benefit of committee members who do not have a legal training, you could give an example.

Gerard Brown: An example is someone who is required to report to a police station but who cannot do so because of ill health or transport difficulties. There can be practical, everyday problems that prevent us from carrying out our obligations.

The Deputy Convener: Is that a weakness in subsections (1) and (5) of section 64?

Gerard Brown: Yes. Where a requirement is imposed—under section 57(4), for example—there must be provision in law for the court to be given a reasonable excuse if the requirement has not been fulfilled.

The Deputy Convener: Simon, do you have anything to add on that?

Simon Di Rollo: No.

The Deputy Convener: I turn to another aspect of FBOs. Do panel members see merit in leaving the duration of any ban to the discretion of the imposer? The bill provides for maximum orders of three, five or 10 years.

Gerard Brown: We are reasonably content with that. We would not be in favour of a life ban, for example, because it would not be proportionate and could be subject to appeal as being excessive.

Anne Keenan: There may be issues of proportionality with indeterminant sentences, if the matter fell in those contexts.

Mr Stewart Maxwell (West of Scotland) (SNP): The bill provides for three, five and 10 years, but why not 15 and 20? I accept what you say about life, but is it not slightly odd to have those three particular fixed figures?

Gerard Brown: As I understand it, they have not been tested. Why they have been chosen is a matter on which others can give evidence. One would have thought that 10 years could be sustained in an appeal as a reasonable period for a football banning order for serious misbehaviour. The legislators have to be sure that what they put in the bill is proportionate to the misbehaviour; I presume that the years that have been chosen reflect that.

Mr Maxwell: Football banning orders could be varied and they could be terminated in different circumstances, either on application by the person who is subject to the order or, in some cases, by the applicant chief constable. I understand that they can be terminated when two thirds of the period specified in the order has elapsed. Are the provisions in sections 53 and 54 to vary or terminate the FBOs sufficient for FBOs imposed on conviction and for civil orders?

Gerard Brown: Our view is that they are appropriate. One has to put in place provisions that will encourage people to behave and to recognise what they have done and, thereafter, in reflection of that, to enable a court to make a decision to terminate the order or to vary the conditions. I compare that to, for example, periods of disqualification. If someone is disqualified from driving for three years, they can apply to the court after two years for removal of the disqualification, submitting their reasons. If the disqualification is

for a longer period—up to 10 years—they can apply for half of that to be taken away. Similarly, if someone is disqualified for 10 years, they can apply for the period to be reduced after five years. However, they have to justify why they want that done. That encourages people to behave and to comply with the order.

Mr Maxwell: Is it reasonable for us to go down the route of the courts and banning orders? Would it not be more appropriate for the clubs to be involved in enforcing the good behaviour of their supporters, either by removing or suspending season tickets or by stewarding their property more effectively, for example?

Anne Keenan: That is a policy issue, which is a matter for the Executive and the Parliament to consider. All I would say is that there is a range of ways in which to tackle that behaviour—through education or more involvement by the clubs, for example. Those should certainly be seriously considered, but the bill presents another tool to the courts to enable them to deal with such conduct. We would welcome that, although that is not to say that it should be considered in isolation or as the only method that we should consider for dealing with such conduct.

16:15

Mr Maxwell: Will FBOs not remove clubs' responsibility to manage the behaviour of supporters on their premises? Clubs might wash their hands of that and say, "It is now up to the courts to deal with these things. It is no longer our responsibility." By introducing FBOs, will we shift the balance of responsibility away from individual clubs?

Gerard Brown: We do not anticipate that clubs will absolve themselves of responsibility. Our view is that FBOs will be another tool in the armoury for dealing with misbehaviour. The orders will take account of more serious misbehaviour not only inside the football ground but outwith it. As we state in our submission, one aspect of the proposal that we find difficult is the time limit of 24 hours. We wonder why that period was chosen. One can imagine a situation in which a football casual moves from Glasgow to Aberdeen and causes trouble there on a Friday night, outwith the proposed period of 24 hours before or after a match. The time limit might restrict the prosecution of individuals.

Mr Maxwell: In the example that you give, the match is on the Sunday.

Gerard Brown: Yes.

Mr Maxwell: In effect, the weekend is part of the whole event.

Gerard Brown: Yes. The weekend starts on Friday.

Mr Maxwell: Or Thursday, in some people's cases.

Gerard Brown: For us, it starts on Friday. Sorry, that was not meant to be cheeky.

The Deputy Convener: We will not get into what is a weekend and what is not. Simon, do you have anything to add?

Simon Di Rollo: The matter seems to me to be a policy issue. I do not think that the bill affects clubs' responsibilities.

Jackie Baillie (Dumbarton) (Lab): Do you have any concerns about the police powers under sections 73 and 74, which relate to the taking of fingerprints and information such as a suspect's date of birth, nationality and so on?

Gerard Brown: No.

Simon Di Rollo: No. We expressed concern about that in our consultation response, but when that was written we had only the consultation paper and not the bill. Having read the bill and thought about it, we do not have any concerns.

Jackie Baillie: Perhaps you could offer me some advice, then. In your consultation response, you said that you would not want the police to use the new powers to carry out spot checks. Which provisions in the bill are sufficiently tight to prevent that from happening? For example, if I was suspected of committing a road traffic offence, could the police come along and take my fingerprints for the purpose of matching?

Simon Di Rollo: There are existing legal provisions to prevent that. The police cannot act randomly. They must act according to the powers that they are given and they must do that in good faith. If they do not do so, they are acting unlawfully. As in any situation, the police are not entitled to act except in accordance with the legal powers that are provided for them. That protection exists, so I am not concerned about sections 73 and 74 of the bill.

Anne Keenan: Sections 73 and 74 amend section 13 of the Criminal Procedure (Scotland) Act 1995, under which the police may act

"Where a constable has reasonable grounds for suspecting that a person has committed or is committing an offence".

The police will still need to have reasonable grounds for believing that an offence has been or is being committed.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): Does the panel have concerns about the ECHR compliance of the mandatory taking of a sample for a drugs test for trigger offences? I understand that, in previous consultation responses, questions were asked about whether that would be ECHR compliant.

Gerard Brown: This is obviously a new departure, but we took the view that an individual, when they are detained for up to six hours, has to provide certain samples. Subject to there being a procedure and machinery whereby a sample for drugs purposes can clearly be identified as being for those purposes—that must be clearly identified; the test must not be presumptive—we did not have any concerns about the issue of invasion of privacy. The reason for that is the global picture: if someone has a drugs issue—they may or may not want to have it resolved—early identification is helpful. The procedures that follow in respect of appointment and assessment allow the person to indicate to the courts eventually—or to the prosecutor if a decision has to be made about prosecution—that they are trying to resolve the issue. We feel that that is a good policy.

Our criticism is that often such procedures are more successful when there is compliance by the individual rather than when the procedure is mandatory. We note that pilot schemes are proposed, as is often the case for such procedures. With that in mind, and given our comments about the mandatory aspect of the latter stages—not the initial stages—of the process, we feel that it might be an idea to have pilots running that are both mandatory and compulsory. [*Interruption.*] Sorry—I meant both mandatory and voluntary.

Jeremy Purvis: I was going to say that that was a good Liberal Democrat solution, but I will not, as the discussion is on the record.

The Deputy Convener: Your comment is on the record.

Jeremy Purvis: I know. I was being ironic.

If I understand the situation correctly, you do not oppose the practice but you have a concern about the purpose. Is that correct?

Gerard Brown: We are content with the practice because it addresses an issue that may be fundamental to criminal misbehaviour. It does not prevent the individual from going to trial, pleading not guilty and being acquitted, but it might address an underlying problem that was not at that stage the cause of the particular behaviour.

Jeremy Purvis: Does the faculty have a similar view?

Simon Di Rollo: Basically, yes. In our response to the consultation, our concern was about making drug testing mandatory and requiring the police to carry it out. We were a little troubled by that because the police are concerned with the investigation and prosecution of crime; they are not social workers. Our concern was that the functions of the police might be compromised to some extent. We expressed that view in our response to the consultation paper.

Jeremy Purvis: You are aware of the much wider aspects of the police's role. For example, it is now becoming the practice that young people who are caught may be referred to drug and alcohol programmes with or without the permission of parents. The police can take a much wider role when they work within antisocial behaviour strategy teams. Indeed, in many areas, they take the lead in that work.

Simon Di Rollo: Yes. Given the contact that we have with the police in more serious criminal cases, we are perhaps not as aware as we should be of the wider role of the police. We have perhaps considered the matter from a narrower point of view than we should have. However, it is worth bearing in mind the difficulties that might arise from making drug testing mandatory rather than something for which the co-operation of the individual is needed. We suggested that the assessment could be made a condition of bail—to provide a carrot and stick—rather than a mandatory requirement.

Jeremy Purvis: Do you have any views on the list of "relevant offences", which are the alleged offences that in common parlance we might call trigger offences?

Gerard Brown: No. In the experience of the members of our committee, the offences that are listed are consistent with offences that might be related to drugs.

Anne Keenan: In our response to the original consultation and to the committee, we commented not only on the issue of whether drug assessment should be voluntary, as Gerry Brown mentioned, but on the issue of resources. Given the wide range of trigger offences and the discretion that is provided for in the sections relating to drug testing, we hope that the pilot exercise will take into account not only whether such drug assessment should be mandatory or voluntary but whether sufficient resources have been allocated to manage the project effectively.

Jeremy Purvis: If a suspect tests positively but chooses—for whatever reason—not to attend a drugs treatment programme, could that fact be used against them by the prosecution in any trial? Would it be admissible to use such evidence against the individual?

Gerard Brown: It could not be used for a trial—

Jeremy Purvis: I am sorry to interrupt, but, if I understood you correctly, I thought that you said that it would be possible for individuals to say in their defence that they were attending a drugs treatment programme.

Gerard Brown: If I used the word "defence", I meant that it could be used as part of the person's mitigation plea if he is found guilty. The defendant

could properly say that he has undergone a period of drug assessment.

Jeremy Purvis: The flip-side of that is that participation in a drugs treatment programme could be part of deciding whether the person is sentenced to a community disposal or something else. Is that what you would expect?

Gerard Brown: That is possible. However, if I may make one brief point before I allow Anne Keenan to respond, I would say that the timing in the bill is important. The bill already provides that the person must not have been detained for more than six hours and that the appointment for an assessment must take place within seven days. However, the bill gives no timescale for the assessment. If the policy intention is to target individuals whose drug taking means that they are high-risk offenders, it is important that the assessment is done quickly. There may be other reasons for the current position, but it seems obvious that, given that the appointment for the assessment must take place within seven days, the individual should be seen to as early as possible.

Anne Keenan: As a supplementary to that, I should say that we were reassured by the terms of new section 20B(8)—to be inserted into the 1995 act by section 75—which specify the purposes for which the sample can be used. We are reassured that the terms of the bill are specific about what that information can be used for.

Carolyn Leckie (Central Scotland) (SSP): Section 88 deals with incentives for providing information or evidence. Both the Law Society and the Faculty of Advocates raised concerns about that and the Scottish Law Commission questioned whether the current arrangements are ineffective.

To save time, I will wrap up a couple of questions into one. Under what arrangements in the bill might a person be offered immunity from prosecution, the opportunity to plead guilty to reduced charges or a reduced sentence in return for co-operation with the prosecution and/or the police? What is your opinion of the strengths and weaknesses of those arrangements? I have a wee supplementary question as well. How will such arrangements—the costs that they might incur and the benefits that might be achieved—be perceived in the wider community?

Simon Di Rollo: Do you want us to describe the existing situation?

16:30

Carolyn Leckie: No, I want to know your views on the differences that the bill will make. You said that there is no need for change and that the present arrangements are effective enough. How will the bill's provisions change the current situation? What are the strengths and weaknesses of the changes?

Simon Di Rollo: We commented on the terms of the consultation paper, which we felt did not describe the current arrangements accurately. It is entirely up to the Lord Advocate, as master of the instance, to decide who will be prosecuted. He can give anyone immunity from prosecution at any time. Even when someone is convicted of a criminal offence on indictment, the Lord Advocate decides whether to move for sentence. Indeed, even if the person in question is found guilty, a prosecutor must still make a motion for sentence. The Lord Advocate currently has the power, through his directions to the police, to secure co-operation from persons in cases—in fact, that happens regularly. For example, if a criminal case has more than one accused, one of the accused is often used as a witness to provide evidence to convict the others and is not prosecuted.

The bill seeks to go beyond that and to add something new to the current arrangements. Under its provisions, a person might be given immunity from prosecution in return for co-operation but, if they do not co-operate, the prosecution can be revisited. We are concerned that the reasons why such a reform is necessary or required are not terribly clear.

Because this kind of legal reform turns the existing system into something different, it raises a number of problems that the Faculty of Advocates and the Law Society have outlined in their submissions. For example, paragraph 129 of the policy memorandum says:

"The Scottish Ministers also believe that placing the prosecutor's common law powers to offer immunity from prosecution in return for co-operation on a statutory basis will facilitate greater use of these capabilities."

Section 88(1) says:

"A prosecutor, if of the opinion that for the purposes of the investigation or prosecution of any offence it is appropriate to give any person immunity from prosecution, may, in accordance with subsection (11), give the person a written notice under this section".

I am unclear whether that means that a prosecutor could not give immunity from prosecution apart from in the circumstances provided for in section 88. After all, at the moment, the Lord Advocate has complete power to decide on such matters, and that should remain the situation irrespective of the provisions in the bill. That is simply one problem that might arise if the bill is passed.

Although we feel no particular urgency to reform the law in this area, I should mention what could be done if it is thought that such a need exists. We suggested that the matter be referred to the Scottish Law Commission, but it might be more

sensible to refer the matter to the Sentencing Commission for Scotland, which is considering the whole issue of sentencing. It could describe carefully what the law currently is—that has not been done in the consultation paper—and then identify why it is thought that those arrangements are ineffective. It could also produce proposals that are consistent with, and an improvement on, the existing law but that do not make the existing law more difficult to understand. That is our thinking on the matter.

Carolyn Leckie: That is well argued. Does the Law Society have anything to add?

Gerard Brown: It is quite a complex topic. We could be here all night.

The Deputy Convener: We will not be.

Gerard Brown: We have spent a lot of time discussing this, and Anne Keenan and I have had many meetings on the matter, as has the society's criminal law committee. We would concur with many of Simon Di Rollo's comments. Anne wanted to say a few things about this.

Anne Keenan: Section 88 deals with the immunity provisions. In our written submission, we have raised a number of concerns about pleas that someone can make if they are what is known as a socius criminis—an accomplice. At the moment, it is generally accepted that such people will have immunity for the extent of the matter on which they are called to give evidence. We are not sure where that will sit with the provisions of section 88.

Also, what will happen to what is known as the personal bar of the prosecutor? Currently, if a prosecutor says that they are not going to proceed in a matter and gives an unequivocal statement to that effect, that is generally accepted as a personal bar. It appears that section 88(8) could get round that situation. At the minute, the section is drafted very widely, and I am not sure where it lies with my main concern about the provisions, which is about the plea of oppression. Although the Crown may decide to bring proceedings, ultimately the court has the power to determine whether the Crown is acting oppressively towards the accused. The test for that is whether the prejudice is so grave that it could not be removed by any direction to a jury from a judge or by any other action that a judge could take, as the prosecutor has acted so unfairly that there could never be a fair trial. There are obvious interactions between that and what the European convention on human rights states about self-incrimination, and so on.

A very important case is Mowbray v Crowe 1993 JC 212. I do not want to bore you with too many of the details, but it is a useful case. The Crown interviewed an accused person to determine whether to carry on with the prosecution or give the person a warning. The court made some pertinent comments about the role of the Crown in that case. It said that, in an adversarial system, the prosecutor should be at arm's length from an accused person. In discussions between the Crown and the accused person, the accused person might reveal information about his or her potential defence, which would put the Crown at an unfair advantage in any further proceedings. The court went on to say that, although the Crown may decide not to use any of that information, there is still the perception to be considered, as justice must not only be done, but must be seen to be done. I am not sure where the findings of that case will lie with the provisions of the bill, especially because of the wide way in which section 88(8) has been drafted.

That is one aspect of the immunity provisions. There are other aspects in relation to sections 83 and 84, which deal with a situation in which someone has already pled guilty and is then assisting the Crown. In our written submission, we comment on the drafting of those sections. Under the bill, although the Crown and the offender can enter into an agreement, there will be no requirement on the court to take that into account. The provisions are different from those in section 196 of the Criminal Procedure (Scotland) Act 1995, under which if a person pleads guilty at an early stage, the court is required at least to take account of that, and to give reasons for any departure from that.

Section 87 of the bill deals with the consideration of undisclosed information, which raises its own considerations. Section 87(3) states:

> "Where … a court takes information about assistance into account, it must not disclose the information, the existence of the report containing it or whether the sentence it passes is less than the sentence it would have passed but for the assistance given."

I do not know how the appeal court would deal with appeals on that basis, or indeed how the Parole Board for Scotland would deal with matters if the judge is not to disclose such information.

Simon Di Rollo: Another matter arising from what has been said is that it is not obvious to me whether those who are responsible for sentencing—sheriffs and judges—have offered a view. Perhaps they have done so, in which case the committee will take that into account.

A fundamental principle is that sentencing is a public process. Exceptions to that might be made, but only in extreme circumstances. The provisions militate against sentencing taking place in public.

The Deputy Convener: Given those detailed responses, is it fair to say that the Law Society

and Faculty of Advocates are troubled by the proposals and believe, as you said earlier, Mr Di Rollo, that the matter should be referred to the Sentencing Commission? Is that also the view of the Law Society?

Anne Keenan: We would certainly want assurances and answers about how the provisions will operate in practice. It would be appropriate to at least have the views of the Sentencing Commission.

Carolyn Leckie: I know that we are running out of time, but I want to follow that up briefly. I am not legally trained, but you have set out a range of complicated matters that are potentially troublesome. What you have said in your submissions and your oral evidence today causes me concern.

On transparency, trade-offs are made and there are costs and benefits. How accountable is the process to society at large? I am a bit concerned about the transparency and accountability of the system as it works just now and I am not really content that the bill will improve that.

The Deputy Convener: Do the witnesses want to comment?

Gerard Brown: No. I think that we have to wait and see.

Simon Di Rollo: At the moment, sentencing is transparent, mainly; the judge must issue a reason for the decision that is made and the process takes place in public. There are proposals in the bill that would reduce that transparency, which should be considered carefully.

The Deputy Convener: That major concern is conveyed. Before we close, do the witnesses want to raise any issues that have not been covered in questioning?

Anne Keenan: Given that I mentioned the Parole Board for Scotland, I should declare an interest. I have been appointed to the board as of today. I make it clear that I am speaking on behalf of the Law Society of Scotland, not the Parole Board for Scotland.

The Deputy Convener: That is duly recorded.

Gerard Brown: We have been appointed to nothing.

The Deputy Convener: That is duly recorded as well. I thank the witnesses for appearing. All members have found the session interesting, challenging and illuminating. We will consider carefully the evidence that you have given.

On behalf of the committee, I welcome the witnesses on our second panel: from the Crown Office and Procurator Fiscal Service, Norman McFadyen, Crown agent and chief executive, and Fiona Scott of the policy group; and John Service, president of the Procurators Fiscal Society. I thank them for coming along to give evidence. We apologise for the late running of the service and we will proceed immediately to questions from committee members.

16:45

Maureen Macmillan: Let us start by considering the Executive's proposals for a police complaints commissioner for Scotland, who will investigate non-criminal complaints against the police. We note that the COPFS will still deal with criminal allegations.

Although the matter is not dealt with in the bill, the Executive's consultation paper contains proposals to strengthen the role of the procurator fiscal in relation to criminal allegations against the police. What is your role in that area? I met my area procurator fiscal yesterday and it seems that the police in the region that I represent are in the habit of submitting lots of complaints, whether they are of a criminal nature or not, to the Procurator Fiscal Service so that the police can say that somebody independent has considered them. Does that happen in other parts of the country?

Norman McFadyen (Crown Office and Procurator Fiscal Service): Yes and it is not necessarily a bad thing. The purpose of the procurator fiscal—in particular, the area procurator fiscal—dealing with complaints against the police is to deal with complaints inferring criminality. Whether the alleged conduct of a police officer amounts to an offence or is more like incivility towards a suspect, witness or whoever is often a grey area. If there is doubt about whether the allegations could amount to an offence, it is not unreasonable to ask the area procurator fiscal to consider them. However, that consideration can and is given quickly. If it is clear that there is no basis for treating the matter as a criminal complaint, the area fiscal will inform the deputy chief constable accordingly and, under the present procedure, the matter will proceed as a non-criminal complaint. The requirement is for all complaints inferring criminality to be referred to the area procurator fiscal. That will remain the position once the commissioner is established.

Maureen Macmillan: Therefore, even once the commissioner exists, you do not think that it would be a good idea for the commissioner to decide whether complaints should be dealt with by the Procurator Fiscal Service.

Norman McFadyen: The commissioner's responsibility will not extend to complaints inferring criminality. Once he or she is appointed, we will need to have discussions with the commissioner to establish protocols about how best we can

identify the cases that are more appropriate for us and those that are more appropriate for the commissioner, as there will continue to be cases that fall on one or other side of the divide. That will be done in the same way as we have done it in the past with the chief constables and the Association of Chief Police Officers in Scotland.

Maureen Macmillan: How do you envisage that being dealt with? You say that you would have to talk to the commissioner and that something would have to be worked out. Have you any idea what?

Norman McFadyen: We already have an agreed approach with chief constables, which is that deputy chief constables have responsibility for complaints and conduct issues. We have clear, agreed procedures with them in relation to the timeliness of reports. Clearly, the commissioner will be a completely new organisation and the processes will be different, because three organisations will be involved. There will be the police force, which will continue to have certain responsibilities; the prosecution service, which will have the responsibility for criminal complaints; and the new commissioner. We will need to establish what the precise relationship will be; it would be a little arrogant of me to presume what it will be.

Obviously, we will work within a new statutory framework and will make the changes that we have indicated to the way in which we work, which is about giving more profile to fiscals' responsibility. It is not always widely known that there is an independent element, or oversight and involvement, in the investigation of criminal complaints.

Maureen Macmillan: Thank you. Do any of the other witnesses wish to add to that?

Fiona Scott (Crown Office and Procurator Fiscal Service): No.

John Service (Procurators Fiscal Society): No.

Jeremy Purvis: First, I wonder what the panel's comments are on the argument that it might be important for people to have a single point of complaint, regardless of whether the complaint is criminal or procedural, so that complainers have a one-stop shop for complaints. Secondly, I wonder what the panel's views are on the potential clarity of having one review mechanism that could review both criminal procedures and investigations, particularly in situations where no action is taken, so that complainants would have an understanding from a fully independent body, such as the commissioner, which would provide consistency between the oversight of both criminal and non-criminal complaints. Many of our constituents might not make a distinction between a Procurator Fiscal Service investigation and a police investigation. I presume that your investigatory functions would continue to involve the police investigating the police.

Norman McFadyen: No; they would continue to involve the police investigating on our behalf. However, we already make it quite clear to persons making complaints what the responsibilities are. In the majority of cases, we see the complainer; if we do not see them, we are always in contact with them, offering them a meeting. That is the model that we have and on which we are building.

In a previous life, when I was deputy Crown Agent, I had substantial responsibility for dealing with complaints against the police. I was on the board of management of the International Association for Civilian Oversight of Law Enforcement—quite a mouthful—which deals internationally with all manner of issues on the oversight of law enforcement. I remember going to a meeting at which there was a presentation from an Australian regulator. At one stage in his presentation, he said that he would like everyone in the hall who interviewed complainers to put up their hand. I put up mine, but only one other person in the hall put up his. There were independent regulators and oversight mechanisms in many countries, but the regulators did not actually see the persons who made the complaints, establish what their complaint was and deal directly with them. They were providing more of an audit mechanism.

We could establish such an audit mechanism, but we do not take that approach in the investigation of criminal complaints; we have a direct hands-on involvement that is consistent with the role of the Lord Advocate as the independent public prosecutor. I do not think that establishing a separate body to have oversight of that, outside the ordinary responsibility of the Lord Advocate, would be a good idea and I would certainly not be in favour of that.

Jeremy Purvis: Do you have a view or comment on there being a single source to which a complainer can go?

Norman McFadyen: I can see the point there. A complaint could be made initially to us, because we would have a heightened profile. If, in discussion with the commissioner or a deputy chief constable, we took the view that the case was properly for one of the other organisations, we could re-refer it. I appreciate that that might not be as neat as having a single gateway, but we would continually try to achieve with the police and the new commissioner an arrangement that ensured that people were, at the very least, pointed in the right direction or had their complaint received and passed very quickly to the right person.

Jeremy Purvis: Are you saying that you do not think that there would be any harm in a single gateway?

Norman McFadyen: I am saying that under the proposals there would not be a single gateway in the sense of one place where anyone can make a complaint. The reality will be that if a complaint is made to an authority that cannot deal with the complaint, that authority will refer it to the right one. Again, I might be tramping on the new commissioner's toes and how they might wish to establish the procedures.

Jeremy Purvis: There is not a commissioner yet.

Norman McFadyen: No.

Jeremy Purvis: That is why we are scrutinising the bill.

Mr Maxwell: I turn to offensive weapons as covered by the bill. The Procurators Fiscal Society's evidence states:

"We … understand anecdotally from our members that the current maximum sentences are rarely if ever used by Sheriffs."

The proposal is to double the maximum custodial sentence where a person is prosecuted on indictment for possession of a knife in a public place. Given that that is the purpose of those provisions in the bill, and given that statement from the Procurators Fiscal Society, what factors are taken into account when deciding to prosecute a person on indictment rather than under summary procedure?

John Service: I am happy to respond to that because it was part of our submission. I represent the Procurators Fiscal Society and we represent the interests of the majority of legal staff—the front-line service within the fiscal service.

The factors that are taken into account are the normal factors that are taken into account in any decision to prosecute, such as the accused's previous convictions and record and the circumstances in which they are found in possession of the knife—where, when, and what the public dangers were. We made that statement in our evidence because it is pretty rare to have a single charge against an individual of carrying a knife in a public place. It is far more likely that a more serious crime, such as assault or robbery, has been committed. However, there could be cases in which, because of the accused's record, it would be deemed appropriate to prosecute that person on indictment. For example, the case of an accused person who has a previous conviction for murder and was found to be in possession of a knife in a club or pub late at night in the city centre might be the sort of case in which a prosecution on indictment would be more appropriate than dealing with the case as a summary complaint. However, the feedback that we got from our members was that such prosecutions are pretty rare.

Mr Maxwell: For clarity, in the example that you gave, which is not just about possession but about whether the weapon is used in an assault, would both charges be brought or just the more serious charge of assault?

John Service: Generally, the more serious charge would be brought.

Mr Maxwell: There would be no charge for possession.

John Service: There would be a charge for the more serious offence. There are double jeopardy issues if someone is charged with two offences relating to the same set of circumstances. If someone uses a knife to rob a shop or to stab someone in a way that causes serious injury—including attempted murder or murder—we would expect there to be a single charge of, for example, robbery or murder.

Mr Maxwell: In cases in which there is just possession, a prosecution on indictment would be pursued only in the circumstances that you just outlined, which would be those in which the person had a history of some sort. Does the Crown Office agree that that would be the norm?

Norman McFadyen: Yes. As John Service says, it is comparatively unusual for an offensive weapon charge to be the sole charge in an indictment. It usually comes along with something else. However, if there was a very serious analogous record, that would be a completely different situation. The classic example would be a conviction for murder.

Mr Maxwell: That is fairly clear. Thank you.

17:00

The Deputy Convener: If the proposals in the bill are enacted, how often would an offender receive a custodial sentence for such an offence beyond the current maximum of two years?

Norman McFadyen: It is difficult to say. Our responsibility is for prosecuting the cases and it is for the court to make what it will of the circumstances when it comes to sentencing. However, the courts take account of the maximum sentences that are set by the Parliament. In assessing the gravity of an offence, they will look to what the maximum is. They do not immediately jump to the maximum—we know that from other areas of life. In very serious cases, a sentence of up to four years could be imposed. However, one would expect there to be some serious aggravation, which may come from the previous record or the circumstances.

The Deputy Convener: The example that was given in response to Stewart Maxwell's question with regard to previous form was that it does not happen all that often that an offensive weapon charge is the sole charge. If that is the case, will the current maximum of two years often be exceeded if the bill is enacted and there is a new maximum of four?

Norman McFadyen: We have to bear in mind the fact that although weapon charges rarely appear on their own on indictments, they frequently appear with other serious charges on indictments. If Parliament sets the maximum at four years, the courts may well take a more serious view of, say, a street drug dealer who is convicted of street drug dealing offences and who has a flick knife. They may regard that as a much more aggravated offence than they do at present. However, I cannot predict what the courts will do. A court would not be just dealing with the charge of possessing a knife on its own; it could well be dealing with the charge of possessing a knife along with another serious charge.

John Service: I agree. There is public concern about knife crime. When someone is found in possession of a knife as part of a general disturbance but has not been responsible for any particular acts of violence, just being part of that crowd and having a knife in their possession is the sort of factor that a judge would deal with seriously. The increased sentence from two to four years is a useful tool in the fight against knife crime.

The Deputy Convener: Does Fiona Scott agree with that?

Fiona Scott: Yes.

The Deputy Convener: Will the witnesses say whether they know of any proposals to increase the maximum sentence available under summary procedure from the current six months?

Norman McFadyen: That matter is under review in the context of the forthcoming legislation on summary justice reform. Fiona Scott will correct me if I am wrong, but I believe that the intention is to consider the various anomalies that might arise in relation to the maximum sentences for statutory offences.

Fiona Scott: My understanding is that the summary justice reform proposals include reconsideration of the maximum sentence available to a sheriff sitting as a summary judge and, in that context, I understand that consideration will be given to all statutory summary sentences under the new proposed summary maximum.

Carolyn Leckie: I note from the Crown Office's submission that you thought that the provisions that deal with incentives for providing information or evidence

"amounts to the most significant part of the Bill"

and that they would

"provide workable and effective procedures".

Do you still have that view, given the evidence presented by the first panel, for which you were present? It would be helpful if you would pick up some of those points. It is unfair to expect you to remember them all, but it would be useful to complement whatever you are able to say with written submissions in response to some of the points that were made.

What are the strengths and weaknesses of the arrangements under which a person might, in return for co-operation with the prosecution, be offered either immunity from prosecution or the opportunity to plead guilty to reduced charges, or be given a reduced sentence? Can you give us some examples to help us?

Norman McFadyen: I am sure that we can help with that. At the moment, the hands of the prosecutor and the police are very seriously tied when dealing with suspects who could help to complete a criminal investigation and to bring the most serious offenders to justice. I am talking about serious and organised crime.

When discussing the case of Mowbray v Crowe, Anne Keenan made the point that the High Court said that the very fact that the procurator fiscal interviewed a suspect at all about the case meant that she could not be prosecuted. That is a significant part of the problem. At present, a person acquires immunity from prosecution for an offence if the procurator fiscal speaks to them about the case.

If someone appears, on the basis of the evidence, to be a bit player, although significant enough to be worth prosecuting, there is nothing that we can do at present except give them immunity. Once we have given them immunity, we hope that they will co-operate further with us, although they may not. I have seen cases, and I suspect that John Service has, too, in which we anticipated that a person who could have been brought to trial themselves for the offence could provide material assistance in the case against the main player. However, that person went on to renege and to change their story in the witness box. There is nothing that we can do about that because they have immunity from prosecution from the minute that we interview them or from the minute that we call them as a witness in a case, whichever is earlier, and if we do not interview them, we cannot establish what useful evidence they can give.

We are seriously hamstrung in dealing with the middle rankers in serious criminal organisations—the people who can help to achieve the breakthrough in enabling us to bring to book the most serious offenders. At present, we have either to take a very high risk and give people who might have committed serious offences immunity from prosecution or wait until they have been right through the system and convicted and then hope that they will co-operate with us, by which time, the major offenders might already have disappeared; indeed, they may be committing more serious offences.

Therefore, we regard this package of measures as essential in enabling the police and the prosecution service to deal effectively with serious and organised crime. If we did not have a package of measures such as this, there would be a serious risk of Scotland becoming a safe haven for serious and organised crime.

John Service probably has concrete examples, too.

Carolyn Leckie: John Service raised concerns about the application of the measures.

John Service: We raised some concerns but, overall, the society's view is that they are more open and clear cut than what preceded them.

The witnesses from the Law Society were asked for examples. In my day job, I am a procurator fiscal for Dumfries and Kirkcudbright. As representatives from every part of Scotland, members will know that class A and hard drugs affect all parts of the country.

Dumfries and Kirkcudbright has its own drugs problem but, more significantly as far as these proposals are concerned, our area is one of the main thoroughfares for the delivery of drugs from the north-west of England to Glasgow and beyond or for drugs coming from, or going to, Ireland. A large number of couriers have been reported to us after being stopped on the M74 or the A75 with van loads, car loads and lorry loads of drugs—sometimes millions of pounds-worth, although usually less. We find that the vast majority of those couriers are small fry. They are not the main operators. They deliver drugs for others for a variety of reasons—perhaps they have been intimidated into doing so or they owe money to bigger dealers. They are then sent to take the cocaine or heroin from Merseyside to Glasgow or elsewhere.

We see the provisions allowing us to get evidence from couriers against the bigger operators in the drugs scene. Our members try to investigate cases and prepare them for court and to get at the heart of the drugs scene—the major operators—but it is difficult to do that, because often the major operators are at arm's length from the supply. The individuals who can give good evidence against the major operators are the middle men—the couriers. The provisions will assist in getting evidence from those individuals. There is a variety of proposals, but the combination of the different arrangements would assist in getting evidence against the major dealers.

Carolyn Leckie: I detect that there is disagreement in assessing the scale of the problem that the provisions attempt to address. Putting that disagreement aside, a number of concerns have been raised about the knock-on effects in other areas of law. The opinions that have been expressed are quite divergent. Is it possible to reconcile them? Do the witnesses recognise that there might be practical difficulties in implementing the measures in the bill?

Norman McFadyen: I take it that you are referring to the views that have been expressed on behalf of the Law Society and the Faculty of Advocates?

Carolyn Leckie: Yes.

Norman McFadyen: To an extent, the answer is yes. The Law Society raised in its written evidence the issue of the circumstances in which new hearings would be fixed for sentencing and whether the accused would be legally represented. I imagine that those matters could be dealt with by rules of court, because that is how provisions with regard to hearings are usually established. An accused could not be sentenced without being entitled to legal representation—that is an absolute entitlement. I am sure that some aspects can readily be dealt with.

As I understood it, the point that was being made today was that the existing common-law provision was good enough and that nothing else was required. My position is that the existing common-law provision is not good enough. It is not apt to deal with modern serious and organised crime. I have been a prosecutor since 1978, and we have always had difficult cases in which we have not been able to make the leap because of the limits on interviewing and using persons who are suspects or accused. That has always been a problem—it is not a completely new problem—and we simply had to live with it. However, it is much more difficult to live with it given the level of organisation in serious crime that there is now. Twenty or 30 years ago, we did not have organised crime in the United Kingdom in the way that we do now. We had the famous underworld figures of Glasgow, but they were not in the same league as people who are involved in serious and organised crime now. The world is much more dangerous.

Carolyn Leckie: I am struggling to understand. The first panel made the provisions seem like a dog's breakfast. Your statement that they are "workable and effective" is far removed from the first panel's opinion. Are you saying that you are content with the bill as it stands and that you do not anticipate any problems?

Norman McFadyen: It is basically workable, but I am not a parliamentary draftsman. It may well be that some of the detail is capable of improvement. It is the general package that I think is necessary.

To be fair to the earlier witnesses, I did not know that they were going into go into detail on the provisions. Some concerns were raised in the written evidence, but I think that they can be dealt with. The question is whether we should depart from the existing rules on what Anne Keenan described as the socius criminis. At the moment, if the socius criminis is called as a witness in a case, they have complete immunity from prosecution. I do not think that that is sustainable.

17:15

The Deputy Convener: As Carolyn Leckie said, we have heard two different views from the two panels, but we will return to the matter.

Jeremy Purvis: I seek clarification on two points. We heard an eloquent example of a case in which the provisions could be used, but how many cases per annum are we talking about?

Norman McFadyen: I suspect that there are a handful of cases in which things go badly wrong because we do not have the proposed facility, although there might be more cases that we do not know about. All prosecutors have experienced such cases. I remember a case many years ago in which we anticipated that someone who had been an accused in a murder trial would give evidence implicating the two co-accused, but he changed his mind in the witness box. That was the end of the case and nothing could be done with him.

What is uncertain is the number of new cases we will be able to build against people whom we cannot indict at present. We will target the facility on the most serious cases because its use is not straightforward; it is a complex procedure, and it will not be needed or used in routine cases.

Jeremy Purvis: I am trying to get a reasonably accurate picture in my mind. You mentioned a case that took place years ago, when, as you said, there was not the serious organised crime that we have today. Did I hear you say that, without the provisions, Scotland will become a safe haven for serious and organised crime?

Norman McFadyen: There is a risk of that. If other countries establish procedures that enable serious criminals to be targeted but we do not, it will be obvious to serious criminals that they are at a lower risk if they base their operations in Scotland. Serious and organised crime is a business nowadays and criminals do risk assessments—they are probably much better at risk assessment than I am.

Jeremy Purvis: You said that, at present, things go wrong in a handful of cases but that there is uncertainty about how many new cases could be brought.

Norman McFadyen: Yes. We did our best to estimate the number of additional cases for the financial memorandum. There could be five, 10 or 15 cases per year, but the number is difficult to estimate because we have to take into account the new arrangements in the investigation of serious and organised crime. With the establishment on a statutory basis of what is currently the Scottish Drug Enforcement Agency and the establishment of the serious organised crime agency in the rest of the United Kingdom, investigation of serious and organised crime by the police and other agencies will be much more focused. The bill's provisions on immunity from prosecution will be useful in such targeted, intelligence-led investigations. However, they are for use at the top end, and at the moment there are not vast numbers of top-end cases.

Jeremy Purvis: The SDEA will not be able to enter into early discussions on the new power with informants or with those whom it is investigating—that would not be appropriate. The power will be used at a much later stage, after the SDEA has passed cases to you. Is that correct?

Norman McFadyen: The power to enter into these arrangements rests with the prosecutor, but there may be cases in which it is possible for the relevant SDEA agent or police officer to explore the possibility of the person being interested in such an arrangement.

Jeremy Purvis: How transparent is that?

Norman McFadyen: That is not transparent; that is just someone having a conversation about something that might be possible. It does not get to being possible until it is considered by the prosecutor.

At the moment, if we grant immunity we are, to some extent, buying a pig in a poke. Under the new system, if we grant immunity we are still offering quite a lot if the person delivers. There has to be preliminary exploration with the suspect or accused—call him what you will—about what he can deliver and that preliminary discussion may be conducted by the police. However, unless and until we enter into a formal arrangement with the suspect or accused, there is no arrangement or immunity—he is subject to prosecution.

The Deputy Convener: I will allow a brief supplementary question from Carolyn Leckie.

Carolyn Leckie: I want to press Norman McFadyen on that. I have to confess that I am really confused now. The incentive is the immunity. Currently, people can be guaranteed immunity when they come into contact with the Crown Office: that is the incentive. You are asserting that the new arrangements, which will allow you to revisit the granting of that immunity and re-try them, will get more people to come forward to give evidence. I really do not understand how that will work. Surely, the new arrangements will reduce the number of people who are prepared to give evidence, as they will think that they will be prosecuted.

Norman McFadyen: No. They will not be prosecuted unless they breach the agreement that they reach.

Carolyn Leckie: How will that increase the numbers?

The Deputy Convener: Let Mr McFadyen respond.

Norman McFadyen: The number of people concerned will increase. As I keep saying, it is a package of provisions. The provisions in the bill will facilitate those who give evidence getting benefits such as discounted sentences and will enable the court to look more readily—indeed, to look at all—at confidential information about the assistance that those involved have been able to give. There will be inducements for them; they will not be doing it for nothing. In some cases, they will do it to get immunity; in other cases, they will do it in the hope of getting a discounted sentence. There are various different incentives that may be used in relation to different parts of the process.

At the moment, we are cautious about granting immunity because people may renege. We may grant immunity more often in the future, in which case it will be in people's interest to come forward, provided that they fulfil their part of the deal.

The Deputy Convener: On behalf of the committee, I thank our second panel of witnesses for coming along. It has been very interesting. We have taken careful note of what you have said.

We now move into private session.

17:23

Meeting continued in private until 17:28.

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