JUSTICE AND HOME AFFAIRS COMMITTEE

Tuesday 30 May 2000
(*Morning*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
20th Meeting 2000, Session 1

CONVENER

*Roseanna Cunningham (Perth) (SNP)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Phil Gallie (South of Scotland) (Con)
*Christine Grahame (South of Scotland) (SNP)
*Mrs Lyndsay McIntosh (Central Scotland) (Con)
*Kate MacLean (Dundee West) (Lab)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Pauline McNeill (Glasgow Kelvin) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Euan Robson (Roxburgh and Berwickshire) (LD)

*attended

WITNESSES

Sandy Brindley (Scottish Rape Crisis Network)
Jamie Gilmour
Anne Keenan (Law Society of Scotland)
Michael McSherry (Law Society of Scotland)
Joseph Platt (Law Society of Scotland)
Sheriff R J D Scott (Sheriffs Association)
Sheriff Wilkinson (Sheriffs Association)

CLERK TEAM LEADER

Andrew Mylne

ACTING SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Fiona Groves

LOCATION

The Hub

Scottish Parliament

Justice and Home Affairs Committee

Tuesday 30 May 2000

(*Morning*)

[THE CONVENER *opened the meeting at 09:45*]

The Convener (Roseanna Cunningham): I call the meeting to order. One or two members have still to arrive, but we are quorate, so we will get started and try to keep the meeting on time—in so far as that is possible.

I ask the committee to agree to meet in private at our next meeting on 7 June, to consider a draft stage 1 report on the Bail, Judicial Appointments etc (Scotland) Bill, as is our normal practice for draft reports.

Members *indicated agreement.*

The Convener: The clerk has reminded me that I should say something about the Parliamentary Bureau meeting last Tuesday. There was a bit of a mix-up with diaries, and I was not aware that I was meant to be at the meeting, so I was called there at the last minute. The bureau was discussing the timetabling for the Abolition of Poindings and Warrant Sales Bill at stage 2 and for the Leasehold Casualties (Scotland) Bill, the next member's bill, which has been referred to us as lead committee.

I indicated to the bureau that while we accepted that we had to take the Leasehold Casualties (Scotland) Bill, I was perhaps a little less happy about taking the Abolition of Poindings and Warrant Sales Bill at stage 2, because I thought that other committees could have taken it. For stage 1 of the Leasehold Casualties (Scotland) Bill—as with stage 2 of the Abolition of Poindings and Warrant Sales Bill—I indicated that there is little point in the bureau expecting us to have achieved anything until at least the end of September.

I have negotiated the end of October for the Leasehold Casualties (Scotland) Bill at stage 1. Basically, I have said that, with the amount of work that we are doing, there is not much point in pretending that we can go any faster than that. That is not to say that we will not try—if gaps become available—to pull things forward, but I have tried to negotiate the longest possible time for us for both the bills.

We have received no apologies for absence, so I will go straight to agenda item 1, which is a decision to take another item in private. In this case, it is item 5, which concerns the revised draft report on the budget process. Usually, I would have asked for agreement on that at our previous meeting, but I forgot. Do we agree to take item 5 in private, as is our usual practice for such reports?

Members *indicated agreement.*

Bail, Judicial Appointments etc (Scotland) Bill: Stage 1

The Convener: Item 2 is further evidence on the Bail, Judicial Appointments etc (Scotland) Bill. I hope that everyone has a copy of the bill, which was introduced to the Scottish Parliament last Thursday and formally referred to us on the same day.

We are quite far down the line in dealing with the bill. All the paperwork for the bill is now available in the document supply centre, for those who have not yet picked it up. I understand that there are only very minor differences—if any—between the draft bill that we have been working from and the one that is now before us. Qualitatively, it does not make much difference, but the bill has now been introduced formally.

I welcome Jamie Gilmour to the committee. He is a solicitor and former temporary sheriff who has views on the situation regarding temporary and part-time sheriffs. Mr Gilmour, would you like to take a couple of minutes to make some introductory comments, before we proceed to questions?

Jamie Gilmour: I trust that committee members have had an opportunity to read the memorandum that I prepared for their benefit. It might be appropriate for me to spend approximately five minutes making a few observations on it.

Phil Gallie (South of Scotland) (Con): We have not had an opportunity to read the memorandum, because we received it only this morning.

The Convener: Because of the holiday weekend, there have been no mail deliveries.

Jamie Gilmour: It will make some useful bedtime reading.

I make my observations against the background of having examined in some depth both the opinions of the judges in the Starrs and Chalmers case relating to the use of temporary sheriffs, and Clancy v Caird, which dealt with the question of the independence of the temporary judge.

I would like first to draw attention to section 6 of the bill, which gives Scottish ministers the power to appoint part-time sheriffs. Significantly, there is no reference to the reason for their appointment, unlike the provision in the Sheriff Courts (Scotland) Act 1971 for the appointment of temporary sheriffs to cover for illness, absence or sudden increase in business. I note that when the Deputy Minister for Justice addressed the committee on 22 May, he indicated that the appointment of part-time sheriffs was sought to cover for annual leave, sick leave and what he described as "other business". However, I think that it was made clear—[*Interruption.*]

The Convener: Would you hold on a second, Mr Gilmour? There is a buzzing noise; someone's mobile phone is switched on. Will members switch off their mobile phones, as they are interfering with the sound system? That is it—who was the culprit? It was Kate MacLean.

Pauline McNeill (Glasgow Kelvin) (Lab): The microphones do not seem to be picking everything up. I am having difficulty hearing.

The Convener: Mr Gilmour, would you pull your microphone forward a wee bit? Thank you.

Jamie Gilmour: In the Starrs and Chalmers case, Lord Reed described the appointment of temporary sheriffs to supplement the work of permanent sheriffs as "a constitutional innovation". In the more recent case of Clancy v Caird, Lord Coulsfield distinguished proper temporary sheriffs from what he described as "improper temporary appointments", covering a failure on the part of the Executive to provide for proper staffing of a full-time, permanent court. It appears to me constitutionally fundamental that authority for part-time appointments should be given to cover only for illness, absence and sudden pressure of business.

Section 6 also proposes to introduce a new section 11B to the 1971 act that would allow for the appointment of part-time sheriffs for five years, with the power to reappoint; in other words, fixed-term contracts that are renewable. My memorandum makes particular reference to observations made by both the Lord Justice-Clerk and Lord Reed in the Starrs and Chalmers case. I suspect that the Scottish Executive is proposing five-year terms that are renewable, taking comfort in the decision in Clancy v Caird that the temporary judge holding a three-year appointment was an independent and impartial tribunal. However, I would like to point out that the position of the temporary judge is radically different from that of the temporary sheriff.

The 1990 statute conferring power on the Secretary of State for Scotland to appoint temporary judges provides for the Lord President to be consulted, contains no reference to reappointment or to the express term of appointment and, significantly, stipulates that the Lord President should direct when a temporary judge will sit. In addition, the Lord President controls the use made of the temporary judge and has laid down guidelines to the effect that temporary judges will not sit in cases likely to involve the Secretary of State for Scotland, Scottish ministers or the Lord Advocate. The fact that the part-time shrieval appointment might be

regarded as probationary to a full-time appointment, that reappointment is to be expected and that the part-time sheriff would, in effect, be on trial makes it arguable that the impartial observer would take the view that a part-time sheriff might be influenced, even unconsciously, when considering cases involving the Executive or a public interest. Lord Sutherland has quite specific views on that, in his opinion on Clancy v Caird.

In practical terms, it is inevitable that part-time sheriffs will be watched during their initial period of office, to assess their form or performance. It is not well known, but files were kept by the Scottish Executive on all temporary sheriffs, and I have no reason to doubt that reference was made to those files when permanent appointments and renewals of commissions were considered. Under the circumstances, I strongly recommend that part-time sheriffs be appointed on a permanent basis. That would present no practical problems, as part-time sheriffs would be engaged only as and when required. Appointment on a non-permanent basis would beg the question why the appointment is not permanent.

On the matter of security of tenure and guarantee against outside pressures, the bill proposes a new section 11C to the 1971 act, which will introduce a brand new procedure for the removal or suspension of a part-time sheriff. That is not the same as the procedure for the removal of a permanent sheriff. The decision or order will be made by a quasi-judicial tribunal, not by a judicial tribunal followed by a ministerial order that is subject to annulment. A quasi-judicial body will be in a position to remove a judicial body in circumstances in which a part-time sheriff has the same obligations and responsibilities as a permanent sheriff.

On the issue of non-allocation of work, section 6 introduces new section 11A(7) to the 1971 act, placing on sheriffs principal a duty to

"have regard to the desirability of securing that every part-time sheriff is given the opportunity of sitting on not fewer than 20 nor more than 100 days in each successive period of 12 months".

It is a pity that there has been no prior consultation on the provisions in the bill, including that one. I have some difficulty in coming to terms with the practicalities of that provision and what it means. The provision does not mean that part-time sheriffs will be obliged to sit for 20 days a year, and it does not mean that a part-time sheriff can sit only 100 days a year. Nevertheless, that was the understanding of the Deputy Minister for Justice when he spoke to the committee on 22 May.

I have been able to speak to one of the sheriffs principal, to gain an insight into the way in which he considers that provision would operate. He said that he would determine his shrieval requirements for the year, and if that meant a shortfall of one and a half sheriffs in the year—which is the equivalent of 330 days—he would advise the Scottish Executive justice department accordingly, so that it could be worked out how many part-time sheriffs might be needed. It would then be necessary to correlate the number of appointments with the volume of work. However, the committee should recognise that it is not sheriffs principal who will assign part-time sheriffs to courts, but the booking unit of the Scottish Executive justice department.

Requests for help will be received from sheriff clerks nationwide. Sometimes the clerk does not know who the part-time sheriff will be, and the part-time sheriff may not know what work is to be undertaken on a particular day. Sometimes a part-time sheriff will have an assignment cancelled, and another will take his place. The type of business may also change on the day, to suit the efficiency of the sheriff court. In single sheriff courts, which are prevalent in rural areas, of which I counted some 29 nationwide, the part-time sheriff could deal with all manner of business, from children's referrals to criminal trials, in the same day.

Accordingly, it can be seen that the sheriff principal will not control the use of the part-time sheriff or the business that he undertakes on a daily basis. That is why I have difficulty understanding how the sheriff principal will exercise the new duty. That highlights the difference in the position of a part-time sheriff and of a temporary judge, which I referred to earlier.

10:00

Finally, on the appearance of independence, the bill proposes to introduce section 11B(6), prohibiting a solicitor in practice from sitting in the sheriff court district where he has his main place of business. That provision recognises a long-established convention, but we still have the anomaly of permanent sheriffs being prohibited from practising law, while part-time sheriffs are permitted to do so without any formal safeguards.

At this stage, I do not want to say anything about remuneration and pension beyond what is stated in the memorandum that was issued to members. Members may want to seek clarification of the position from Scottish ministers. I alert the committee to the fact that there is still an application by several temporary sheriffs at industrial tribunal for a ruling on the payment of pension contributions by the Scottish Executive.

The Convener: Thank you.

Christine Grahame (South of Scotland) (SNP): I am trying to get my head round temporary sheriffs, part-time sheriffs, floating permanent sheriffs and ordinary sheriffs. Are you saying that there are problems with part-time sheriffs that are not overcome by the legislation, in that they may be in a sort of probationary role and therefore not fully independent? I took that from your article and the comments that you have just made.

Jamie Gilmour: Yes. That was one of the concerns raised by the judges in the Starrs and Chalmers judgment; I referred to that in the article that I wrote in December. The bill does not address that issue, because the Executive is proposing part-time sheriffs with renewable contracts. If the bill is passed as it is currently drafted, as sure as sparks fly upwards, within three or four weeks that would be tested in the courts. I would hate the Scottish Executive to be put in the embarrassing position of having hurriedly to issue permanent commissions to part-time sheriffs, particularly when that is an issue that could be addressed at this stage.

Christine Grahame: I take it that your position is that part-time sheriffs are not the solution.

Jamie Gilmour: No. Knowing the system, we need the flexibility to deal with illness, holidays or a sudden increase in business. For example, a permanent sheriff could have a jury trial that runs longer than anticipated, and it would be necessary to bring in someone else to deal with the court's other business. A part-time sheriff with a permanent appointment is the ideal solution. There is a need for flexibility in the system.

The Executive should recognise that such part-time appointments need to be made on a permanent basis, so that the part-time sheriff can be instructed or engaged as required. I fail to see any practical reasons for not issuing part-time sheriffs with permanent contracts that would last until they retired at 70 or until they decided to resign. The only reason why the Executive might not be doing that is something that I was told in 1993, when I was seeking long-term commissions for temporary sheriffs. I was told that the solicitors in the Scottish Office did not think that it was a good idea because they ran the risk of having to pay pensions to temporary sheriffs. That was an economic reason.

Christine Grahame: I have read about the Treasury-driven line. In your article, you say:

"There is no alternative but to grasp the nettle of expense and, instead, engage a greater number of 'floating' permanent sheriffs and a small pool of temporary sheriffs".

Jamie Gilmour: That is what has happened. Since 22 November, new permanent sheriffs have been appointed. However, there will still be a need for part-time sheriffs to give the system some flexibility.

Christine Grahame: Are you saying that we should still have temporary sheriffs as well as part-time sheriffs?

Jamie Gilmour: No. Part-time sheriff is just a new name for temporary sheriff. The Executive obviously feels that the name "temporary sheriff" has been so blighted by the Starrs and Chalmers judgment that it wants to give the post a new name.

Christine Grahame: I am obliged for that clarification. It is just that, in your article, you talked about using retired solicitors as temporary sheriffs. However, we are now talking about renaming temporary sheriffs.

Jamie Gilmour: Yes.

Phil Gallie: I have some questions about the article, which we got in time and were able to read. Given the urgency that you ascribe to the requirement for the introduction of part-time sheriffs, do you think that the bill's somewhat controversial inclusion of bail is unfortunate?

Jamie Gilmour: I have to say that I have not studied the proposed bail provisions in the bill.

Phil Gallie: Well, it is an important part of the bill. However, I feel that its inclusion only complicates the issue.

You have expressed some reservations on dismissal procedures. Do you think that such procedures for sheriffs and judges should be aligned?

Jamie Gilmour: The procedure for the removal of a part-time sheriff should be the same as that for the removal of a permanent sheriff. The bill proposes a quasi-judicial body—which, by the way, is chosen by the Executive—for removing a member of the judiciary. That could have European convention on human rights implications.

Phil Gallie: In your article, you mention the reasons for having part-time sheriffs, specifying cover for absence, and express some reservations that such reasons have been excluded from the new section 11A. Is it not the case that, as section 11 of the Sheriff Courts (Scotland) Act 1971 has not been repealed, those conditions remain?

Jamie Gilmour: Any sections that are not specifically repealed will remain.

Phil Gallie: Does that not meet your concerns about including in the bill the reasons for appointing part-time sheriffs?

Jamie Gilmour: As I see it, the Executive is repealing the whole section on the reasons for

appointing temporary sheriffs, such as covering for illness or absence or avoiding a delay in administration. The Scottish ministers now seek a general power of appointment. I think that the reasons for using part-time sheriffs should be specified. Even with the existing section, we reached a stage at which, for economic reasons, the Executive engaged temporary sheriffs to do about 25 per cent of the work in the sheriff court. Although that might have happened partly for reasons of flexibility, it was mostly for economic reasons, which is wrong. Running the whole Scottish justice system on the cheap undermines it.

Phil Gallie: That has been a long-running argument. You have obviously put a lot of thought into this article. Did you envisage this situation arising with the incorporation of ECHR, or did it hit you out of the blue?

Jamie Gilmour: No. A year before the Starrs and Chalmers judgment, the Scottish Office was warned that it would be tested.

Phil Gallie: Thanks very much—that is a very interesting answer.

The bill sets a limit of 60 part-time sheriffs. Given that, as your article suggests, we had about 130 temporary sheriffs, do you think that a limit of 60 is wise? With the limitation of 60, should a set number be applied to the number of full-time sheriffs in position?

Jamie Gilmour: The difficulty, Mr Gallie, is that there could be 60 part-time sheriffs but many of them might not do a great many days and others might do considerably more days. What will happen in practice is that, initially, the Executive might appoint 20 to see how they cope with the work load. It may be that 20 sheriffs can each do, on average, 50 days, which may cover it.

It is a matter of striking a balance between doing what is needed to avoid delays by shoring up the system with part-time help and appointing more permanent sheriffs.

Phil Gallie: I can understand a bottom limit on the amount of time an individual spends on a bench because a level of expertise, knowledge and experience must be built up, but why is there an upper limit of 100 days? Might not that give us problems if a trial were extended?

Jamie Gilmour: I do not think that the Executive should be hamstrung with a specific number of days that a part-time sheriff can sit. The Bail, Judicial Appointments etc (Scotland) Bill does not say that—it does not say that a part-time sheriff can sit for only 100 days. The nebulous provision in new section 11A(7) puts the doubtful duty on the sheriffs principal to have "regard to the desirability" of seeing that a part-time sheriff sits a minimum of 20 days and not more than a 100. That is no more than a general guideline, but it is not even a guideline that is under the control of the sheriffs principal. It is for the Executive to decide who it engages.

That provision was introduced to cater for the criticism in the Starrs and Chalmers judgment about so-called sidelining, which has happened in the past. As the committee will appreciate, some temporary sheriffs were more competent than others, so some tended to be engaged rather more than the others. In the same way, there were some who did not do their 20 days. In the bad old days, at the end of the year, the Executive used to write round the people who had not done the 20 days to ask them why. If they did not do 20 days, it would consider whether it was going to renew their commissions. That has gone out of the window now, because the part-time sheriff could not be seen to be under any external pressure to do any number of days—whether it be less than 20 or more than 100.

Phil Gallie: I stand corrected on that. The bill does say "desirability of securing".

Jamie Gilmour: It is not a provision at all. It has been put in to try to cope with sidelining, but the use of the part-time sheriff will not be under the control of the sheriffs principal—it will be under the control of the Executive. Hence I go back to my original point that it is essential that part-time sheriffs are appointed on a permanent basis. If they are on renewable contracts, that will be challenged in the European Court of Human Rights.

Maureen Macmillan (Highlands and Islands) (Lab): Mr Gallie has asked several of the questions that I wanted to ask about the minimum and maximum number of days.

I have no problem with the idea of permanent part-time sheriffs—that is something that someone with a teaching background is all too familiar with—but they should have a contract, perhaps with a minimum number of days, and they should be paid for those days. That would give them a feeling of independence.

You mentioned rural courts, I did not understand what the problem would be with rural courts.

Jamie Gilmour: Rural courts are the courts where there is effectively a single sheriff. It is not as if there are several sheriffs in the court and business is allocated on the basis that one court is doing civil work, another is doing criminal work and another is doing children's referrals. In rural courts where only one sheriff is sitting, the sheriff will normally deal with all the business for that day.

Maureen Macmillan: Why is that a problem for temporary or part-time sheriffs?

Jamie Gilmour: It is not a problem; I was pointing out a distinction. The Executive seems to be taking comfort from the position of temporary judges. A temporary judge is held to be an independent and impartial tribunal. In the past, temporary judges have been appointed for varying periods. Temporary Judge Coutts had been appointed for three years, but there is no statutory requirement for the period of any appointment. The fundamental distinction between the temporary judge and the temporary sheriff is that the work of the temporary judge is under the control of the Lord President, whereas the work of the temporary sheriff is under the control of the Scottish Executive justice department.

10:15

The Convener: You referred to a lack of consultation. A vague passage in paragraph 38 of the policy memorandum says:

"Ministers have consulted representatives of the Scottish Judiciary regarding temporary and part-time sheriffs."

From your role in the Temporary Sheriffs Association, can you tell us for the record what consultation there was with your organisation about the changes?

Jamie Gilmour: There was no consultation whatsoever with the Temporary Sheriffs Association on this bill.

The Convener: None.

Christine Grahame: Can I take it that the Executive will be in real trouble if it proceeds with the use of part-time sheriffs, which you say will be in the hands of the Executive and not the sheriff principal, and that there are problems with the system for the removal or suspension of sheriffs?

Jamie Gilmour: There are two main problems. First, it should be specified in the bill that part-time sheriffs are to be used for illness, absence and sudden pressure of business—and not to supplant the permanent judiciary. Secondly, and even more fundamental, they should be appointed on a permanent basis and not be on fixed-term renewable contracts. The Executive could be riding a tiger if it goes down the route of the bill as it stands.

Christine Grahame: And, if the final decision is the Executive's, there will be problems with suspension and removal.

Jamie Gilmour: If the Executive is intent on continuing on the tribunal basis, the tribunal would have to be a judicial tribunal and not a quasi tribunal. The committee should understand that there would then be a tribunal that had been chosen by the Executive. That is where it all falls down.

The Convener: I think that that exhausts our questions, Mr Gilmour. Thank you very much.

We will now hear from representatives of the Sheriffs Association. Sheriff Wilkinson has been before the Justice and Home Affairs Committee in the past, but I do not think that Sheriff Scott has. Welcome to you both. I believe that you would like to make a brief submission before we move to questions.

Sheriff Wilkinson (Sheriffs Association): It might be useful if I do—I gather from what you said earlier, convener, that members of the committee may not have seen the correspondence that I sent you.

The Convener: It arrived only this morning, I regret to say.

Sheriff Wilkinson: In any event, it might be helpful if I enlarge on that information. I will endeavour to do so briefly.

We welcome the opportunity to give evidence to the committee because we are very concerned that this bill should, if at all possible, pass through Parliament quickly—but in a way, of course, that is compatible with proper scrutiny of its provisions. We are very anxious that the bill should be in place in a satisfactory form as soon as possible. You may be familiar with the reason for that anxiety. At present, the sheriff courts are faced with serious problems. In certain courts in one sheriffdom—Tayside, Central and Fife—it is well recognised that there is a crisis. Business is being delayed for very long periods.

There are also difficulties elsewhere. In general, big courts have been affected less than small ones, but even in Edinburgh we are now fixing summary trial diets and civil business some 20 weeks ahead, against the target figure—which was previously being attained—of 12 weeks. That is leading to a backlog. Certain business has been given priority, but the business that has not been given priority will have to be dealt with sometime; it cannot be put off indefinitely. We believe that the situation will get considerably worse over the months ahead. For that reason, we regard it as urgent that the provisions in chapter 1 of part 2 of the bill—relating to temporary and part-time sheriffs—should pass into law as quickly as possible and be implemented promptly thereafter.

The present situation is having a very bad effect on the public interest in the efficient and expeditious disposal of justice—on which considerable progress had been made over recent years. That progress has now been reversed. It is also have a demoralising effect on court staff and, to some extent, on sheriffs. It is not good for justice that we should live in a system that is constantly subject to pressures that cannot be coped with. I realise that sheriffs and others have

to cope with a certain amount of stress in their professional lives, but stress that results from trying to put a quart into a pint pot—trying to accommodate a volume of work that cannot be accommodated by the resources available—is bad for justice. For those reasons, we are glad to have this opportunity to address the committee and to emphasise the importance that we attach to the prompt implementation of the measures on part-time sheriffs in particular.

It is, however, important not only that the bill should pass into law quickly, but that it should do so in a satisfactory form—in particular, in a form that is secure against challenge. The challenge that is likely to arise is under the European convention on human rights, which was the source of the successful challenge to temporary sheriffs in the case of Starrs and Chalmers. There is no advantage in having this bill on the statute book if the office of part-time sheriff is open to challenge on similar grounds to those advanced successfully against temporary sheriffs in the Starrs and Chalmers case.

Although we have not considered the matter in quite the same terms as Mr Gilmour, we would like to associate ourselves with some of the anxieties that he has expressed. He spoke particularly about section 6, which introduces new section 11C to the Sheriff Courts (Scotland) Act 1971 and which we regard as critical. In that respect, the bill as introduced contains an important difference from the bill as originally drafted—perhaps the only one. The bill as originally drafted was, in our opinion, fatally flawed. It was quite obviously open to challenge under the European convention on human rights. We accept that the amended version represents some improvement. It may have been made partly in response to representations that we made. In our opinion, question about compatibility with the European convention still remains.

The core of the objection in the Starrs and Chalmers case was the fact that temporary sheriffs were not perceived as being independent of the Executive. It is therefore essential that any legislation for the new office of part-time sheriff should ensure that they are perceived as independent of the Executive.

The weakness of new section 11C from that point of view is that it provides for a tribunal to be chosen by the Executive. The amended version is some improvement on the original, in that it provides for a judicial chairperson and for the legal qualification of one of the members, but it remains a body nominated by the Executive; its members may not themselves be independent of the Executive. The judicial chairperson may be seen to be independent, but he or she is also to be selected by the Executive. There is nothing in the bill to secure that the two other members who are nominated are independent of the Executive.

In our view, section 6 still leaves questions about whether, in the result, part-time sheriffs can be regarded as independent of the Executive. Similarly, the provisions for their removal depend on a tribunal that is nominated exclusively by the Executive. There is provision for consultation—but no more—with the Lord President. The proposals leave serious questions about compatibility with the European convention on human rights. We are concerned about compatibility rather than about the intrinsic merits which any such tribunal may or may not have.

The only secure way of achieving compatibility with the convention is to have removal of part-time sheriffs in judicial hands. Our preferred course is that the same procedure should apply to part-time sheriffs as applies to permanent sheriffs, but some other means could be used provided it left the removal of part-time sheriffs essentially in judicial hands.

That appears to have been recognised in England and Wales, where the Lord Chancellor has introduced arrangements whereby all part-time judicial office holders will be removable only with the concurrence of the Lord Chief Justice, and after investigation by a judge appointed by him. In England and Wales, the whole process remains securely in judicial hands. That applies to all part-time office holders, including the equivalent of the proposed part-time sheriffs.

It is interesting that even in the bill the procedure for removing justices in the district court is entirely in judicial hands—in the hands of two sheriffs principal. It seems very odd that part-time sheriffs should be treated differently—not only odd, but open to challenge under the European convention on human rights.

10:30

We recognise that there may be other arguments. Another body of opinion maintains that arrangements of this kind can be reconciled with the European convention on human rights. We are not saying that the case is open and shut; we are saying that this is not an occasion for experiment or for those kinds of risks to be run. We are therefore opposed to the new section 11C.

That is all I want to say on that aspect of the bill. I can enlarge on my comments if that is required, but that is our position.

The Convener: There are likely to be questions on that. Sheriff Scott, is there anything that you would like to add before we begin our questions?

Sheriff R J D Scott (Sheriffs Association): No thank you.

Phil Gallie: Would it be true to say that the sheriffs were happy with the temporary sheriffs system that was in operation prior to 1999?

Sheriff Wilkinson: No, it would not be true to say that. For years we made representations to successive Governments, suggesting that the position of temporary sheriffs was highly unsatisfactory. That dissatisfaction was based partly on the extent of their use. They were almost replacing full-time sheriffs in some areas, which we felt was unacceptable. We made representations about that.

Quite apart from the implications for the European convention on human rights, the situation of temporary sheriffs in the United Kingdom was unsatisfactory. It was not right that someone who held a judicial office was as easily removable as temporary sheriffs, and we repeatedly drew attention to that issue over a long period.

We recognise—although I cannot recollect whether we made distinct representations to the Government about this, I know others did—the vulnerability of temporary sheriffs under the European convention on human rights. From the time of the incorporation of the convention in the Scotland Act 1998 and the proposal of the Human Rights Act 1998, it seemed to us that temporary sheriffs were going to be vulnerable. I am surprised that other people did not recognise that.

The Convener: There have been long-standing and notable critics of the system. Ian Hamilton QC wrote frequently about the perceived difficulties with temporary sheriffs.

Sheriff Wilkinson: We would associate ourselves with that view, and have done so.

Phil Gallie: I shall not try to second guess the European convention on human rights, but I want to pick up on the benefits that I suspect should come from this bill, given the concerns that you expressed about temporary sheriffs prior to 1999. Would you like to highlight some of the benefits of the bill?

Sheriff Wilkinson: The benefit of the bill, to which Mr Gilmour also referred, is to increase the availability of a resource that can be drawn upon when there are difficulties on account of illness or unexpected pressures of business. The system ought to be able to cope with the ordinary pressures of business, but there may be exceptional demands of business, or sheriffs may be required for public duties. A good many of us sit on committees and perform other tasks.

The Convener: You also give evidence to committees.

Sheriff Wilkinson: Sheriff Scott and I are able to be here this morning only, I am afraid, at the cost of business in Edinburgh sheriff court being to some extent disrupted and delayed. Some part-time provision would be useful in coping with that sort of situation. It would also be useful in tackling the backlog, because one could devote a core of part-time sheriffs, if I can put it that way, to deal with cases in which a backlog has built up. In a way, it might be more difficult to employ permanent sheriffs. A core could be used for a time, and when the situation passes there would be no need to employ so many people.

Phil Gallie: There is a limit of 60 part-time sheriffs in the bill. That seems to be in line with your wishes, but there is no reference to the number of full-time sheriffs that would be expected to be in place in addition to those part-time sheriffs. We were to appoint an additional 10 sheriffs from September, but there were second thoughts and another nine or 10 were added.

Sheriff Wilkinson: There is now a total of 19 additional sheriffs.

Phil Gallie: Do you think that a sufficient number of full-time sheriffs are now in place?

Sheriff Wilkinson: Not if we do not have part-time sheriffs. That is the core of our concern.

Phil Gallie: Assuming that there will be 60 part timers, would the present number of sheriffs with those part-time sheriffs meet your aspirations?

Sheriff Wilkinson: That depends on how much those part timers are going to do. Given the number of sitting days for a part-time sheriff, and the number of part-time sheriffs that it is possible to appoint, it would be possible to have sufficient judicial resource to provide what is needed.

Phil Gallie: Later, I would like to ask another batch of questions on bail, but given the urgency of the bill—for all the reasons that have been given—do you envisage in the current circumstances some people escaping justice through being timed out? Do you regret the controversy that has arisen because measures on bail were inserted into an important bill that seeks to address a short-term requirement?

Sheriff Wilkinson: I am not sure that I understand the point. The bail provisions, as we understand them, are required to meet ECHR objections. To that extent, they seem to be needed. I am not sure in what sense you see that as a short-term provision.

Phil Gallie: The short-term need is to get over the shortage of sheriff bench-sitting days. We have to address that immediately. Perhaps a further question on that is whether we could drop section 11C and forget about the dismissal procedure just now, given the controversy that surrounds it, in order to get the part-time sheriff situation sorted out.

Sheriff Wilkinson: That is a point about section 11C, not about bail.

The Convener: Phil is serving notice that he wants to return to bail questions. We will deal with the issues to do with part-time sheriffs now; those who want to return to the bail question will do so. I know that you have indicated that you will answer questions if you can.

Sheriff Wilkinson: We cannot drop section 11C altogether. There has to be some provision for the removal of part-time sheriffs. Our concern is to secure such provision. The simplest way would be to make part-time sheriffs subject to removal by the same procedure as that used for removing permanent sheriffs. There may be other ways, but that is the simplest way.

Maureen Macmillan: I have one point for clarification on section 11C. I take on board your point about subsection (3) that the tribunal should not be appointed by the Scottish ministers, but subsection (2) refers to

"investigation carried out at the request of the Scottish Ministers".

Are you happy with that, or would you rather that the request did not come from the Scottish ministers?

Sheriff Wilkinson: That is unexceptionable. It is not an issue on which we would want to make a particular point. It seems acceptable to us that Scottish ministers should raise questions of this kind. Are you referring to 11C(2)?

Maureen Macmillan: Yes, where it says:

"The tribunal may order the removal from office of a part-time sheriff only if, after investigation carried out at the request of the Scottish Ministers, it finds that the part-time sheriff is unfit for office".

Sheriff Wilkinson: I do not know whether one can exclude Scottish ministers. They have public responsibilities and there may be a public concern that they feel should be addressed, which they should have the right to raise. I confess that we had not considered it, but it may be unsatisfactory that only Scottish ministers can initiate such an investigation.

Sheriff Scott: That highlights the main point, which is that the proposed tribunal does not reach the required degree of independence. If the investigation can be initiated only by Scottish ministers, and if only they can choose the judges—whether lay or professional—on that tribunal, then Scottish ministers are quasi-prosecutors, if you like, for a quasi-judicial tribunal.

The Convener: Would you consider it appropriate for the tribunal to be able to initiate action? The way in which the section is drafted suggests that, if the Scottish ministers decline to carry out any investigation, for whatever reason, the tribunal has no independent remit. A hypothetical situation might be that a minister happens to be married to a sheriff about whom there are complaints and there is no request for an investigation. Is it appropriate that the tribunal should be permitted to initiate its own investigations?

Sheriff Wilkinson: It is not clear whether this has to be a standing tribunal—that is another problem. As I read the bill, it is possible for a tribunal to be set up on an ad hoc basis. It would be unworkable for such a tribunal to introduce an investigation. There are problems about tribunals initiating investigations generally—they become judge in what is, in a sense, their own cause. I can see a case for there being some means by which investigations can be initiated other than by, or in addition to, Scottish ministers, but I would not be altogether happy about the tribunal having the power.

Christine Grahame: I am convinced by what you said with great clarity about section 11C. I hope that the Executive is listening—I am sure that it is.

Mr Gilmour talked about reappointment. He felt that a problem with the five-year period might be lack of independence—a part-time sheriff might feel they were on probation. Do you recognise that problem?

Sheriff Wilkinson: We have not discussed that aspect in great detail, but Clancy v Caird appeared to endorse the view that renewable appointments were acceptable. On the other hand, I accept Mr Gilmour's point that part-time sheriffs will be in a rather different position from that of temporary judges. The critical fault—if it is a fault—is not so much that part-time sheriffs will have renewable commission, but that the extent to which they are deployed is in the hands of the Executive rather than in the hands of the judiciary.

10:45

Christine Grahame: I was coming to that. Mr Gilmour said that the use of part-time sheriffs should be specific. Proposed section 11A(6), under section 6 of the bill, says:

"A part-time sheriff shall be subject to such instructions, arrangements and other provisions as fall to be made under this Act by the sheriff principal of the sheriffdom in which the part-time sheriff is sitting."

Are those instructions and arrangements different from the use of part-time sheriffs?

Sheriff Wilkinson: It is a little difficult to see quite how those provisions will work. It is true that that provision appears to give the sheriff principal some role in the deployment of part-time sheriffs.

It may be that, as the law stands and as will be the case in future, the sheriff principal has, notionally, some negative control. At least, as I read the law—although there may be some controversy on this point—the sheriff principal can refuse to have a particular part-time sheriff allocated to work within his sheriffdom. Of course, if he does that, he may be left with the difficulty of getting anyone. I believe that I am right that, if that power exists, it is seldom used.

Christine Grahame: The words "notionally" and "negative" are not very strong interventions. Would you prefer specific provisions that would give the Executive's power over the use of part-time sheriffs, about which I am not very clear, to sheriffs principal?

Sheriff Wilkinson: We have concentrated our criticisms on section 11C, which we think represents the really vulnerable issue, rather than on section 11A. However, in the light of Mr Gilmour's comments, I recognise that perhaps improvements could be made to section 11A. In fairness, if I may put it that way, to the Executive, it is perhaps difficult to work out a scheme that would cover all Scotland satisfactorily and that would achieve the desired result. It is relatively easy for temporary judges who sit in the High Court and the Court of Session, as only one judge—the Lord President—controls the whole area. It is not so easy to work out a scheme to cover six sheriffdoms.

Christine Grahame: You said, and I hope that I have noted your comment properly, that there are serious problems in sheriff courts and that there is a crisis. I do not think that you are a man who would use those expressions lightly. You then went on to mention the difficulty with available resources. Does that comment relate simply to the removal of temporary sheriffs, or is there more to it?

Sheriff Wilkinson: The problems arise from the removal of temporary sheriffs, who covered more than 6,000 sitting days a year. By my calculation, that figure represents the equivalent of 30 full-time sheriffs. Eleven additional full-time sheriffs have been appointed, and by measuring the situation that way, one can see that we are 11 sheriffs short. Two thirds of the problem has been addressed, in a sense.

Christine Grahame: I am concerned about a point that Mr Gilmour mentioned in his article for, I think, *The Scots Law Times*. He raised the issue of cases that may have become time barred, prosecutions that may have been abandoned and the difficulties caused to witnesses, which one always appreciates. In your view, is there evidence, albeit anecdotal, of such problems in Scotland's criminal justice system because of this situation?

Sheriff Wilkinson: Sheriff Scott may be able to answer that question more fully than I can.

Sheriff Scott: The Scottish Court Service asked its staff to keep a note of cases that had been adjourned for lack of what it called temporary shrieval assistance. Therefore, the SCS could provide the committee with figures based on those returns. Whether those figures would give the entire picture is another question.

What has tended to happen is that, in each sheriffdom, the sheriff principal has made a list of priorities to establish the order in which work should be done. The criminal cases, where there are time bars, particularly for people in custody, are given high priority, as well as, naturally, some children's cases. Other sorts of cases fall further down the list. As there is a state of near crisis every day, that means that the lower priority cases sometimes do not get reached. In civil litigation, cases—ordinary actions for the recovery of debt—are being put down for proof and then have to be put off because there is so much other work to be done. There is an on-going crisis and an accumulating backlog, both of which Sheriff Wilkinson referred to.

Christine Grahame: Would we be able to get some statistics?

Sheriff Scott: You could get some statistics, but I do not know whether they would give the full picture. They could tell you, for example, in how many cases in Edinburgh sheriff court a proof had been put off for the lack of a temporary sheriff—or any other kind of sheriff—to hear the case. However, I do not think that figures are kept on how often that happens to a particular case and for how long the case is put off in total, rather than at a time.

Phil Gallie: During the introductory remarks, you mentioned that for summary cases in Edinburgh the time had gone from a target of 12 weeks to 20 weeks. Is that definitive information? Do not those figures justify the comments made?

Sheriff Scott: We are satisfied that those figures are accurate. The target time of 12 weeks is the time from when the case comes to court to when the date of the trial is set. That is the same for criminal and civil cases. The target is achieved if a date for the trial or proof is set within 12 weeks. At the moment, the target cannot be achieved, because the diary is full. It can take 20 or 21 weeks—the figure creeps up all the time—before a date can be found for the first go at getting the case done. In many cases, that cannot be done and the case has to be put off.

Sheriff Wilkinson: We know that because we are adjourning cases for that length of time as a matter of course. In time, that should be reflected in the statistics.

Phil Gallie: That is the evidence that I sought.

Pauline McNeill: I want to go back to the subject of part-time and temporary sheriffs so that I understand exactly where you think we should be. Are you saying that the way in which part-time sheriffs are appointed and removed should be identical to that for full-time sheriffs and that the only difference should be the number of hours that are worked?

Sheriff Wilkinson: In our view, that would be a way of enacting legislation that would be secure against challenge under the European convention.

Pauline McNeill: You are saying that the job of the part-time sheriff would be to fill the gaps in the system. How would that work in practice? If you looked at the differences between the work of a permanent sheriff and a part-time sheriff, would the only difference be in the number of hours worked in a year?

Sheriff Wilkinson: Temporary sheriffs worked the same working day as a full-time sheriff. The difference was in the number of days that they worked. Temporary sheriffs broadly speaking have been accustomed to doing the same type of work and working the same working day as permanent sheriffs.

Pauline McNeill: Is the idea that part-time sheriffs would be called in at short notice in cases of illness or whatever?

Sheriff Wilkinson: We think that that is how they should be used. Part-time sheriffs could be called upon in cases of illness, emergencies or casual need—for example, when a sheriff has to be absent from duty for some public purpose. That is the proper use of part-time assistance. However, we accept that in the present situation part-time sheriffs might be used fairly extensively to cope with the backlogs that have built up.

Pauline McNeill: Do you agree that the bill would have to include a maximum number of days that part-time sheriffs could sit, or provide for them to sit until the conclusion of a particular piece of business?

Sheriff Wilkinson: There is some difference of opinion among sheriffs about what is right or desirable in respect of a maximum number of days. I am sure that we all recognise the need for a minimum, if only to recruit people of an appropriate calibre and to ensure independence. A maximum number of days would help to preserve independence, because it would guard against a part-time sheriff becoming a substitute full-time sheriff. That happened in some cases under the old system. However, some people think that a maximum number of days would cut off a useful resource.

Pauline McNeill: I hear what you are saying but, if there is no cut-off point, part-time sheriffs would be the same as permanent sheriffs, because they would not be part time.

Sheriff Wilkinson: Many of us would agree with that.

Pauline McNeill: On Phil Gallie's point, do you think that judicial appointments should have been dealt with separately from bail or is it right to contain both in one bill?

Sheriff Wilkinson: We do not have a particular view on that. At one time, we were anxious that action on part-time sheriffs was being held up because of the Executive's desire to deal with it along with other matters. However, now that the bill has been published, we do not have a strong view on whether the provisions should have been separated.

Pauline McNeill: My final question is about your concerns about new section 11C. I understand your point about trying to achieve the maximum independence from the Executive. What would you put in place of subsections (1) and (2)? You are worried that it is the Scottish Executive that orders the investigation into whether a part-time sheriff is fit for office. If not the Executive, who should take that role?

Sheriff Wilkinson: We have made some suggestions on that. Our preferred choice would be that the same provisions would apply to part-time sheriffs as apply to permanent sheriffs under section 12 of the Sheriff Courts (Scotland) Act 1971. However, we understand that there may be reasons why that is not acceptable. The Lord President and the Lord Justice-Clerk may not want that added burden. There is also some concern about the procedures, rather than about the fundamental principle.

In a letter to the justice department, we suggested that a tribunal should include two High Court or Court of Session judges nominated by the Lord President. We would, I think, be quite content with some procedure such as is envisaged in England and Wales, where removal would be with the concurrence of the Lord President of the Court of Session or the Lord Justice General after an investigation carried out by a judge from the Court of Session or the High Court.

Pauline McNeill: Some concern has been expressed by local authorities about the distinction that the bill will make in relation to signing justices. We have had letters telling us that we should find another way around the issue of compatibility so that serving councillors can continue as justices. Have you a view on that?

Sheriff Wilkinson: We do not. I have read some of the discussion of that matter in the

committee. We do not have much relevant experience.

11:00

Scott Barrie (Dunfermline West) (Lab): On the removal of part-time sheriffs, you said that your preferred option would be to have the same procedure as that used for the removal of permanent sheriffs. What is that procedure?

Sheriff Wilkinson: A report saying that the sheriff is unfit is made by the Lord President of the Court of Session and the Lord Justice-Clerk after they have carried out an investigation. The First Minister would have to make the relevant order, but he can do so only after he has seen that report.

Scott Barrie: Why could that system not be used for part-time sheriffs?

Sheriff Wilkinson: I think that it would be entirely suitable for that purpose.

Scott Barrie: But what would be the argument against using it?

Sheriff Wilkinson: It would add yet another burden to the Lord President of the Court of Session and the Lord Justice-Clerk. There have been problems with the process because the Lord President of the Court of Session may have been consulted about the case before the procedure is embarked on. For that reason, the present Lord President of the Court of Session has avoided becoming involved in the complaints about the fitness for office of sheriffs. I understand that there is a difficulty caused by the fact that the procedures for an investigation are not laid down. There is some anxiety about how the procedures should be defined.

I am not aware of any dissatisfaction about the requirement for the provision to be in judicial hands. Perhaps another judge who is less involved should be substituted for the Lord President of the Court of Session and the Lord Justice-Clerk.

Euan Robson (Roxburgh and Berwickshire) (LD): In the case of Starrs and Chalmers, was the principal concern of the court shrieval independence or security of tenure?

Sheriff Wilkinson: They go together. The requirement of the European convention is for an independent and impartial tribunal. Therefore, the ultimate concern is with independence. The case to which you refer turned on the idea of security of tenure. The independence of the temporary sheriffs was held to be undermined by the fact that the Executive could decide whether they remained in their office. The two issues are critically related in that way.

Euan Robson: If the temporary sheriffs had been at the mercy—as you put it—of their colleagues, or of a body other than the Executive, would there have been a similar problem?

Sheriff Wilkinson: That must depend on who the other body was. If temporary sheriffs were at the mercy—to use the phrase that I perhaps inadvisedly used—of other judges, the same difficulty would not be involved. Indeed, under section 12 of the 1971 act, on the removal of permanent sheriffs, the matter was in the hands of two senior judges. In a fairly recent House of Lords case, that was commented on as being a particularly strong feature of those provisions. It was said in that case that the two senior judges might be considered the persons best qualified to assess the sheriff's fitness and to recognise the importance of judicial independence, and were thus the bulwark standing between the sheriff and any undue interference by the Executive.

Euan Robson: In your view, the Executive may have got the balance wrong in the bill by addressing issues such as security of tenure and ease of dismissal, but not relating them to independence.

Sheriff Wilkinson: Yes.

Michael Matheson (Central Scotland) (SNP): I want to clarify a point that you made in response to Pauline McNeill's questions. There seem to be both short-term and long-term aims for part-time sheriffs. My concern is that the short-term aim of addressing the backlog that has built up could, in the long run, result in the same problem that we had with temporary sheriffs, in that part-time sheriffs will become part of the system and be expected to shore things up. Are you concerned that such a situation could develop under the provisions of the bill?

Sheriff Wilkinson: There is a danger that that will happen. The provisions about the maximum number of part-time sheriffs are meant to address that concern, but the number can be varied by order. The provisions about the number of days—in particular the maximum number of days—on which part-time sheriffs can sit are also intended to address that problem. Those are somewhat shaky ways of addressing the problem.

Michael Matheson: I understand that the 1971 act, to which Mr Gilmour's article referred, states the purpose for which temporary sheriffs should be appointed. However, section 6 of the bill makes no mention of the purpose for appointing part-time sheriffs. Would including the reasons for appointing part-time sheriffs in section 6 be one way of addressing the issue of part-time sheriffs being misused to shore up the system? Would that be better than dealing with the issue by setting the number of days on which they can sit, or

specifying the number of such sheriffs who can be appointed?

Sheriff Wilkinson: There might be advantage in that. The section would have to be drafted in rather stricter terms than those in section 11 of the 1971 act in relation to temporary sheriffs. It is notorious that that did not achieve the result that you have in mind. Something along those lines might be desirable.

Michael Matheson: I am aware that part of the difficulty could be that there are both short-term and long-term purposes for part-time sheriffs, and that it could be difficult to draft provisions that could be used for the short term, given that in the long term the part-time sheriffs may be wanted to cover sick leave and so on.

Sheriff Wilkinson: I have referred to the short-term purpose, but, if needs be, it may have to be sacrificed. What is important is that we have satisfactory provision in the long term.

Maureen Macmillan: Can part-time sheriffs be appointed full-time sheriffs, in due course? Does that happen?

Sheriff Scott *indicated agreement.*

Maureen Macmillan: Is it possible that time as a part-time sheriff could be seen as a probationary period, and that the independence of part-time sheriffs could be compromised in that way? Can you think of a solution to that? If we stipulated that people who have served as part-time sheriffs cannot become full-time sheriffs, we might have difficulty in attracting people of high calibre who aspire to becoming full-time sheriffs. Does that create a dilemma for us, and can it be resolved?

Sheriff Wilkinson: It creates something of a dilemma. I confess that I have always been uneasy about the notion of probationary sheriffs. The liberty of the public and other considerations affecting their material interest should not be in the hands of people who are being tried out. Probationary appointments are unsatisfactory for that reason. Beyond that, I do not think that I can comment. I hope that part-time sheriffs will not be used on a probationary basis.

Maureen Macmillan: But that is just a hope.

Sheriff Scott: In the Starrs and Chalmers case, the Solicitor General said that to some extent the use of temporary sheriffs afforded an opportunity to see how they made out and to assess their suitability for a permanent appointment. I do not think that we are in a position to take this matter further with you today, much as we would like to. A consultation paper on judicial appointments has been issued, but we have not yet reached a collective view on that. We are working on it at the moment. No doubt the committee will consider it in due course.

The Convener: I think that we have exhausted questions on part-time sheriffs. Before I ask Phil Gallie to address the bail issue, could you say what consultation has taken place with the Sheriffs Association on the proposals contained in the bill? It seems that you have effected one change.

Sheriff Wilkinson: There was no consultation on the terms of the draft bill, although over the past eight or nine months we have had several meetings with the justice department, including the Minister for Justice. At all those meetings, we emphasised the importance of making progress with legislation of this kind and made certain suggestions about what might be done. However, there was no consultation on the draft bill before it was published. We were among the bodies to which the draft bill was circulated, and I responded to it by letter. It may be that the changes to section 11C were influenced in part by that response.

The Convener: Phil Gallie wants to ask some questions about bail. Other committee members may also want to ask about that subject. The sheriffs have agreed to take questions about the bail provisions in the bill, but they will indicate if they consider a question inappropriate for them to answer. I ask committee members to accept their decision.

Phil Gallie: The bill would make it mandatory for sheriffs to reach decisions on bail within 24 hours of an individual appearing before them. Could you outline present practice and say what facilities exist for denying bail initially, then reviewing that decision within a set time scale? How would the bill change current practice?

11:15

Sheriff Wilkinson: In that respect, the bill does not really affect current practice. We are accustomed to making decisions on bail within 24 hours of a person being brought before us and we usually make such decisions in much less time than that. We do not imagine that causing problems with, or making any difference to, existing practice.

Phil Gallie: Why do you think there is a need to incorporate new section 22A into the Criminal Procedure (Scotland) Act 1995?

Sheriff Wilkinson: That might be because there is now an obligation to deal with bail, irrespective of whether there has been an application for it. We have been accustomed to dealing with bail only when it has been applied for. It was usually applied for when that was an option, but it will now be necessary to deal with it.

Phil Gallie: So, it is fair to say that that is puzzling to the sheriffs.

Sheriff Wilkinson: That particular provision does not trouble us.

Phil Gallie: Fair enough. I want to ask about the exceptions that are included. In effect, sections will have to be removed that cover murder and treason, in which sheriffs do not, I presume, currently have discretion to allow bail.

Sheriff Wilkinson: That is right. We do not have to consider application for bail in such cases. The High Court may, however.

Phil Gallie: Why should such provision be included?

Sheriff Wilkinson: The law must meet the requirements of the ECHR. The Executive's understanding on that point is probably right—case law that has been developed under the ECHR requires that that be done. The court before which an arrested person is first brought must have the power to make a decision on the matter, regardless of the seriousness of the crime.

Phil Gallie: I am sure that will cause some concern in the public, but never mind.

Sheriff Wilkinson: We must deal with the ECHR.

Phil Gallie: Yes—we are stuck with that convention.

The Convener: Do not put words in the sheriff's mouth, Phil.

Phil Gallie: I thought that that was part of the art of being on the committee, convener.

Why is it necessary to remove the restriction on appeals? Is that also because of the ECHR ?

Sheriff Wilkinson: The reasons are similar. There are currently some restrictions on appeals. An appeal cannot be made against a refusal of bail at the stage of committal for further examination in solemn proceedings. That means that there is a period—usually of seven days—during which an appeal cannot be taken. That is the main change that is to be made. An appeal can be taken at any time under the new provisions.

Phil Gallie: Will that add to sheriffs' work loads? I would imagine that if it does, it would not be by much.

Sheriff Wilkinson: It will be a minor addition in comparison with the many other additions that we will have and the increase in the range of our work.

Christine Grahame: Do you think that the criteria on which bail may or may not be granted should be specified in the bill?

Sheriff Wilkinson: No. I understand that the committee has heard evidence on that. We are broadly content with the provisions in the section on bail. That is not to say that they are ideal, but we accept the need to bring the law in line with the European convention. We would not want the grounds for granting or refusing bail to be put in under statutory reform. The argument in the Executive's policy document seems cogent and well considered, and we sympathise with it.

Christine Grahame: Do you accept or reject the evidence that we heard that there is an inconsistency in granting bail between sheriffdoms, and from sheriff to sheriff in the same sheriffdom?

Sheriff Wilkinson: I do not have detailed evidence of that, but it does not surprise me that there is inconsistency between sheriffs or from sheriffdom to sheriffdom. A degree of inconsistency is inevitable, because one is dealing with uncertain subject matter and with imponderables. How does one know whether someone is likely to reoffend during bail? One can look at his record, but it is a question of impression and weight.

The same is true of most of the grounds for refusing bail—they deal with imperfect subject matter and with imponderables. It is inevitable that different sheriffs will attach different weight to one consideration compared with another, and their impressions will vary according to the circumstances of each case. Real or perceived inconsistency is therefore perfectly possible.

I do not believe that guidelines or a statutory code would avoid that. One is concerned with weight and with reaction to the particular circumstances of cases. In my opinion, there is no way in which that sort of problem can be addressed by a statutory code or by guidelines. One can help to address it by training, and sheriffs need to be educated about certain changes in our approach to bail that the ECHR will bring about. We have already had an extensive training programme and there will be more training, some of it about bail issues, in September. That will provide some help in overcoming inconsistency—better than could be achieved by guidelines or statute.

The appeal process is also a remedy. It, too, will not achieve perfect consistency. Different judges, in their appellant function, will attach different weight to one consideration or another, or may take different views of the significance of various facts. However, it provides a check against the more serious abuses and inconsistencies. In our opinion, it is really the only check that can be provided. Appeals on bail matters are readily available and will become more widely available under the provisions of the bill.

Christine Grahame: I am not a criminal practitioner. If bail is refused, how quickly can an appeal be lodged to review the decision?

Sheriff Wilkinson: I do not see the far end of that, but I understand that the matter is dealt with within days.

Christine Grahame: I wondered whether there was room for continuing a matter. Twenty-four hours is quite a short time span for a sheriff to gather sufficient data to make a consideration.

Victim Support Scotland gave evidence about the idea of having statements from the lead witness—the alleged victim—when considering bail. I have great concerns about that. You may not be able to comment, but I would be interested in your view on principal witness statements.

Sheriff Wilkinson: One of the difficulties in bail decisions is that one is going on imperfect subject matter and information. Information about risk to the victim and how the victim perceives that risk is one of those imperfect areas, and it would certainly be good to have better information. However, there would be practical problems in having such information available consistently at the stage at which a bail decision has to be made. The primary stage is when the accused person is first brought before the court, usually within 24 hours or so of having been arrested. There would be practical problems in getting the information in that time.

The Convener: Thank you, Sheriff Wilkinson and Sheriff Scott. We are grateful for the time that you have taken this morning, and we hope that your attendance here has not thrown the courts into disarray.

I now ask the witnesses from the Law Society of Scotland to come forward. We are now in serious difficulty with regard to time. There is no doubt that we will have to continue past 12.30, as there are some items on our agenda that must be dealt with today; there is no discretion about that.

Kate MacLean (Dundee West) (Lab): I have to leave at 12.30.

The Convener: If people have to leave, they have to leave, but there are items that must be completed. Standing orders require them to be dealt with. I ask members to try to focus their questions, and witnesses to try to focus their answers.

Do the witnesses wish to take two minutes to make a brief statement? Please try to keep to that time, as we are running badly behind.

Anne Keenan (Law Society of Scotland): With that in mind, I will merely outline the progress the Law Society has made with the bill.

The Law Society welcomes this opportunity to speak to members of the Justice and Home Affairs Committee about the measures they are considering. We have not as yet taken this bill through the society's full committee and council procedure but, with the time scale available, I do not think that that is realistic in any event.

Our comments are therefore of a preliminary nature; further comments may come from the society as the bill progresses and as regulations and draft regulations are made available.

A working party has been formed to consider this matter, comprising members of the society's judicial procedures committee and the criminal law committee. We are mainly considering the principle of the bill as regards how it affects the society, its members and the public.

Rather than taking up further committee time, it is perhaps now for members to direct us to issues of particular concern and we will try to deal with them.

The Convener: At the outset, I ask you to respond to the question that I have asked other witnesses: what level of consultation have you had with the Scottish Executive on this bill?

Anne Keenan: We have had no consultation other than being sent a draft copy of the bill, which was sent to certain members of the society. There has been nothing other than that, as far as I am aware.

Phil Gallie: You have said much about the time scales, Anne—along the same lines as what our convener has said about our tending to overrun on such matters.

When we heard the sheriffs, who gave evidence before you, the word shambles came to mind with respect to this bill. It addresses ECHR issues, but we hear from the sheriffs that in their view it breaches European convention measures. Have you any views on that?

Anne Keenan: We have views on particular aspects of the bill. Mike McSherry and Joe Platt might be able to address particular issues. I am not sure whether Phil Gallie is going to direct us to particular sections. We can perhaps deal with our views on bail at the moment.

Phil Gallie: I was cutting down on my question time. You heard the sheriffs and you have heard about a number of areas where they have specific concerns. It was those areas that I thought you might be able to address.

Anne Keenan: Given what the sheriffs said, we could initially deal with the issue of the temporary and part-time sheriffs.

Joseph Platt (Law Society of Scotland): I am happy to deal with any questions on that, Mr Gallie.

We have three concerns about the bill as introduced. We are concerned that the appointment of part-time sheriffs is to be time limited. We are against that instinctively because it seems to us potentially to undermine the independence of the appointees. Having said that, we fully accept that the decision of the Court of Session in the temporary judges case, which is Clancy v Caird, seems to accept that there is no objection in principle to time limiting the appointment of judges.

11:30

One of the concerns in the Starrs and Chalmers case was that a temporary sheriff might be seen to be compromised because his or her appointment was coming to an end. We do not think that there is much difference, in principle, between a one-year appointment and a five-year appointment. We have considered whether a temporary sheriff in the final year of his or her appointment might be seen to be compromised if he or she were hoping to be reappointed as a part-time sheriff. We have some concerns in those regards. The Court of Session decision in Clancy v Caird set those aside to some extent, but we do not feel that time limiting was fully addressed. The court seemed to accept that since judges in the European Court of Human Rights were on time-limited appointments, it must therefore be all right. We cannot tell whether these appointments will be challenged in the fullness of time. If there is a challenge, it will probably come from a Scots solicitor and a Scots advocate. We have some concerns about time limiting.

Our other concern in relation to appointment is the number of days. I think that Mr Gallie was concerned that the maximum should not be set. We have a concern about there being no maximum. Even 100 days is 20 working weeks.

Phil Gallie: I said that the minimum should be set, but I left the maximum open.

Joseph Platt: The maximum seemed to us to be slightly high in that if someone were depending on shrieval work for 20 working weeks out of his or her working year, it might be seen to be the case that the part-time sheriff would be dependent on that work. That might undermine the perception of his or her independence in seeking reappointment, because it may be very important to the part-time sheriff if the rest of his or her practice is not taking up a great deal of their professional time.

Our other concern in relation to appointment is that new section 11A(2) refers to regulations that we have not seen. That is obviously a concern, because we would want to see what the regulations provide.

As Anne Keenan rightly said, we are at an early stage of our consideration of the bill. I have, I hope, laid out our concerns about new sections 11A and 11B. Sheriff Wilkinson talked about new section 11C, on the removal from office. We, too, have concerns about that. The point was well made by the Sheriffs Association: for there to be seen to be complete independence, the mechanism for removal must be seen to be independent. I come back to my earlier reservation, which is that we have not seen the regulations. If the regulations for the appointment of the tribunal were, for instance, for a standing tribunal, the members of which may not be removed, that might allay some of our concerns. The devil is in the detail and we want to see the regulations.

Another reservation that we have is that the bill seeks to address the ECHR problems that might arise. Part-time sheriffs have human rights and it seems to us that one omission is that there is no right of appeal against removal of a part-time sheriff; that is not envisaged by the bill. I am not sure that there is a right of appeal against removal of permanent sheriffs at the moment. That point may have to be addressed and that problem may have to be faced.

If a sheriff or part-time sheriff were removed, he or she might raise an ECHR point in relation to the mechanism for removal. One would presume that such a sheriff or part-time sheriff might consult a solicitor, and that might be the advice that they received. We therefore have concerns about whether there is going to be provision for appeal against removal. New section 11C(4) refers to regulations, but again we have not seen them. Until we have seen the regulations, our position has to be reserved.

That broadly lays out our reservations. I will be happy to deal with any other questions.

Phil Gallie: One issue that has not been raised is the retirement age of part-time sheriffs. The previous Lord Advocate suggested that 65 should be the cut-off point. The bill sets it at 70—as I understand it is for others. Given that solicitors normally fill the ranks of part-time sheriffs, or will do so in the future, have you any views on the retirement age?

Joseph Platt: It is generally accepted by the Executive and the profession that the retirement age for sheriffs—either full-time or part-time—is likely to be somewhat ahead of the retirement age for members of the general public, as appointment is unlikely to come at a young age. Therefore, for the Executive and society to get value out of an appointment, sheriffs should continue to sit beyond 65, and there is no perceived problem with sheriffs sitting at 70. That age range has been accepted for judges and sheriffs for some time, and it has not posed any serious difficulties.

Phil Gallie: My other points concern bail and the district courts. Would you like me to pursue those now, convener?

The Convener: Address the point on district courts now and we will return to bail at the end of our discussions on part-time sheriffs.

Joseph Platt: Michael McSherry will deal with questions on bail and district courts. I shall confine myself to comments on part-time sheriffs.

Phil Gallie: There is deep concern among members of all parties about how councillors who are appointed as JPs are to be treated, creating a situation in which there will be signing justices only. How should the problems in the district courts be addressed? Can we afford to lose such a block of experienced and knowledgeable JPs?

Michael McSherry (Law Society of Scotland): I have a long involvement with the district courts as I was a stipendiary magistrate in 1980. When the district courts were set up, many justices of the peace did not want to sit in court. That is where the idea of the signing justice came from. They wanted to fulfil their valuable public function but did not want to sit in court. The idea was therefore introduced of appointing someone who could witness forms and grant warrants.

On a more general point, the Law Society of Scotland feels that the work that is undertaken by justices of the peace is very valuable. Some of them are very experienced and able, and recognition must be given to that.

Phil Gallie: Would you look to the Scottish Executive to find a means of ensuring that experienced district or local councillors who are JPs should be allowed to continue in justice-dispensing roles?

Michael McSherry: Some effort should be made to do that, otherwise a vast amount of experience will be lost.

Michael Matheson: I would like to ask broadly the same question that I asked the Sheriffs Association, on the appointment of part-time sheriffs. Temporary sheriffs have been used to shore up the system, which was not their intended purpose. In section 6, no provision is made for the purpose of the appointment of a part-time sheriff—which would be to cover annual leave, sick leave and so on. Should there be such a provision, indicating the reasons for appointing part-time sheriffs?

Joseph Platt: We have not completed our consideration of the bill, but I have some sympathy with your view. In the past, temporary sheriffs were used more than they ought to have been. The Court of Session took the view that temporary judges were being used properly—just to fill in gaps—whereas temporary sheriffs had become part of the system and their days were depended on. However, we have not yet formed a view on whether such a provision, or a restriction on the use of temporary sheriffs, needs to be in the primary legislation.

Michael Matheson: In regard to the amount of time part-time sheriffs are allowed to serve and the number of part-time sheriffs who can be appointed, would it be fair to say that the present provisions do not sufficiently address the concern about the way in which part-time sheriffs could be appointed to shore up the system?

Joseph Platt: Certainly there is scope in the bill for adjusting all the figures. For example, part-time sheriffs could be allowed to sit for more than 100 days. The wording of the section reflects "the desirability" of limiting their sitting days to 100. Although the terms used in the bill might allow the situation to slide back to where it was, that could not happen if the number of part-time sheriffs were limited to 60. There were far more than 60 temporary sheriffs.

Christine Grahame: I will restrict myself to three questions on bail and two questions on the justices. On the matter of bail—

The Convener: Could you ask your questions about the justices first? We will deal with bail separately.

Christine Grahame: Okay. In a paper that he prepared for the District Courts Association, Aidan O'Neill says that the appointment of justices of the peace and councillor justices of the peace

"does not contravene the requirements of independence and impartiality of the judiciary".

The article seems to suggest that setting two kinds of JPs is really using a sledgehammer to crack a walnut. Do you agree with the view that they are sufficiently independent and do not have to depend on the local authority for their income to perform their duties?

Secondly, Aidan O'Neill makes a distinction between the role of JPs and the role of the clerks, which he describes as "difficult". He goes on to say:

"It seems to me that the best policy is one of openness with the advice on the law given by the clerk being made available to the parties as well as to the justices."

What is your view on those two distinctions? Do you think that simply by changing the role of the clerk to allow that advice to be given openly, we do not need to go through the rigmarole of having two kinds of justice?

Michael McSherry: Although, as we indicated at the start, the Law Society has not had a chance to run this through, I tend to agree with Mr O'Neill on that point. The practice of the professional

element—the clerk or assessor—varies throughout Scotland. If advice were given transparently in the same way that a judges charges a jury, I do not think that the justice would have any difficulty in clearing the European hurdle.

The Convener: We will now move on to the issue of bail. Phil Gallie and Christine Grahame have already registered their interest in asking questions. Do any other members want to ask questions on that subject?

Members *indicated disagreement.*

The Convener: Okay. Phil Gallie will go first, and then Christine.

Christine Grahame: The terrible twins again.

Phil Gallie: I will be fairly brief. Sheriff Wilkinson referred to the practicalities of having guidelines on bail. I presume that, with the incorporation of ECHR, bail could not be automatically refused if someone had breached bail. Given that breaching bail shows some disdain for the court's findings, might it be possible to overcome that by charging those individuals with contempt of court?

Michael McSherry: It would not be possible to charge an individual who had breached a bail order with contempt of court. The breaching of a bail order is itself a criminal offence and can be prosecuted separately. Furthermore, the power exists to recall the initial bail order, if necessary.

Phil Gallie: Under the bill and ECHR, would it be possible to close down access to bail for an individual who breached an order?

Michael McSherry: I do not imagine that an unmeritorious candidate for bail will be in any better position before the bill's implementation or after it. The current law and practice in Scotland is such that we can easily comply with European law.

Phil Gallie: Is that based on the discretion of sheriffs?

Michael McSherry: Yes.

Anne Keenan: It might also be worth pointing out that the bill changes the accused's first appearance in custody. As the current provisions that apply when an accused has breached a bail order will still be in force, the accused will then have to make an application for bail. That will not be changed by the bill. It applies only to the first appearance, so there should be no concerns about that.

Christine Grahame: I take it, therefore, that you are not in favour of the incorporation of grounds for refusing or granting bail in the act?

11:45

Michael McSherry: No, we are not. The collected jurisprudence of Europe and Scotland, and the European matters that Sheriff Wilkinson talked about—

Christine Grahame: And you do not think that the guidelines should be publicly available to the defence.

Michael McSherry: The guidelines—and all that I understand by guidelines is the collected law on the matter—are available to the defence.

Christine Grahame: I understood that directions were given to sheriffs. I was unfair, in that I did not ask that of the sheriffs. I see that the sheriffs are shaking their heads, so I will leave that question.

Do you agree that there is a lack of uniformity on bail decisions, but that that is in the nature of the art?

Michael McSherry: Yes, in the same way that some sheriffs impose larger fines than do other sheriffs. It is in the nature of—

Christine Grahame: So it does not concern you.

Michael McSherry: No.

Christine Grahame: If you are refused bail, how long is it until your application for appeal to have bail granted is heard?

Michael McSherry: A matter of days.

Christine Grahame: There is therefore no room in this bill for a continuation for bail. Twenty four hours is quite a short time. Do you see any room for a 24-hour period in which the sheriff can leave bail open? I appreciate that we are talking about somebody's liberty here, but you see no necessity for it.

Michael McSherry: A period of 24 hours would not cause any difficulties.

Christine Grahame: We heard evidence from Victim Support that it would be useful if the principal witness statement was before the sheriff when considering bail. What are your views on that?

Michael McSherry: I agree with Sheriff Wilkinson that the more information is available to a court when reaching a decision, the better, but at the early stages of criminal proceedings the issue is not one of the impact that the crime has had on the victim; you are still operating on the basis that the person who is appearing before the sheriff is innocent.

Christine Grahame: That was my difficulty.

Michael McSherry: The question is whether he gets bail, subject to particular conditions. The issue is one of bail or not.

Christine Grahame: My difficulty was that the statement would be untested. I wanted to hear you say that.

Anne Keenan: We have also discussed among ourselves the fact that there is a vehicle through which witnesses' concerns can be raised—the police report which, if reported properly, will list the concerns of a witness. Procurators fiscal can also raise those concerns and back them up with the statements that they have, so the procurator fiscal could make representations to the court and ask for particular bail conditions, which Michael referred to, if there were concerns.

Christine Grahame: One of the problems that Victim Support had about the evidence that was before the sheriff was that it was not as up-to-date as it ought to be. Can you throw some light on that?

Michael McSherry: There will always be a difficulty, because if you had an up-to-the-minute version from the complainer there would still have to be some method by which the accused could test it.

Christine Grahame: No, I am talking about the police report and what you do have in such situations. How up-to-date is that information?

Michael McSherry: If there is an early arrest after a crime, the information will be up-to-date, but it depends how much time elapses between the crime and the arrest.

Joseph Platt: If the offence occurred the day before the person appeared in court, the report would be up to the day before. The sheriffs probably had in mind the fact that the addition of a statement from the victim possibly would not take us much further and that the information that the victim had given to the police would be relayed to the court by the procurator fiscal at the bail hearing. If there are special conditions attached, such as in a case of domestic violence, the court will be told that. If the court is going to grant bail, it can impose conditions, such as the accused not being allowed to go back to the matrimonial home. Concerns can be dealt with through the bail conditions

Christine Grahame: How old could a police report be?

Michael McSherry: The police report goes by e-mail from the police station to the fiscal's office, so it is very quick. If the arrest has been early—

Christine Grahame: But what happens if it has not?

Michael McSherry: It could be ancient.

Christine Grahame: Is that it? That is the police report.

Michael McSherry: Yes.

Joseph Platt: Perhaps I can deal with one of Mrs Grahame's concerns. Presumably that would happen only when there had been a complaint about an offence, the matter was investigated by the procurator fiscal, the investigation took some time, the conclusion was that there was sufficient evidence to proceed and someone might appear on petition. If that were the case, the time between the event and the appearance on petition would also be substantial. The considerations of urgency that you highlight may well not arise in a case such as that.

Christine Grahame: I am not sure that I understand that. I will have to ponder that.

Joseph Platt: I was not aware of another situation in which the police report would be terribly out of date. The only situation I can envisage is when an offence is reported and there is insufficient evidence to charge a particular person or insufficient evidence at the time of the report, so a lengthy investigation has to take place before someone appears.

Anne Keenan: If there were concern that there would be a problem with the witness or there were fears for the witness's safety, the person might in any event appear from custody, in which case the police report would be recent—from the day before.

The Convener: That concludes the questions for these witnesses. I thank them for bearing with us in spite of the slowness of our deliberations.

Anne Keenan: Thank you.

The Convener: The next witness is Sandy Brindley from Glasgow rape crisis centre. Thank you for coming to see us. Our questions are principally on the proposed changes to bail. Do you want to say anything before we move to questions?

Sandy Brindley (Scottish Rape Crisis Network): We have some brief comments, particularly on the effect of the removal of restrictions of bail on women who have experienced sexual violence.

First, we are concerned about the possible implications of the bill for women's safety. We do not share the confidence of the Deputy Minister for Justice that public safety will not be jeopardised. However, legal opinion seems to be unanimous that it is inevitable that the Criminal Procedure (Scotland) Act 1995 will have to be amended to bring it into line with European human rights legislation. We disagree with previous witnesses: we would like statutory guidelines to be included in

the bill that set out the criteria to be used in determining whether bail should be granted. We agree with the opinions expressed by Professor Gane, who gave evidence to the committee on 15 May.

Secondly, we endorse the concerns expressed by Alison Paterson about the lack of information on bail that is given to witnesses. Often, women are not informed that the accused has been released on bail—women are not aware that men who are accused of rape are routinely released on bail. Given that the accused is likely to be a released for a year while the woman is struggling with the court process, we want the provision of information in the whole criminal justice system to be examined.

The final point that we wanted to make is that because there is such a low conviction rate in rape cases, the provisions and protections offered under the Criminal Procedure (Scotland) Act 1995 apply to only a very tiny minority of women contacting rape crisis centres in Scotland. We believe that there is an urgent need to restore women's confidence in the Scottish criminal justice system.

Phil Gallie: The sheriffs talked about the backlog in the courts and the pushing back of cases. They said that they prioritised, and I am sure that they consider rape victims a priority.

The fact that murder is now being included in automatic consideration for bail almost certainly means that the chance of excluding rape is virtually non-existent. You have identified some of the general public's concerns with bail. Would you have preferred it if bail had been dealt with separately from the issues in this important judicial appointments bill?

Sandy Brindley: Our concern is not necessarily that bail is being dealt with alongside the temporary sheriffs; it is that we would like the bill to provide for statutory guidelines. We do not feel strongly about whether that should be done on its own or in combination with other issues.

Phil Gallie: The point that I am trying to make is that the general public have many concerns over bail. It is an emotive issue. However, the appointment of part-time sheriffs has to be addressed immediately. I am suggesting that more thought should be put into the bail issue. That is why I am asking whether you would have preferred it to be dealt with separately.

Sandy Brindley: I understand your point; it is possible that further consultation would have been useful.

Christine Grahame: I note that you do not accept what the solicitors said—that someone who was not deserving of bail would not be better off under this legislation. You spoke about the lack of information that is given to alleged victims. How would you like the person—who is usually the main victim—to be kept informed?

Sandy Brindley: The Convention of Scottish Local Authorities has already made some good recommendations to ensure that there is a structured system of communication between the woman who has been raped and the criminal justice processes. We would like women to be informed if the accused—

Christine Grahame: Can I stop you there? I prefer to say "the woman who is alleged to have been raped". That is not to detract from what you are saying, but we are considering the pre-trial stage. Where can we see the recommendations that you mentioned?

Sandy Brindley: COSLA has produced guidelines on preparing and implementing a multi-agency strategy on violence against women. There are clear and useful guidelines concerning the police and the provision of information to women. At the moment, that provision is patchy and inconsistent across Scotland. That is of obvious concern and extends beyond issues of bail. For example, women who have been expecting a case to go to trial have not been informed that it is not to proceed and that it has been marked "No proceedings".

Christine Grahame: That is probably true of lots of people who are involved in proceedings, regardless of whether it is a rape case.

Sandy Brindley: Yes, but I think that it can be especially difficult for women who have been raped.

Christine Grahame: Yes, I would not for one minute say that it was not difficult for them, or for any victim of violence.

I wanted to ask about witness statements at the stage of bail, pre-trial. We have heard evidence from Victim Support Scotland on that. What are your views on that evidence?

Sandy Brindley: I do not have enough information on the details of their proposals either to endorse or reject them. I am concerned that a hierarchy of suffering might be created. Women who have been raped can react to that experience in different ways. Some women's way of dealing with it is to carry on as normal and to block it out, because it would be too painful to integrate the experience into their life. If we were to look at victim impact assessments, I would be concerned over who would decide how much a woman had suffered. I know that there are difficulties surrounding the decisions of the Criminal Injuries Compensation Authority about whether child sexual abuse has made enough of an impact on a

woman's life to make her eligible for compensation. I would be concerned if similar thinking were present within our criminal justice system.

Christine Grahame: Would I be right in thinking that you would not want the witness statements?

Sandy Brindley: They would be of limited value and rape crisis centres would not see them as a priority.

12:00

Pauline McNeill: Like Christine Grahame, I was interested in your comments about the victim not being properly informed; you gave an example of a case not proceeding against an accused man. Is it usual for the victim to be informed of the accused's release on bail?

Sandy Brindley: That is certainly not our experience. If a woman stays in a small town, for example, the first that she might know about what is happening is when she is walking down the street and sees the man who raped her. Often, a woman has very little information about the legal process. A woman who makes a complaint of rape assumes that the accused will be imprisoned. It can be startling and upsetting for her to find out in such a way that the accused has been released on bail, because it has not been explained to her that that is the routine procedure for men who are alleged rapists.

Pauline McNeill: I note your comments that, on balance, you are not confident that judges use their discretion and that you would prefer guidelines to be introduced. What, roughly, should be in such guidelines? Would they be in keeping with the ECHR? The convention can cause difficulties, even with drawing up guidelines, as they would have to comply with all ECHR tests.

Sandy Brindley: I understand that it would be a case of putting into statute what exists already in common law on the risk of reoffending and interference with witnesses. The list has been outlined clearly in previous evidence to the committee. The guidelines would consider public safety; our legal advice is that statutory guidelines would not necessarily conflict with the ECHR.

Pauline McNeill: Are you referring to Professor Gane's list?

Sandy Brindley: Yes.

Maureen Macmillan: Pauline McNeill's questions covered more or less the points that I was going to raise. Have you any statistics on how many alleged rapists are released on bail?

Sandy Brindley: I do not have statistics, but I know that releasing men on bail is certainly routine. The procurator fiscal's office in Glasgow has made it clear that it would be unusual for someone who had been accused of a sexual crime not to be released on bail, unless that crime was covered by the provisions of the Criminal Procedure (Scotland) Act 1995.

Maureen Macmillan: I agree with you that there is room for improvement.

The Convener: I have just one question, which perhaps I should have asked all the witnesses—hindsight is a great thing. Given that the bill is designed to bring Scotland into line with ECHR, does your organisation have knowledge or awareness of practice in relation to bail conditions and criteria in other European jurisdictions? Do you have in mind examples of best practice? Are you aware of problems in other European countries? I am curious about that, given that the bill is about ECHR compliance. The presumption is that other jurisdictions may be more compliant than ours.

Sandy Brindley: I do not know of any examples that relate to bail specifically, but strategies have been implemented in different European countries to deal with the issue of access to justice for women who have been raped.

The Convener: Thank you, Sandy. I am sorry that you had to wait such a long time. That concludes our evidence session.

Subordinate Legislation

The Convener: The next item on the agenda is the Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2000 (SSI 2000/145). Do we agree to take note of this statutory instrument?

Members *indicated agreement.*

The Convener: We come to the Divorce, etc (Pensions) (Scotland) Regulations 2000 (SS1 2000/1120). We have before us a motion in Pauline's name. She asked that it be included, but only as a safeguard because of time. Do you want to move the motion, Pauline?

Pauline McNeill: No. I missed the last meeting, so I apologise if my point has been made before, but I have concerns about lack of notice. I think that we have to satisfy ourselves that there is nothing in the regulations that departs from the law. However, I am happy with regard to that in this case. Has that concern been aired already?

The Convener: I put your concerns on record last week but we did not discuss them. We decided that we could discuss the matter today. If you want to have a five-minute discussion, we could do so now.

Pauline McNeill: I do not want to discuss the regulations, but I wanted to put on record my opinion that regulations should not be put before this committee only two days before it meets. We do not want the Executive to get the impression that it can sneak things in and get them through on the nod.

Christine Grahame: I support what Pauline says. I notice that we have in our papers an Executive memorandum that it would have been useful to have seen before.

The Convener: We got it on Thursday.

Christine Grahame: Yes, but we did not have it last week. It answers the questions that needed to be asked. If we are changing matrimonial law that has been established since 1985, we need more information. I want it noted that we should have received the memorandum at the same time as the regulation.

The Convener: That point is noted and we will flag up our concerns to the Executive. If further information is available, it should be supplied.

We have agreed to deal with the next two items on the agenda in private.

12:07

Meeting continued in private until 13:00.

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