JUSTICE AND HOME AFFAIRS COMMITTEE

Wednesday 7 June 2000
(*Morning*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
21st 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

THE FOLLOWING MEMBERS ALSO ATTENDED:

Johann Lamont (Glasgow Pollok) (Lab)
Mr Gil Paterson (Central Scotland) (SNP)

WITNESSES

David McKenna (Victim Support Scotland)
Alison Paterson (Victim Support Scotland)

CLERK TEAM LEADER

Andrew Mylne

ACTING SENIOR ASSISTANT CLERK

Alison Taylor

ASSISTANT CLERK

Fiona Groves

LOCATION

Committee Room 1

Scottish Parliament

Justice and Home Affairs Committee

Wednesday 7 June 2000

(*Morning*)

[THE CONVENER *opened the meeting at 09:35*]

The Convener (Roseanna Cunningham): I bring the meeting to order. I have received no apologies for absence. However, I have received notice that Pauline McNeill is stuck in traffic, which presents one or two difficulties as she is the reporter on item 2 on the stalking and harassment consultation. As I do not want to hold the meeting up for a long time, I propose to take item 3 first, which means we can move straight to taking evidence from our witnesses. *[Interruption.]* Pauline has now arrived, so the committee can ignore everything that I have just said.

I welcome Gil Paterson to the meeting. He intimated that he wished to attend, particularly for item 3. Johann Lamont might also be coming, although she has not yet arrived. She flagged up an interest on behalf of the Equal Opportunities Committee, which has also taken evidence on stalking and harassment.

I propose that the committee should meet in private at our next meeting on 13 June to consider a draft response to the stalking and harassment consultation paper and to the revised draft stage 1 report on the Bail, Judicial Appointments etc (Scotland) Bill. Are members agreed?

Members *indicated agreement.*

The Convener: The first item on the agenda is to ask the committee to take item 6 in private. Are members agreed?

Members *indicated agreement.*

Stalking and Harassment

The Convener: The second item on the agenda is the stalking and harassment consultation. The Law Society of Scotland was invited to the meeting; however, it apologises for not being able to attend. We had to arrange the meetings at fairly short notice when we realised that some space was available. The organisation intended to provide a copy of its response to the consultation. We hope to have that this morning and will hand it around when we receive it.

Pauline McNeill will report on her meeting with the Law Society of Scotland and the clerk has circulated a paper with information about her meeting with the Scottish Police Federation. Once Pauline has reported, we will take some evidence from Victim Support Scotland.

Pauline McNeill (Glasgow Kelvin) (Lab): I thought that I would start by summarising the consultation document and give the committee some notes on the evidence that I have taken so far.

The Executive promised to review the current law on sexual and violent offenders by 2001, including issues such as harassment and stalking. Three high-profile committee inquiries are currently on-going: the MacLean committee on sentencing and treatment of serious sexual and violent offenders; the Millan committee on mental health legislation; and Lady Cosgrove's expert panel on handling sex offenders in the community. Some of the work of those committees is related.

From the consultation document, it is clear that the Executive has currently no preconceived agenda and that it is open to all parties, including this committee, to influence its thinking. As the law stands, there are no clear-cut definitions of stalking and harassment. By those terms, we mean intentional behaviour that involves more than one incident; however, it does not include playing loud music or any other anti-social behaviour. The document rightly points out that we cannot consider stalking and harassment in isolation from other issues such as domestic violence, as many stalkers are former partners. Scottish Women's Aid has supplied some evidence on this matter. There are also cases of obsessive behaviour, where the stalker might suffer from mental instability or a personality disorder.

The criminal law in Scotland, which is largely based on common law, is seen by many as a strength and the main legal measure that is currently used is breach of the peace, which can include single incidents. In Scots law, the test for breach of the peace is whether certain behaviour

is likely to cause fear, alarm, upset or annoyance. The common law crime of threats is also applicable.

In the area of civil law, we have already considered the issue of interdicts, the breach of which can mean up to two years in prison. The committee is already dealing with exclusion orders and matrimonial interdicts. Furthermore, some organisations have given us evidence about the ineffectiveness of the Protection from Harassment Act 1997.

The consultation document and organisations that have given evidence point to English law, in which the statutory offence of harassment specifies that a course of conduct must have taken place. A course of conduct means at least two occasions. However, the test for harassment is higher than breach of the peace in Scots law as it centres on whether certain behaviour puts people in fear of violence.

There are four options for change: relying on the present legal provisions; changing current practice, instead of the law; making the current law more effective; or—the nub of the matter—creating a new statutory offence that specifically deals with stalking and harassment. Changes to the current law could include the requirement to disclose information on previous convictions, and many organisations have highlighted both the need for such detail and how it can help to secure harassment orders or interdicts. Police powers of arrest could be increased, which is a proposal that touches on our discussions about how some interdicts lack the power of arrest. Furthermore, the consultation document suggests reducing the burden of proof in cases of alleged harassment; however, that would also include reducing the standard of proof in such cases.

It is important to draw the committee's attention to section 45 of the document, which discusses whether there is a case for creating a new statutory offence. The case is not clear-cut and we have to find out whether such an offence would have the flexibility of the current common law.

I want to update the committee on the evidence that I have taken so far. The Law Society of Scotland felt that section 45 encapsulates its feelings about both the current position and the way we should go, and that defining a new offence on stalking and harassment is problematic. The organisation had some ideas that are included in the document.

The document also contains proposals for making the current law more effective. It calls for better information to be available to judges at the stage of sentencing and talks about recording certain types of offence as breaches of the peace with aggravation. When a judge considers someone's previous convictions for sentencing, it is not clear from a conviction for breach of the peace what sort of offence was committed. If it was for harassment, it should be called breach of the peace (harassment).

The document makes an important point about social inquiry reports. It may be possible to give social work departments more time to compile reports on investigations into offenders, so that they can get a complete picture. At the moment, they feel that time is limited and they cannot get a full picture, so that the wrong decision is sometimes made when it comes to sentencing.

09:45

I spoke to representatives of the Scottish Police Federation, which is opposed to creating a new offence. They say that the law as it stands is easy for the police to apply and interpret, and feel that a new offence would lead to mistakes, as one would have to define exactly what is meant by stalking and harassment, so there is a possibility that it could be wrongly implemented. Their view was that it is difficult to define stalking and harassment in statute, and that solicitors would spend their time trying to work their way round that. They agreed that there should be more awareness and training, and that it should be clear on an offender's record whether a breach of the peace conviction related specifically to a charge of harassment, as the Law Society of Scotland recommended.

I also spoke to representatives of Greater Easterhouse Women's Aid. Mairead Tagg had been involved in some research and had worked on "Frontline Scotland", and it was quite useful to hear about her dealings with women and get a picture of someone who had direct experience on the ground. The people from Women's Aid told me that most perpetrators are men, most victims are women and most stalkers are former partners. They felt that the provisions as they stand have been a complete failure and they pointed out that women have to pay to get access to the criminal justice system. They feel that they should not be expected to pay.

The Women's Aid representatives agreed with the Scottish Police Federation that there should be better training, but they felt that the entire system, from the police to the judiciary, was totally failing and should be re-examined. They urged us to consider whether men with a history of violence and harassment should be allowed to have contact with their children. That is often used as a way of manipulating their former partners. In New Zealand, a former partner must show that he is no longer a threat to the person whom he has been harassing before he can have access to the children. They called for a full forensic

psychological examination of individuals arrested for stalking and harassment to be routinely carried out to assess the risk to victims.

They stated that they believe that the current breach of the peace offence is an insult to women and is completely inadequate. I asked whether they thought that we should create a new crime of stalking and harassment, but they were not clear about whether we should go in that direction. Nevertheless, they were clear that the law as it stands is inadequate. Finally, they said that they have been dealing with some high-profile cases involving some pretty nasty incidents of stalking and harassment. Some of the women involved may be prepared to speak to me or to the committee. I shall allow the committee to decide whether that is appropriate, and I welcome members' views on whether we should take up that offer from Women's Aid.

The Convener: Thank you, Pauline. As regards inviting victims of stalkers to give evidence, I am afraid that we are driven by time constraints, as we have only one more week to decide how to respond to the consultation paper. It is difficult to see how we could timetable further evidence sessions. It is only a matter of luck that we have had this week and next week to schedule in extra sessions on some issues.

The Scottish Police Federation mentioned the idea of indicating an aggravation on a breach of the peace conviction. I raised that matter some years ago in a House of Commons standing committee when Lord James Douglas-Hamilton was at the Scottish Office. I subsequently received a letter from him indicating that that proposal was being accepted and that, from then on, breaches of the peace that were really harassments were to be recorded as such. As far as I can see, that has never been implemented, but it would be worth going back to investigate that. I shall try to dig the letter out of my somewhat disorganised archives. A commitment was given some time in 1996, and it seems clear that it has never been implemented, so we should examine that.

Are there any other questions for Pauline McNeill before we take evidence from Victim Support Scotland?

Christine Grahame (South of Scotland) (SNP): I would like to put on record the fact that I am very unhappy that, because of the pressure of work, we are unable to take further evidence. This is an important issue and I would like us to get it right once and for all.

The Convener: That is why we appointed a reporter. We knew that we simply could not schedule it into our agendas.

Christine Grahame: I am just putting down a marker to say that I would not have been averse to hearing from some of the women who have been harassed, so that I could fully appreciate the impact that it must have on their lives. I am not happy that, through no fault of committee members, we are unable to do that.

Phil Gallie (South of Scotland) (Con): Pauline McNeill is to be congratulated on the effort that she has put in. You concentrated on stalking and harassment against women. Are you able to give a percentage breakdown of how many instances there have been of women stalking and annoying men?

Pauline McNeill: No, I do not have that information. However, if we were to create a new statutory offence of stalking and harassment, it would be non-gender specific. As one would expect, Women's Aid puts emphasis on cases of women being stalked and harassed by men, and I have been reporting on the evidence from that organisation. I am sure that statistics on female stalkers can be gathered and considered when the committee re-examines the whole matter later. If we are to legislate against stalking and harassment, we must also recognise that there are often cases in which the victim does not know the perpetrator. Sometimes, the stalker is unknown to the victim, and we must consider whether a new offence might be useful in cases that involve strangers.

The Convener: Cyber-stalking is something that is becoming more prevalent. Did anyone you met mention that? Even if they did not, technology is moving things on and, whether we like it or not, cyber-stalking and cyber-harassment are beginning to emerge as a major problem in other countries. I imagine that it is only a matter of time before we find ourselves dealing with it here. If we change the law or our practices and procedures, it would be a pity not to take the opportunity to deal with cyber-harassment pre-emptively, rather than waiting for it to become a big problem and then having to legislate separately.

Johann Lamont (Glasgow Pollok) (Lab): I apologise for arriving late. As a member of the Equal Opportunities Committee, I have a couple of observations to make on how women are treated in the judicial system, as victims of crime and as offenders. The sub-group on women has been doing a bit of work on that, and it struck me that we could have taken evidence on stalking and harassment and fed back our views to you. We have had discussions and taken evidence. I will direct to you to the parts of our previous meetings when we did some work on that issue.

The Convener: It would have been useful to have had that flagged up to the committee earlier.

Johann Lamont: It has been flagged up through various debates, but there is no formal

way in which it can be done. We would have been able to do some of the work. We can do nothing about it now but it is something that we should consider for the future.

The Convener: Are there any other questions?

Maureen Macmillan (Highlands and Islands) (Lab): I want to ask about interdicts and powers of arrest, which have been mentioned. Scottish Women's Aid is aware that interdicts with powers of arrest could be used against ex-partners who are harassing their former spouses or partners. What are your feelings about that? Has the matter been raised in discussions with bodies other than Scottish Women's Aid?

Pauline McNeill: The matter was raised primarily in discussions with Scottish Women's Aid. It is clear from discussions about stalking and harassment that the central issues overlap with some of the other work that we are doing. What came across from Scottish Women's Aid was that to legislate in the way that we have considered would plug a gap. We would then examine what was left.

Maureen Macmillan: It strikes me that sanctions are missing. Processes can be gone through, but at the end of the day there must be sanctions against those who are harassing someone. A charge of aggravated breach of the peace is one possible sanction, so that an arrest can be made before any further damage is done.

Pauline McNeill: One of the issues that Scottish Women's Aid highlighted—others might also do so—was women having to pay for interdicts when a criminal offence has been committed. Even if there is an interdict law that can be relied on, there will be difficulties if, for example, a victim does not have a telephone and cannot, therefore, call the police. If the police do not properly record what the interdict is, the victim will not be safe. However we progress, the system must be efficient from the bottom up. That will start with the police ensuring that they can easily lay their hands on the interdicts when a victim calls so that they can act immediately. There is no doubt that there will be an overlap with some of the other work that the Equal Opportunities Committee is doing.

Christine Grahame: Did you hear from Scottish Women's Aid that the police did not have a note of the terms of interdicts? There is a requirement to intimate those terms. The solicitor who obtains an interdict with powers of arrest is required to make certified copies of that interlocutor for the chief constable and the local police station. The solicitor is also required to tell the police when the interdict ceases to function, if that falls—as is the case at the moment—on divorce. I am worried about the police being unaware of the terms of interdicts if solicitors are going to that trouble to protect their clients.

Pauline McNeill: We talked about non-harassment orders and we perhaps overstepped the mark a bit. I have some experience in this, having had to write to my local police station to remind them of a non-harassment order. The number of interdicts will be increased, so if we are to legislate on this, we must get the legislation absolutely right, bearing in mind that the police already have problems with non-harassment orders. We must get this right from the bottom to the top.

Christine Grahame: It is a matter of practice.

10:00

Gordon Jackson (Glasgow Govan) (Lab): I would be hesitant about accepting the proposition that the police do not have a clear record of those interdicts. I was at a meeting with police in my area last night and they are extremely concerned about the matter. They are in the process of setting up a scheme under which vulnerable people, especially women, will, at considerable expense, be supplied with free mobile phones dedicated to the 999 service. There will be a lot of phones available and anybody with a problem will have a phone all the time. When the police are as motivated as that, I would be loth to accept on the record that they do not have a clear knowledge of the interdicts. That does not seem likely to me, although I suppose it is possible that it happens in some police stations.

Pauline McNeill: You are right to say that, but I did not say that the police do not have those records of interdicts. However, if we are to examine the system from top to bottom, we must ensure that it is efficient. There have been cases in which the police have had to be reminded of non-harassment orders, because the act has only been in force since 1997. Everybody agrees that it could be more effectively used.

The Convener: You flagged up paragraph 45 in the consultation document as being the key paragraph on which we should focus. That paragraph makes it clear that

"Scots common law appears to enable the court to deal with the relevant type of offending behaviour and, if appropriate, to hand down severe penalties."

In the discussions that you have had, have you been able to pinpoint why that is not happening? As a lawyer, it is always an issue for me to know that there are clear ways forward in the law as it stands, but that the law is not being implemented in the ways in which it could be.

Pauline McNeill: There are two reasons. The first is that breach of the peace is a charge that covers such a wide range of behaviour that people

do not know whether to take it seriously. The other flash-point is that there is not enough detailed information on previous convictions records available to a judge who is passing sentence. I have been told that a previous convictions record will say only "breach of the peace", but there will be no indication that conviction was for harassment or whatever.

The Law Society of Scotland also made the point loud and clear that if there is a social inquiry report order—which there would be for those aged under 21 years and certain other categories of offender—there is a very short time in which the report must be prepared. The society's point is that one will not be able to see the full picture. There should be more time allowed for the preparation of a full and detailed report so that if there are any mental disorders and so on that must be considered, that will be included in the report.

Women's Aid also made the point strongly that the system is totally inadequate when it comes to sentencing. We need to examine what information is available.

The Convener: Sentencing is a very different question because, even if a separate crime were introduced, sentencing would still have to be dealt with, unless a sentence was prescribed absolutely. That will not happen even if there is to be a new law that introduces a new crime. Sentencing cannot be prescribed in that way, other than possibly to prescribe a minimum sentence. Sentencing will continue to be a big issue regardless of whether there is a new crime. If sentencing is one of the big problems, we might be moving into slightly different territory in terms of how we handle the situation.

Pauline McNeill: Women's Aid felt that in cases in which a person had shown near-violent behaviour, had harassed their partner for years and had several convictions for breach of the peace, sentencing did not reflect an offender's history. Women's Aid feels that sentencing does not reflect all the trauma and emotion felt by the victim.

The Law Society, however, said that if we create a new statutory offence we will have to specify in statute what the limitations on the prison sentence would be. At the moment, cases of breach of the peace can, in theory, go to the High Court—there is no maximum sentence. As you pointed out earlier, that has simply not happened. Perhaps we need to consider why the current laws are not being used properly.

The Convener: We will now take evidence from our two witnesses, Alison Paterson and David McKenna. This is about the third week in a row that you have appeared before us; thank you for coming at such short notice. You will remain for the next item on the agenda, but at this stage I ask members to confine their questions to consultation on stalking and harassment. Are there any bids?

Gordon Jackson: Do you think that there should be a separate offence of stalking?

Alison Paterson (Victim Support Scotland): We were expecting to make a joint statement.

Gordon Jackson: I am sorry.

Alison Paterson: Perhaps a statement is not in order. I appreciate that we are now well into the discussion, but we have highlighted some points in our statement that may be helpful to the committee.

The Convener: You may make a statement, but please keep it very brief. I know that most of our witnesses have made statements, but that is not something that we ask for automatically. I am concerned about the length of the statements that witnesses are bringing with them.

Alison Paterson: In that case, I will make one point relating to language and definition. The terms harassment and stalking seem to be used interchangeably, even in very informed discussions such as this one. The consultation is very revealing in stating

"experience suggests that stalkers use a variety of means".

I hope that when examining whether there needs to be a separate offence, the committee will take into account the fact that in the United Kingdom there is virtually no research into the nature of stalking. We rely exclusively on American academic and police research analysis and tentative definitions of stalking behaviours. I have some information about that with me. I will not go into it now, but at various points when taking evidence you may want to bear in mind the fact that the nature and causes of stalking may be fundamentally different from the causes of harassment.

The Convener: That is useful and interesting. I suspect that most committee members have not thought about the issue in those terms. You are right to say that most people would use the terms stalking and harassment interchangeably. It is useful to have indicated that they are different. Gordon, you had a question.

Gordon Jackson: I do not want to get bogged on this, but it is an important point. From research that has been done, can you give us an idea of what would constitute methods of stalking as opposed to methods of harassment? That is obviously an important distinction, but I confess that I do not understand it.

Alison Paterson: It has to do with what drives the behaviours. This month we published in the

Scottish Legal Action Group magazine a short article that goes into this issue in more detail. As we know, stalking was first identified in the celebrity-strewn state of California, as a result of some high-profile cases involving media personalities, film stars and so on.

Over the past 10 years, there has been work that differentiates between the simple obsessional stalker, who was previously in a relationship with the victim and is normally someone immature, unable to maintain relationships, jealous and so on, and what is termed the love obsessional—someone who persistently fantasises that they are in a relationship with the victim. That is quite different from having been in a relationship with the victim.

There are also false victimisation stalkers, who believe that they are victims and may report cases to the police. Another phenomenon is erotomania—a term that may not be used before the committee again. It normally affects women, who believe that their victim knows and loves them. The work gives a depth and breadth to the behaviours, motivations and obsessional personality disorders that can drive stalking and make it so difficult to eliminate.

Gordon Jackson: If I am following what you are saying, the difference between stalking and harassment seems to lie not in behaviour, but in the motivation for that behaviour. What the law needs to do is criminalise the behaviour. Differences in motivation are important when it comes to sentencing, treatment and what we do with people, but only behaviour can be criminalised. That leads me back to my original question. Leaving aside differences in motivation, do you think that we should deal with the criminal behaviour that we are discussing simply by using the law on breach of the peace better and more effectively, or do you think that we need a new statutory offence?

Alison Paterson: Before I ask my colleague to answer your question in more detail, I would stress that the motivation for different types of behaviour is imperative when deciding whether offences should be dealt with by statute or by common law. In Scots law, there is no obstacle to using both.

David McKenna (Victim Support Scotland): Pauline McNeill has touched on the complexity of dealing with stalking and harassment behaviour through the existing laws and processes in Scotland. If police officers, members of the judiciary and the people sitting around this table cannot work their way through it, there is little chance that victims of stalking and harassment will manage it. Pauline McNeill listed the different ways of dealing with stalking and harassment behaviour.

We are concerned that although, quite rightly, when dealing with stalking and harassment we have concentrated on the victims of domestic abuse and anti-social behaviour, stalking and harassment are much more widespread in Scotland than we realise. Many children and adults who are subjected to bullying suffer stalking and harassment, as do men and women who suffer sexual harassment in the workplace and elsewhere. People from ethnic minorities also suffer harassment and stalking, as do gay and lesbian people and disabled people.

A recent Scottish Executive report on research carried out in Edinburgh, which I can pass to the clerk, suggested that up to 50 per cent of gay and lesbian people have been the victims of crimes of violence or other criminal activity. One of the things that they reported was that they were continually—or often—stalked and harassed.

I agree with Alison Paterson—before we embark on a change in the law, it is important that we understand the nature of the problem, so that whatever solution we arrive at addresses it once and for all and protects everybody in Scotland, regardless of their circumstances or characteristics, from stalking and harassment behaviour. Our experience over the years of talking to victims who have gone down the interdict and breach-of-the-peace route is that, in practice, it has not delivered the protection that they needed. For a range of reasons, it has not worked for them. It is rare for Victim Support not to call for a change in law, but we do not yet understand the exact nature of the problem and need to do more work to establish what stalking and harassment means to people in Scotland. That is the way in which to get the right answer and to deal with this issue.

Alison Paterson: You will have gathered that we feel the most effective ways of addressing the issue of protection and of dealing with the perpetrators are to consider improvements to practice that could be made—we have some suggestions for that—and to do more research.

The Convener: So you think that at this stage it is premature to talk about changing the law and that before we do that we need to examine all the aspects of this problem and all the current practices and procedures?

Alison Paterson: On balance, yes.

David McKenna: There is some immediate action that could be taken. The police service in Scotland could examine its procedures for identifying breaches of the peace that include harassment and stalking. They could do that in writing and the Association of Chief Police Officers in Scotland could issue guidance, which would have an immediate impact on the policing of

stalking and harassment.

There are some quick-win things that could be done in relation to the existing law but, before venturing into changing the law and delivering some new offence that does not cover what we need it to do, we should wait until we know more.

The Convener: I appreciate that you do not have time to go into this in great detail, but could you identify some of the key areas that need to change? You mentioned police guidance as one of them.

10:15

Alison Paterson: One of the fundamental issues, which is as relevant today as it was in 1997, when it was last considered, is public awareness and awareness within the criminal justice system. There is a danger that the system colludes with the nature of stalking and harassment. The victims are full of doubt: how do they know when they are being stalked? At what point should they begin to take it seriously? Professional knowledge needs to be increased. Experienced police forces across the water should be encouraged to share their strategies and techniques.

A UK database of cases should be developed to enable the police to predict how a situation might develop. Information about the nature of the problem needs to be shared. A database that could track and record perpetrators of persistent stalking would be useful.

We should consider the concept of specialist police officers. There might be a view that the problem is not of the scale that it is known to be in parts of America. Police forces should develop specialist knowledge in relation to stalking and harassment, just as they have done in relation to women and children.

David McKenna mentioned the use of technology to protect victims. A range of facilities are available that would reassure people, particularly during an investigation, when someone might not be apprehended but the victim might be in fear of his or her life.

With regard to public perception, the offence of breach of the peace does not do justice to the seriousness of the problem. There should be increased prosecution of stalking cases under the charge of breach of the peace in the High Court. There is no reason why—if we are taking the impact on the victim seriously enough—that could not happen.

The Convener: Do you mean that instead of it appearing as, say, item 5 on an indictment in the High Court, the High Court case should simply be breach of the peace?

Alison Paterson: The great advantage of the offence of breach of the peace is its flexibility. If the offence is retained as the most effective way of prosecuting stalkers, we suggest that we should apply a lot more knowledge about the impact of the crime on victims. The logic would be that we should impose penalties of a greater severity. That would be symbolic of the fact that we view the offence as serious.

The Convener: That would be an issue for the Crown Office to respond to.

Johann Lamont: I was interested in what you were saying about needing more evidence. There is a tendency to take the tabloid view of stalking. People think that it is new and exciting, but women have experienced it for generations.

Am I right in saying that you are not ruling out moving towards legislation that names the crime? I take it that you believe that we are not ready for that at this stage. Would you comment on the view that victims would welcome a move to specifying the crime better as that would acknowledge the seriousness of what they have gone through? Do you agree that sometimes there is a role for that in law? We know in common language that if you talk about it, it is just a breach. It is just viewed as a breach in certain quarters and calling it that conceals more than it reveals. Is it your experience that victims feel that the seriousness of the crime and their suffering is acknowledged if the crime is more clearly defined?

David McKenna: That issue cuts across the gamut of crime—what it is called and what it is recorded as often does not relate at all to how the victim perceives what has happened to them. There is a broader issue about whether the categories of crime that we use should reflect the nature of the crime. For example, someone is charged with assault, but in fact it is domestic violence. The charge does not say to the victim that that was your partner who abused you.

There is an issue as to whether we should use common language such as domestic violence or domestic abuse when crimes are recorded, rather than technical terms. However, that is a presentational issue. More important is that whatever we call the crime, we protect people. What is important is that fewer people are victims of crime, whether it is stalking and harassment or domestic abuse. That is what matters to victims—that they have confidence that the justice system is protecting them.

Alison Paterson: That links into a matter that is perhaps more an issue for the social services, the voluntary sector and, perhaps, the police: the need for specialist counselling and advocacy services for victims of stalking, perhaps especially in

relation to the type of stalking in which there is not a known relationship. We do not necessarily have expertise or understanding of the nature of what drives that stalker. A victim who came to an organisation such as Victim Support Scotland would get support and assistance, but we would not necessarily have the specialist knowledge to give them the best advice on dealing with it.

Christine Grahame: I found your evidence very interesting. It seems to be in harmony with a lot of what the police are saying. Specifically, the Police Federation stressed the need for more training and awareness raising. The note JH/00/21/5 states:

> "When a police officer joins the force, he or she undergoes a 2 year training period during which stalking and harassment is covered. Thereafter, training on the issue is patchy."

That does not seem to be helpful to anybody.

What you have said this morning is on the record, but if you want to give more detailed information I would be happy to see it. I have found some of the points that you have made interesting. My sentiments are the same as yours: the initial step is to change practices and systems, so that we are really informed before we consider changing the law, which may not be necessary if we develop breach of the peace or if there are developments on some of the other issues that you have raised this morning. If you feel that more detailed information would be of use to some members of the committee, I would be happy to receive it.

Phil Gallie: You mentioned a database of cases. Every member of the committee would probably be able to have their own database. One of the points that strikes me is the individuality of each case. They range from what I consider to be harmless contact to situations in which there could be serious results.

I am also concerned about the effect of community care and people coming back into the community who perhaps may not be a threat but might create nuisance. Do you have views on the effect that people returning to community as a result of community care has had on stalking and harassment?

David McKenna: The purpose of a database is that once a stalker or harasser comes to the attention of the authorities—whether to the police service or to the courts—there is a record. Phil Gallie is right: plenty people will undertake stalking and harassment where their victims will not know whether it is sufficient to warrant any action. To some extent there is not much we can do about that, but when someone comes to the attention of the authorities, it is useful to have information about their previous activities and behaviour, because that adds to the case.

The Convener: Could I just butt in on that point, as a couple of issues arise from it? Although somebody may come to the attention of the authorities, that may never result in a conviction.

David McKenna: I mean conviction information—not being a lawyer, I was speaking loosely. You made another interesting point about stalking, which is related to the point that Gordon Jackson and Alison Paterson were discussing a few minutes ago. Someone can be the victim of a stalker and not be harassed, or be stalked and not know that they are being stalked—by the time they find out, it might be too late. It might be the intention of the stalker that the victim should not be aware that they are being stalked.

Alison Paterson: I think that there are two sides to the community care issue. Vulnerable people living in communities who have been used to institutional life are prone to victimisation and may be harassed, but also, if they are not properly supported, may find that their conduct puts them in a vulnerable position on the wrong side of the law. The issue is complex.

The Convener: I thank the witnesses, but ask them not to go away.

We have now received the paper from the Law Society of Scotland, on which I commented at the start of the meeting. It is long and detailed, so it would have been pointless to attempt to circulate copies for this item on the agenda. We will distribute copies at the end of the meeting and next week we will consider our response to the consultation.

Vulnerable and Intimidated Witnesses

The Convener: The next item on the agenda is vulnerable and intimidated witnesses. We wanted to take evidence on the proposals to improve protection for witnesses in cases involving allegations of rape. There has clearly been a great deal of recent publicity about the issue, in connection with what the Executive may be doing and other matters. I decided that because, for entirely unconnected reasons, we would have time in the meetings this week and next to take a limited amount of evidence, it would be appropriate to put this item on the agenda.

Members will be aware that from time to time there are high-profile cases in court that relate to the issues that we are about to discuss. I remind all members of the sub judice rule: you must not refer to any matter in relation to which legal proceedings are active. I ask members not to comment on anything about which they may be reading in the press or of which they are otherwise aware. Steer away from that. We do not want to get into difficulty and I do not want any committee member to be hauled before a High Court judge to explain their comments.

We asked the Zero Tolerance Trust to give evidence this morning, but it was unable to do so at such short notice. The timing was obviously likely to be a problem. Again, I can say that we are very grateful that Victim Support Scotland is able to attend at such short notice.

Johann Lamont asked a parliamentary question on the cross-examination of witnesses by those accused of sex offences, which was answered yesterday. The fairly brief answer said:

"Scottish Ministers have instructed that proposals are developed to prevent an accused person charged with a sex offence from cross-examining a victim personally and to strengthen provisions restricting cross-examination on sexual history. Ministers will immediately begin the process of taking advice on how this can be done while ensuring that the accused receives a fair trial."—[*Official Report, Written Answers*, 6 June 2000; Vol 7, p 6.]

Members may have seen in one of this morning's newspapers an article that suggests that there are difficulties with some aspects of that approach. The article was in *The Scotsman*, under the headline

"Protection for rape victims difficult, ministers admit".

I do not know whether members have had a chance to read that article, but if they have not they may want to do so after the meeting, as we will come back to this issue next week.

I understand that Pauline McNeill has a question on this matter for First Minister's question time on Thursday, but I do not know how high up the list it is.

Pauline McNeill: It is question 6.

The Convener: Ah, well—perhaps that was not hugely relevant.

I understand that the witnesses have a short opening statement for this item, so I will let them give it this time, because we have not discussed this issue previously.

Alison Paterson: We are really out of sync today, convener.

The Convener: Do not tell me that you have no statement. [*Laughter.*]

Alison Paterson: We need to practise more.

The Convener: Never mind.

Alison Paterson: I apologise for being a mite harassed.

10:30

The Convener: That is okay.

There has been a lot of press coverage of this issue recently, partly because of the leaks that appear to have emanated from the Executive—or from sources close to the Executive—about the difficulties. I suppose that this morning's newspaper article is a confirmation of what those sources have been suggesting, which is that the Executive has been running into difficulties over how to achieve a particular result.

The issue is not just about the cross-examination of rape victims by accused persons who are representing themselves—notwithstanding the high profile such cases attract, it is not something that happens routinely; there are other issues that relate to rape victims and the ways in which court procedures and the law affect them. I do not want the committee to focus too completely on only one issue to the exclusion of all the others.

We probably all agree that the conviction rate in rape cases is abnormally low and, therefore, we hope not only to achieve an increase in the conviction rate but to ensure that the experience is made less, rather than more, traumatic. Having said that, one of the difficulties with court cases is that they are, by definition, traumatic for victims. I suppose that there is a line below which, in the interests of justice, we cannot really go.

I believe that Gordon Jackson wanted to ask questions at an early stage.

Gordon Jackson: I wish to lay out what the positions are.

The minister refers to proposals

"to prevent an accused person charged with a sex offence from cross-examining a victim personally".—[*Official Report, Written Answers*, 6 June 2000; Vol 7, p 6.]

I want to be clear about the witnesses' position, but first let me put the situation in context. I totally understand the motivation of those who wish to protect people in court.

It is well known that I have some personal difficulty with the idea that there can be an utter, 100 per cent, blanket legislative provision that says, "In no circumstances ever can a man in this case defend himself." I have a problem with such a total prohibition.

Is it your position that a total, 100 per cent prohibition is what is wanted and that no one charged with this kind of offence—I will come to the detail of that in a minute—will ever, in any circumstances, be allowed to defend themselves?

Alison Paterson: Article 6 of the European convention on human rights deals with the right to a fair trial. Paragraph 3d of article 6 makes it absolutely clear that the accused shall have the right

"to examine or have examined witnesses against him".

Gordon Jackson: I am not asking about the reasons; I know what they are. I am asking whether that is your position.

Alison Paterson: I understood you to be asking whether there are circumstances in which an accused person should never have the right to defend himself. The locus for my answer is the ECHR—the accused would always have the right to be defended. What we are saying, and what the Home Office has satisfied itself is compatible with ECHR, is that in rape and sexual assault trials—and, indeed, in cases that involve other, very vulnerable witnesses—the right of the accused to cross-examine personally the witness should be withdrawn.

Gordon Jackson: For the avoidance of doubt, I want to be clear on this. The locus is not ECHR—the locus is the law of Scotland. Obviously, we are trying to ensure that the law of Scotland is compatible with ECHR, but while the law must be compatible, ECHR is not our motivation for doing things.

I am just asking—and I think I have been given the answer—whether your position is that, in certain situations, there should be a statutory prohibition on a person being allowed to defend themselves.

David McKenna: It is not that they should not be allowed to defend themselves, because they can do so through representation. We are saying that the direct cross-examination of a victim of rape or sexual assault by the accused should not be allowed.

Alison Paterson: I repeat that there is a locus for ECHR on both sides. A recent case, which was settled, between the Home Office and Europe, where the victim in a rape case had been cross-examined by the accused personally, would have had a strong chance of being upheld in Europe under article 3, which deals with protection from inhumane and degrading treatment. For every ECHR right for the accused, there is a right for the victim. I totally understand what you say about Scots law—it is a contextual matter. However, we believe that there is now a locus for ECHR in such cases. While we do not have detailed information, we understand from officials that, for some reason, there are concerns that some of the more unique features of Scots law procedure will make the enabling of such a prohibition, without challenge from the accused, more difficult than in England.

I am a lay person, but no one has been able to explain to me yet how the objects of justice in Scotland can be so different from the objects of justice in England and Wales that we would not be able to achieve that level of protection.

Gordon Jackson: Forgive me—I did not want to get into whether such a prohibition is ECHR compatible or not. That is for lawyers, and in this context I am not acting as a lawyer. I am just asking you, as witnesses, what you want.

To what crimes would the statutory taking away of a person's right to defend themselves apply? By "defend themselves", I mean do their own defending. How far would that go—would it cover rape, sexual crimes or a case where an elderly person has been the victim of a break-in and is very distressed by that?

David McKenna: That is a matter for discussion. Our view, which reflects the changes that are taking place in England and Wales, is that the prohibition should certainly cover rape and sexual assault cases. In such cases, the person who is accused of committing the offence should not subject the victim to direct cross-examination.

Alison Paterson: The provisions in "Speaking Up for Justice", which are going on statute, set out a series of procedures whereby criminal justice officials will be able to suggest to the court that, because of the particular vulnerability of an individual victim—

The Convener: I am sorry to interrupt, but can we establish the status of what you are talking about? You said that the recommendations in "Speaking Up for Justice" are "going on statute". What do you mean?

Alison Paterson: The document "Speaking Up for Justice—Home Office Report on Vulnerable and Intimidated"—

The Convener: Oh—in England. I needed to clarify that, as I was slightly puzzled. I was not aware of any legislation, and you meant the English legislation.

Alison Paterson: Thank you for reminding me of the turf on which I give evidence.

In England and Wales, it has been recognised that, as part of the raft of measures to protect witnesses—both in the community and in the courts—there should be discretion on the part of the court, based on an individual assessment of a victim's vulnerability, to debar the accused from direct cross-examination of the victim. Therefore, a number of cues, if you like, would be assessed as to the level of vulnerability. Frankly, it is extremely unlikely that those measures would be used in the case of an elderly woman whose house had been broken into. In the main, they would apply to personal crimes of violence.

We are not here today to focus on that, however. We have come to answer questions on rape and sexual assault.

Gordon Jackson: The minister is also interested in strengthening the provisions restricting cross-examination on sexual history. The word "strengthen" begs the question how the present provisions might be altered. Do you have any suggestions?

Alison Paterson: We are aware that the excellent provisions that were brought in to limit the level and nature of questioning have not proved effective in every case. Lynn Jamieson's research has shown that good practice guidance has not been observed universally by the legal profession. There are issues around good practice guidelines in relation to cross-examination in general, which could stand being reconsidered.

We have not come prepared to answer such a detailed question, but we would—in consultation with Rape Crisis and Zero Tolerance in particular—be happy to submit written evidence on that.

David McKenna: There may be an issue about enforcing existing provisions, as opposed to strengthening them. Much depends on how the judge who is presiding over the court interprets the guidelines.

Training and awareness raising in the judiciary is a constant issue. It should encompass an understanding of how the process appears to the victim who is being cross-examined or examined. More care should be taken to cause as little unnecessary distress as possible. Victims do not necessarily understand the purpose of every question that is being asked of them, but they are sensitive to the way in which questions are asked and often feel aggrieved about it.

Alison Paterson: Another side to the general conundrum around what happens in court, in relation to the giving of evidence on rape and sexual assault, is whether the primary witness—the rape or sexual assault victim—is enabled under our system to give best evidence.

We have argued the case, as has Rape Crisis, for the introduction of specialist prosecutors in rape and sexual assault cases in Scotland. The current procedure is that the advocate depute is unlikely even to introduce him or herself to the rape victim. Although briefed by the Crown, the advocate depute will not have acquainted him or herself with the personality of the victim and how she is likely to stand up under hostile cross-examination. The advocate depute will not know how to ensure that she is able to describe accurately, in as strong a way as possible, what has happened. We believe that that is a flaw in the system.

The experience in some American states is that, from the beginning of the reporting of a crime, a specialist prosecutor is allocated to work with the woman. We believe that that is one of the factors responsible for higher conviction rates.

Pauline McNeill: Is there any indication that the quality of evidence from a victim is directly affected when the accused defends themselves?

Alison Paterson: Going to court to give evidence about such a personal crime is already stressful. We know from cases that are no longer sub judice that the added stress factor of facing the accused takes an emotional toll that impacts on someone's ability to remain calm and to give evidence clearly. That in turn affects the process. We would be concerned about the long-term impact that that has on the individual's mental and emotional health.

Pauline McNeill: I want you to specify whether the quality of evidence in court is directly affected by the right of the accused to cross-examine.

David McKenna: I am not sure that there is any empirical evidence with which to respond to that, but you can draw your own conclusions. If a witness feels that they are going through a tortuous and degrading scenario, that is unlikely to improve the quality of the evidence that is being put before the court.

Pauline McNeill: I do not know whether you can answer this question, but does a person have a categoric right, in every case in every court, to defend him or herself? Are there any cases in which, in theory, you cannot represent yourself?

10:45

David McKenna: You would need a lawyer to answer that.

Pauline McNeill: Has anyone looked at the possibility of a kind of indirect representation? Arguably, that is why we have solicitors and advocates, but I am thinking about the fact that the person who wants to cross-examine the victim wants to ask detailed and intimate questions that they themselves have framed. Has anyone looked at the possibility of doing that through a third party?

David McKenna: Again, members of the committee are probably better placed to answer that question than we are. We have an adversarial system of justice in Scotland, which means that witnesses are examined and cross-examined. We take the view that in Scotland we should be looking at alternative means of obtaining evidence to put before the courts. For example, in rape and sexual assault cases, the cross-examination could be done in some other way, such as being done on oath before a judge and agreed by the parties before going into court. I suspect that that would be greeted with substantial alarm.

The Convener: That would raise eyebrows.

David McKenna: At least, but we should not rule anything out. I know that in court people are not victims, they are simply witnesses, but sometimes they have been subjected to horrendous physical and sexual assaults. Do we want the kind of justice that takes a woman who has been raped and puts her in a public court with strangers and insists that the person who she knows committed that assault on her—

The Convener: Can we be careful? Let us remember that until there is a conviction, we are dealing with an allegation.

David McKenna: I accept that, but I am talking about the victim's perception. The formal position may be that one person is a witness and one is the accused, but from the victim's perspective—which in many cases is correct, because the accused is found guilty—and from ours, to put people who have been raped in that position is not acceptable in the 21st century. There must be better ways of getting fair and equal justice than having to talk to someone in a witness box. That is the basis of our point. It is not a case of rights in the European convention on human rights, but rather the human rights that we should have in any democracy.

Pauline McNeill: I do not disagree with you, but as Gordon Jackson pointed out, in our law people are innocent until proven guilty. If we are to make changes to the law, I want to be clear about the evidence.

Are there figures to show that men choose to defend themselves more often in cases of rape than for any other crime?

David McKenna: As far as I am aware, the Crown Office does not monitor or record those cases in which accused people defend themselves.

Phil Gallie: David McKenna commented on the victims of rape. Does Victim Support recognise that there can be victims on both sides of the argument and that, on occasion, false allegations are made? Does it acknowledge that there have been cases of individuals taking their own lives following the stigma and anxieties that were caused by such false allegations?

Alison Paterson: Of course we do. Nevertheless, we are here today to present the views of the victims. In previous evidence, we reminded the committee about the battery of experts who are there to advise the accused, and the fact that in our system the victim has absolutely no right to representation.

On a more constructive note, we could look with interest at what comes out of yet another Home Office policy review—I apologise for quoting all these developments in England and Wales, but they are a wee bit ahead of the game on this issue. A Home Office inter-agency group is considering the processing of rape and sexual assault cases and is about to report. In particular, the group is considering the vexed issue of what has become known as date rape and whether it should be treated as a separate offence. Some cases that have been featured in the media, particularly those that are most vexatious and have resulted in miscarriages of justice, have been in that whole arena where the victim has been in some sort of previously consensual relationship. It will be interesting for us to consider what comes out of that work.

David McKenna: If, within the criminal justice system, we can recognise that the accused person is innocent until proven otherwise and treat them accordingly, surely we can accept that a victim is a victim until proven otherwise and treat them accordingly. We must consider how we treat people and ensure that we give them basic rights.

Phil Gallie: I go along with much of what you have said. However, rape victims are given a degree of anonymity, whereas someone who is charged with rape loses any claim to anonymity. In the period before the matter is brought before the courts, it can play on an innocent person's mind. I recognise the cases that you refer to, but there have also been cases of people making accusations maliciously. I recognise that those cases are minimal, but when we consider the full implications and seriousness of a rape charge, we must consider both sides of the argument.

Mr Gil Paterson (Central Scotland) (SNP): Is your position that the rights of one person should

not outweigh the rights of another?

David McKenna: Yes.

Mr Paterson: To overcome that, even if we cannot stop an individual cross-examining the victim, do you not think that video-linking should come into play automatically? We could allow someone to conduct their own defence, but find some substitute for cross-examination, which is the part that causes such alarm to the individual who is being interrogated.

Alison Paterson: We understand that that is what is being prepared as the new approach in English and Welsh courts. Video-linking is absolutely vital, especially for children who are giving evidence. I am glad that you were not suggesting that the situation would be ameliorated in a case where an accused wants to personally cross-examine by video, because I imagine that that could create an additional set of horrible reactions. However, that is not what you were proposing.

Mr Paterson: No, it was not. The tone of your evidence suggests that the current balance is wrong; the sexual experience of the accused is not brought before the court, yet the victim's relationship with individuals outwith the relationship with the accused is trawled before the court. Are you suggesting that there is an imbalance, and that if something is good for one party, it should be good for the other?

Alison Paterson: Yes.

Mr Paterson: Have you any evidence to suggest that the way in which rape trials are conducted is the reason why so few people come forward in the first place, and that the success rate for taking rape cases to conviction is dramatically lower than for other crimes?

Alison Paterson: We have been told informally, by people working in the Crown Office, that one of the reasons for conviction rates being so low is the number of cases that are being prosecuted that would not have been prosecuted before. That may be a result of increased awareness or pressure on authorities to do something about the serious allegation of rape or sexual assault. I cannot give a view on that, other than to say that the way in which cases are prosecuted could be improved. We made suggestions earlier about the need for specialist knowledge and possibly even specialist prosecutors.

As a victim support officer and a woman, there is no doubt in my mind that low conviction rates are the end-product of a system that is hugely ambivalent in its attitudes to women and to women's rights to assert their sexuality and to say no. The fact that the criminal justice system—not just judges—is male-dominated has to be a factor, at an unconscious level alone, in how the whole thing progresses.

Kate MacLean (Dundee West) (Lab): Unlike Gordon Jackson, I do not have the slightest problem with people who are accused of rape and sex crimes automatically not being allowed to cross-examine alleged victims in court. How often does intimate cross-examination of sex attack victims occur in Scotland? Even if it is only once or twice, that is once or twice too often. From your work, do you have any evidence of the effect on victims of rape and sex attacks of being cross-examined by the person who is accused of carrying out the crime? Does it have an effect on the number of women who report sex crimes?

David McKenna: As I understand it, no records are kept and there is no monitoring of cases in which accused people represent themselves in the cross-examination of the victim. It is not every month that a victim of rape or sexual assault is directly cross-examined by an accused person. However, it is common enough—we could probably say that it happens every week in a court somewhere in Scotland—for an accused person to cross-examine a woman in relation to a charge revolving around sexual behaviour. In cases of minor sexual assault charges, it is far more common for people to represent themselves, not just during cross-examination of the victim, but throughout the case. The more serious the case, the greater the likelihood that the accused will be represented.

Women come out of the process badly distressed, angry and sometimes damaged. It can have an adverse effect on individuals' recovery and certainly leaves them with very little confidence that the justice system can deliver the goods.

Alison Paterson: That is absolutely right. From this year, our new and improved statistical monitoring database will enable us to analyse more closely every case that comes to Victim Support Scotland. We will be doing that for a number of types of crime and situation.

The committee will recall that the line that was adopted by the Government at the time, about the situation in Scotland, was that no sheriff would allow inappropriate cross-examination. Generally speaking, many sheriffs have exercised sensible judgment in such cases, in relation to the lines of questioning and situations that they have allowed to unfold in their courts. However, we know that cases are going on as we speak, and that such protection is not being afforded universally throughout Scotland.

11:00

Michael Matheson (Central Scotland) (SNP): We have concentrated on cross-examination of witnesses, but a matter that concerns me in relation to vulnerable and intimidated witnesses is the reporting of cases by the media. Any woman who has witnessed the way in which the newspapers report sexual assault and rape cases would be deterred from pressing charges in such cases. I know that from personal experience.

The sheriff can order the court to be cleared when a victim is giving evidence. However, members of the media are allowed to remain behind to report on the evidence that is given, although the witness's name must be excluded from any report. First, do you believe that we should improve that situation? In England, the rules on reporting cases will be tightened up to protect victims. Secondly, if the rules are tightened up, what sort of provision should be made and how should we seek to achieve it? Would it be appropriate to have a complete media blackout when certain witnesses are giving evidence?

Alison Paterson: We tend to think about victims' rights as being exclusively concerned with criminal justice, but the victimisation that results from crime is, essentially, a social issue. The issue of victims' right to privacy is fraught with difficulties because involvement with the media is conducted on a voluntary and consensual basis. We are trying to carry out joint work with our sister Victim Support organisation in England and Wales and with the press to determine whether we can establish greater agreement on reporting of personal crimes. That will result in a general overview of the problems that are faced by victims outside courts when they are pursued by the media, especially in cases that attract a lot of media attention, such as those that involve rape and sexual assault.

What happens in court produces unique problems. Although the media are prohibited from naming the victims in certain cases, they are entitled—except in unusual circumstances—to remain and follow proceedings when a court is cleared.

Gordon Jackson: I think that they are always allowed to remain when the court is cleared.

Michael Matheson: Yes, they are. In a case that I dealt with recently—which, I should add, is no longer current—the press were allowed to remain behind on every occasion.

Gordon Jackson: I have never known them to be excluded.

Michael Matheson: No. I do not want to go into the case in detail. However, I cite it as an example.

In the paper "Towards a Just Conclusion", recommendation 16 is that

"the law of evidence be changed to allow the court to exclude the public (and if necessary the media) from the court room in cases where witnesses face serious and specific intimidation".

Is that a recommendation that you believe should be implemented to meet the needs of vulnerable witnesses? Do you support the idea of excluding the media when especially sensitive issues are being dealt with?

Alison Paterson: We do, but we feel that, unless we also safeguard and protect victims outside the court in cases of intimidation, the objective would be only partly achieved. A witness might feel more secure in court and give better evidence, but if he or she is subjected to a barrage of media intrusion on leaving the court, there is still a problem.

Michael Matheson: That is a fair point. Do you feel that the mechanisms that are used by the Crown Office and the police to assess whether witnesses are vulnerable are adequate? Your evidence would suggest that you do not. Do you feel that implementation is patchy across the country? There seems to be a better understanding of how to recognise and deal with vulnerable witnesses in some parts of the country than in others.

David McKenna: There should be a substantial overhaul of the way in which the justice system recognises the vulnerability of witnesses. Over the years, guidelines have been issued by ACPOS and by the Crown Office. For us, the key issues are that there is no agreed definition of vulnerability that applies across all agencies in Scotland and that the definitions that we have come across are rather narrow and too well defined. The definition of vulnerability should be open enough to allow identification of vulnerable people by the nature of the crime, by the characteristics of the victim, by the relationship to the accused or by all three of those things. Victims of racially motivated crime should also be recognised as vulnerable. We would like a more open interpretation of vulnerability—one that everyone could agree on and that would inform the police service and other agencies.

Michael Matheson: Is your experience that the police have one interpretation of a vulnerable witness, that the Crown Office might have another and that the witnesses themselves might have yet another interpretation of what it means to be vulnerable?

David McKenna: The important point about defining vulnerability is that there are no special measures available further down the track. In Scotland, one can have access to special

measures only if one is a child or a victim of rape or serious sexual assault. There is also a statutory definition that includes people with specified mental health challenges. Those are the only people who can access special measures in court. We believe that other victims and witnesses should be entitled to special measures because of their vulnerability, but their vulnerability often does not fit into those narrow categories.

The Convener: Off the top of your head, what percentage of victims and witnesses would you end up classifying as vulnerable? I know that you will not have detailed research on this, but do you have a feel for what the percentage might be?

David McKenna: We could be talking about somewhere in the region of 10 or 15 per cent of all witnesses who go through the court system. That does not mean that all those witnesses would require special measures, but it means that special measures ought to be available to them, if appropriate.

Johann Lamont: The convener said that there is a report in *The Scotsman* today that expresses anxiety about the ways in which vulnerable witnesses might be protected. I have not seen that article, but I know from my discussions with Angus MacKay that he wants to change the current situation. Some of the anxieties might come from those—the legal people who are urging caution—who will have to find the means by which that protection is to be achieved. However, the matter concerns people outside the circle of judicial and legal advisers and we sometimes feel that we are in conflict with the legal system on this issue; its opinions seem to be out of kilter with others' feelings about natural justice.

I want to refer the committee to evidence that was given by representatives of the Rape Crisis Network on their experiences with the victims of rape, who often said that going through the system was like a second violation. Do you feel that under-reporting of the crime could be a consequence of women having such experiences?

I was interested in your comments on special prosecutors. Are you in favour of the development of special courts for dealing with crimes of the sort that we are discussing? If so, what would be different about the culture of such a court and of such prosecutors?

If there were a blanket rule that, for certain categories of crime, people could not conduct their own defence but had to have it conducted for them, would that undermine the presumption of innocence? If it were a blanket rule, people would not have to make individual decisions in individual cases.

I would also like to ask about victim empowerment. How do you feel about a victim being able to make a statement about the impact on them of a crime? There is a difficulty in that no one speaks up for victims in court, because the prosecutor is operating in the public interest. How can victims have someone to speak up for them?

The Convener: Last week, we took extensive evidence on victim impact statements. I do not want to rehearse the same point.

Johann Lamont: The question is linked to the idea of rape victims feeling that someone is speaking up for them.

The Convener: Please keep your response to that aspect of the question brief. I ask Johann Lamont to have a look at some of the comments that were made on the record last week.

Alison Paterson: There is no doubt that a personal victim statement of the type that is used in England and Wales would improve victims' experiences. That would also ensure that courts had full information about concerns about victims' safety, especially when sentencing is being considered.

We do not claim to have expert background information on how specialist prosecutors would work. Lily Greenan, formerly of Rape Crisis Edinburgh, spent three months on a Churchill fellowship in the United States of America, where she examined the experience in California. She has given some interesting presentations on the matter. Also, the Crown Prosecution Service in Leeds now employs specialist prosecutors on a trial basis; who prosecute cases of rape and sexual assault.

It is not clear whether special courts would be necessary if the quality of inter-agency teamwork and the prosecution process were improved in relation to rape and sexual assault. Achieving that improvement would be interesting and worthwhile work for both lay and legal people in the context of a wider review of the way in which we treat rape and sexual assault victims. Although public confidence in the police response to reported cases might have increased, it is not yet at the level that we want. That would enable people—especially young women, children, and people who have suffered in silence for years but who might want to come forward, even years after commission of the crimes—to disclose their experiences to the system. We need to make significant improvements.

Maureen Macmillan: I feel, after listening to you, that we need to do some research and to get some figures on what is going on. On the one hand, we are told that such cross-examination hardly ever happens and that it is not significant. On the other hand, David McKenna has said that someone is cross-examined in Scotland in that way once a week—perhaps not in a rape case, but

in a sexual assault case. We also have to tease out the motivation of an accused person who wants to cross-examine the victim, especially if he has been represented by an advocate and then decides suddenly that he wants to cross-examine the witness himself.

We must also consider the total experience of women when they are raped. For example, I represent a country area, and I am concerned that women who have been raped might, in the corridor of a small rural police station, meet the person who is alleged to have raped them. What facilities are there to support victims from the word go? A great difficulty is, as Michael Matheson said, that women do not come forward because they are put off by the way in which cases are reported. They are also put off by society's attitude to women who have been raped—although people think that rape is terrible, there is also salacious interest in such cases. Do you agree?

11:15

Alison Paterson: Absolutely. If Parliament focused on the treatment of women and children in sexual crime cases in the criminal justice system, it would be giving one of the strongest signals that it will examine the issue fundamentally. That might not be the whole story—there might be social issues that must be tackled in the long term to change things fundamentally. We cannot, however, wait indefinitely for a complete and overarching strategy before tackling some of the pressure points.

Mrs Lyndsay McIntosh (Central Scotland) (Con): I have been interested in what has been said so far. Is there evidence that women who are supported by the fiscal service or by the Crown Prosecution Service throughout a rape trial are in a position to give better evidence and have a better chance of securing the conviction that they want? Is there evidence that people who are well supported by the Crown make better witnesses?

Alison Paterson: That is an interesting choice of words. The question of how supportive procurators fiscal can be—given that they are prosecuting in the public interest—is exercising the Crown through the Lord Advocate's feasibility study. The simple answer to your question is that the victims of rape and sexual assault are not, at the moment, supported through the process by the prosecution. The Crown has made great efforts to ensure that much higher priority is given to the quality of interviewing of victims of rape and sexual assault, to the way in which precognitions are taken, to the quality of information that is given to victims, to familiarisation of victims with the court and so on.

One reason why the Executive has decided to fund a witness service in the courts is that it recognises that the prosecution witness has no representative or support person. That is a contradiction in the adversarial system. In inquisitorial systems such as those that exist elsewhere in Europe and in which the victim has legal representation, there might be quite a different answer to that question.

Mrs McIntosh: After helping witnesses through a trial, is it your experience that if they do not have closure—to use an American expression—after the event, they do not feel that the trial has been worth while?

David McKenna: In general, most victim witnesses, particularly in the most serious cases, find the whole process distressing. Most victims are dissatisfied at the end of a trial and feel that the system did not work for them, irrespective of whether the verdict is guilty, not guilty, not proven or whether a sentence is five or 10 years. In the justice system, there are not many satisfied victims of crime.

Alison Paterson: Moreover, in our justice system there is not much process or ritual involved in sentencing that enables the victim to feel that their experience is recognised as part of the process. It is only occasionally that, in summing up, a sheriff or judge will address the trauma of the victim and the difficulty that the victim has experienced. Clearly, there are symbolic as well as practical deficiencies in our system. Visitors to this country often say that sentencing is over in a flash.

Mrs McIntosh: One reason why judges and sheriffs do not comment is that their remarks will be picked up by the press. Even the most inconsequential comment can end up in the headlines.

The Convener: I am aware that Phil Gallie has indicated that he wishes to flag up a related issue, although not one that is specifically concerned with rape. Before I move on to that, I would like to run through some straightforward questions, to which I hope I will get straightforward yes or no answers. We received a summary of the recommendations that are in "Towards a Just Conclusion"—the consultation that took place about a year and a half ago. Are you aware any movement on those recommendations?

Recommendation 3 was:

"That the Association of Chief Police Officers in Scotland be invited to draw up and disseminate to police forces, and make publicly available, best practice guidelines on treatment of vulnerable and intimidated witnesses."

Has that happened?

David McKenna: We are not aware of any change.

The Convener: Recommendation 13 was:

"That, with the aim of enhancing the scope for vulnerable and intimidated witnesses to give evidence other than in person:-

- the Crown Office conduct a review of the use made by prosecutors of the hearsay evidence and prior statement provisions in Sections 259 and 260 of the Criminal Procedure (Scotland) Act 1995, with a view to determining whether there is scope for wider use in relation to particular categories of vulnerable or intimidated witnesses".

Are you aware of the Crown Office having conducted that review?

David McKenna: No, but the Crown Office is talking about conducting it.

The Convener: The paper was issued in November 1998.

Recommendation 15 was:

"That The Scottish Office commissions research at an appropriate time, to observe whether the alternative means of evidence now available for vulnerable adults are effective in allowing these witnesses to give testimony with minimum distress."

Are you aware of that research having been done?

David McKenna: No.

The Convener: Recommendation 16 was that the law of evidence should be changed

"to allow the court to exclude the public (and if necessary the media) from the court room".

Michael Matheson mentioned that. Are you aware that such a change is being considered?

David McKenna: No.

The Convener: Recommendation 16 went on to suggest that

"the law of evidence be changed to allow such intimidated witnesses to give evidence by alternative means currently available for child and vulnerable adult witnesses".

Are you aware of any movement on that?

David McKenna: No.

The Convener: Recommendation 17 was:

"That The Scottish Office commissions research into the ways in which victims of sexual crimes give evidence in court, in order to identify any shortcomings in the present arrangements."

Are you aware that any such research has been commissioned?

Alison Paterson: Yes, but we do not think that more research is needed. We made that point.

The Convener: I am concerned that some of those recommendations, which appeared 18 months ago, have not, as far as you are aware, been implemented.

Alison Paterson: We hope that the action plan will give an update on that.

The Convener: Do you mean on progress in particular areas?

Alison Paterson: On all the recommendations. The action plan for "Towards a Just Conclusion" might tell us about things that we do not know, but which are going on behind the scenes.

The Convener: But you have not been involved in and are not aware of any work on issues such as the Crown Office review.

David McKenna: No.

The Convener: There are other recommendations, but you have given us a fair indication of what is happening.

Phil Gallie has a question on an issue unrelated to what we have been talking about so far.

Phil Gallie: It is pretty unrelated to that, but not to witness support. On several occasions you have mentioned the situation in England and Wales, which differs from that in Scotland. When a verdict of not guilty or not proven is handed down in Scotland, the individual concerned cannot be brought back before the courts. I understand that south of the border, if there is evidence of witness intimidation or of interference, a retrial can be ordered. Would Victim Support give its support to that happening in Scotland?

David McKenna: Where someone has acted to pervert the course of justice, there are special circumstances. I suspect that we would support a provision that allowed such cases to be brought back to court and reviewed.

The Convener: Thank you very much. Before you rush off, Gordon Jackson has a point of information.

Gordon Jackson: On stalking, the idea was that previous convictions should be set out more specifically, so that sheriffs would know what the breach was. That point is being addressed by a working party of the Lord President, which is likely to recommend the change. In addition, Lord MacLean is dealing with the matter in his committee on serious violent and sexual offenders. Two separate committees are likely to recommend the change, which we would all welcome. I thought that I should share that information.

The Convener: Thank you, Johann and Gil.

Petitions

The Convener: We now move to item 4, which is petitions. There are three petitions, the first of which is petition PE111 by Frank Harvey. A note has been circulated by the clerks, which is fairly straightforward. There are two things that we could do in respect of this petition. First, we could treat it in the same way as we treated PE29 and PE55 on road traffic offences and defer consideration until we see the outcome of the Department of the Environment, Transport and the Regions research. Secondly, we could simply note the petition and take no further action. I recommend the first option. As we have two live petitions, we may as well include this one. We will write to Mr Harvey and tell him that we will reconsider the petition when we get the information that we are waiting for.

Michael Matheson: Mr Harvey's petition raises a number of issues in relation to a specific incident, which he refers to as the reason for his petition in the first place. If we are writing to him, we should make it clear that we do not get involved in individual cases, so that he is aware of that in future.

The Convener: Yes.

Phil Gallie: Mr Harvey's petition is somewhat different from the others. I have no problem with our putting the petitions together, but this petition involves different circumstances, with regard to police chases and so on.

The Convener: The other two petitions are not exactly the same. The point is that we are better dealing with this petition when we come to talk about road traffic offences and road traffic situations; we will be better informed then. We will defer consideration of this petition and inform Mr Harvey of what we are doing.

Petition PE124 is on contact rights for grandparents. Members will be aware that an extensive amount of information is coming in on this matter. I saw a detailed document yesterday, but it has not reached the clerk's desk yet. This petition originated in an earlier attempt to secure right of access for grandparents in cases of custody and access. It was pointed out to the petitioners that in Scots family law there is no right of access for anybody, not even a parent—access can be denied to a parent, let alone to a grandparent. The petitioners rightly went away and have come back with a different approach, which we have before us today.

The petition asks us to make changes to the Children (Scotland) Act 1995. The committee cannot do that; we can simply draw the matter to the attention of the Executive. However, as the clerk's note points out, there is an impending white paper on family law. The issues in that white paper might relate to the issues in the petition. It might be more appropriate to defer consideration of this petition until we deal with the white paper. That is the option that I recommend. Alternatively, we could note the petition and close consideration of it. Do we agree to defer consideration?

Members *indicated agreement.*

11:30

The Convener: We will advise the petitioners of our decision.

Petition 176, from Mr McMillan, calls for the Scottish Parliament to create an independent body to investigate and prosecute complaints against the police in cases where the Crown Office and police complaints department have failed to investigate complaints fully.

We have two options. As the committee has agreed that we may come back to the issue of self-regulation in the legal profession and the police force, we could defer consideration of the petition until that time. Unfortunately, we do not know when that would be. I suggest that we write to the petitioner to inform him of our intention to deal with the issue of self-regulation at some point. We could inform him when we do so and invite him to resubmit his concerns to us. I am aware that the Equal Opportunities Committee has been talking about police complaints. Kate MacLean, do you want to add anything? I do not know where your committee is with that at the moment.

Kate MacLean: We made recommendations in our response to the Executive's report on Macpherson. The committee expects to question Jim Wallace later this month on the recommendations.

The Convener: Perhaps the petitioner could be advised of the activity of the Equal Opportunities Committee.

Phil Gallie: There is some urgency in relation to self-regulation. Some amendments to the Standards in Scotland's Schools etc Bill that will be discussed today deal with the powers that are given to the General Teaching Council. A massive question mark is building up over other areas, such as the medical profession. This committee has to recognise that such matters are urgent.

The Convener: Unfortunately, there is also some urgency in relation to many other areas. I believe that the issues in this petition would best be addressed when we deal with self-regulation. Phil is right: self-regulation relates not only to the police but to teachers, doctors and so on. Rather than dealing with the matter in relation to each profession in turn, we may find that there is an

argument for dealing with the issue as a whole and introducing a standard across all the professions. We do not want different regulations to apply to different professions.

However, this committee is unlikely to be able to deal with the issue within the year. We have a vast number of priorities, most of which are marked "urgent" or "for immediate attention"—we have yet to deal with the issue of legal aid. We are juggling those issues constantly. I would emphasise the fact that—and Phil rightly substantiates this point—there is widespread concern about self-regulation across the professions, which are seen to be failing people.

Phil Gallie: This will worry you, convener, but I warmly welcome your comments.

The Convener: That really worries me. Can it be struck from the record? [*Laughter.*]

Scotland Act 1998 (Modifications of Schedule 4) Order 2000

The Convener: Item 5 is subordinate legislation. We are to consider a draft affirmative instrument, the Scotland Act 1998 (Modifications of Schedule 4) Order 2000. I note the clerk's intimation of the background to this instrument. The difficulty is in knowing what it will do in practice. I found the whole thing a little opaque, as did the clerk. Do we have a time limit? When does this instrument have to be agreed to?

Andrew Mylne (Clerk Team Leader): The Finance Committee will debate it next week, at the same time as this committee will meet.

The Convener: I would like to ask what precisely the instrument will do, as it will change the Scotland Act 1998. If we are to be presented with statutory instruments that change acts, I would like to know clearly what they are intended to achieve. There is an Executive note on this, but it is as clear as mud.

Could we ask the Executive to advise us, in clear and simple terms, of the exact import of the statutory instrument? I am reluctant to let it go through on the nod, especially as it seeks to amend the Scotland Act 1998.

Scott Barrie (Dunfermline West) (Lab): Am I being stupid, or does this have something to do with the statutory instrument that we received last week on pensions?

The Convener: Who knows? That is the kind of thing that it is important to know.

Scott Barrie: We raised questions about that instrument and then said that it was fine. From my brief reading of that, and from trying to understand this instrument, I understand that there is some correlation. However, I am not sure.

The Convener: That is a useful point to highlight. When subordinate legislation is presented to us, we must be sure what exactly it is intended to achieve.

Scott Barrie: I thought that it was just me who did not understand it.

The Convener: We can defer discussion of this item until next week. It will probably not take long.

Andrew Mylne: The committee will meet at the same time as the Finance Committee next week, when that committee will debate the order.

The Convener: I am reluctant to agree to this order without knowing exactly what it is about and what its impact will be.

Andrew Mylne: We can seek further clarification from the Executive.

The Convener: We must do so.

Andrew Mylne: A minister will be present at the Finance Committee meeting. If a member of this committee attended that meeting, they could ask the minister about it.

The Convener: Do we want to make a decision now that one of us will scoot out of our meeting next week to attend the Finance Committee debate?

Gordon Jackson: Haud me back.

The Convener: It looks as though it will be you, Scott.

Scott Barrie: Oh, come on.

Gordon Jackson: Motion carried. [*Laughter.*]

Scott Barrie: I do not even understand the instrument.

The Convener: The clerk will ask the Executive for clarification before next week.

Scott Barrie: Okay.

The Convener: So, you will be our envoy to the Finance Committee. Thank you. That was a job well done.

We now move into private session to discuss draft committee reports. I ask members of the public to leave.

11:39

Meeting continued in private until 12:21.

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