JUSTICE AND HOME AFFAIRS COMMITTEE

Tuesday 13 June 2000
(*Morning*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
22nd 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 MEMBER ALSO ATTENDED:

Mr Gil Paterson (Central Scotland) (SNP)

WITNESSES

Peter Beaton (Scottish Executive Justice Department)
Andrew Berry (Law Society of Scotland)
Sandy Brindley (Scottish Rape Crisis Network)
Dr Alastair Brown (Crown Office)
Barbara Brown (Scottish Executive Justice Department)
Gerard Brown (Law Society of Scotland)
Gerald Byrne (Scottish Executive Justice Department)
Janet Cameron (Crown Office)
Anne Keenan (Law Society of Scotland)
Michael McSherry (Law Society of 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

Tuesday 13 June 2000

(*Morning*)

[THE CONVENER *opened the meeting at 09:33*]

The Convener (Roseanna Cunningham): Good morning. Let us now begin our proceedings.

Scott Barrie (Dunfermline West) (Lab): Before we start, I remind members that I shall be attending the Finance Committee later this morning; I sent everyone an e-mail about that. Are there any comments that members would like me to convey to the Finance Committee, or am I a free agent?

The Convener: Apart from what we discussed last week, there are no other points to raise. Have you seen the response from the Scottish Executive?

Scott Barrie: Yes, I have a copy of that.

The Convener: If you also have a copy of the *Official Report*, you should have all the information that you need. With some luck, you should not have to be at the Finance Committee meeting for long. We are very grateful to you for representing the views of the Justice and Home Affairs Committee on the Finance Committee.

I received a phone call this morning from Gordon Jackson, who is stuck in Glasgow. He is trying to get through, but if he makes it he will be late. Euan Robson apologises for not being able to arrive until 11.30 am or 12 noon; he is required at a local inquiry in his constituency and is unable to get away from that. I welcome Gil Paterson to the meeting again, as I did last week. I understand that Johann Lamont may be coming as well, although she has not yet appeared.

I remind members of a note that we all received by e-mail. I know that some people are notoriously bad at reading their e-mail—I am not looking at Maureen Macmillan in particular. The reason why the windows in this room are taped up is that there is filming today in West Parliament Square for a Channel 4 television drama called "Sword of Honour", which is set during the second world war. We are officially in preparation for bombing, I believe—and that is an appropriate moment for Phil Gallie to arrive. [*Laughter.*]

Phil Gallie (South of Scotland) (Con): Did I miss something?

The Convener: I understand that a 43 ft barrage balloon is about to be inflated. If that should happen, people should not be alarmed, as it is all part of the on-going drama. I am advised that the filming should not disrupt committee business, but I am not entirely sure that that is true.

Let us move on to more important matters. The Scottish Women's Aid response to the consultation paper on stalking and harassment was sent out to members. Unfortunately, it was sent out without its final page, which is now being circulated; members should add that page to their copies of the response. The response from the Scottish Police Federation is available and has already been circulated, and we also have copies of the response from the Association of Scottish Police Superintendents.

Petition PE212, from the District Courts Association, has now been formally referred to the committee. It calls for the Scottish Parliament to delete all proposals in part 2 of the Bail, Judicial Appointments etc (Scotland) Bill that deal with justices of the peace. I propose to deal with that petition at next week's meeting. We are finalising the committee's report on the bill today and we shall move to stage 2 within a week or so, so it seems appropriate to deal with the petition then. We shall put it on the agenda for next week. I think that members have already seen the petition and we have taken it into account in our draft report on the bill.

Vulnerable and Intimidated Witnesses

The Convener: The first item on our agenda concerns vulnerable and intimidated witnesses. There are a number of people here today to give evidence, and I welcome first Sandy Brindley, the legal affairs spokesperson for the Scottish Rape Crisis Network, who has graciously agreed to come to the committee yet again. The committee is aware of the imposition that we put on voluntary organisations such as yours when we ask you to come to meetings such as this, Sandy, and we are very grateful that you have been able to find the time. I understand that you would like to make a short opening statement.

Sandy Brindley (Scottish Rape Crisis Network): The Scottish Rape Crisis Network welcomes the opportunity to come along to the Justice and Home Affairs Committee to raise our concerns about how the criminal justice system relates to women who complain about rape or sexual assault. I shall briefly outline the concerns of those who work in rape crisis centres and of the women who contact us, and identify some areas in which we feel action is needed to restore the confidence of women and girls in the criminal justice system. The evidence that I shall give you will be similar to the evidence that we gave to the Equal Opportunities Committee some months ago. Our concerns have not changed since then.

Let me begin by putting the issue in context. The significant majority of rapes and sexual assaults are not reported to the police. Around 80 per cent of women contacting rape crisis centres in Scotland do not report the incident to the police. For incidents that are reported, there is a very low conviction rate, estimated at between 9 and 15 per cent. Women who report incidents of sexual violence to the police frequently describe their experience of going through the criminal justice system as a process of violation.

Our experience is that attitudes in society towards women in general, and towards women who have been raped in particular, are reflected throughout the criminal justice system. The myth of women frequently making false or malicious allegations of rape or sexual assault is pervasive and identifiable throughout the criminal justice system. In reality, only between 2 and 4 per cent of complaints of rape are found to be false.

We are concerned by the lack of consistency in the police response to complaints of rape and sexual assault. There have been significant improvements in the police response in the past 15 years, such as the setting up of woman and child units and other specialist units throughout Scotland to deal with those crimes. However, some police officers still approach a woman complaining of rape and sexual assault with a view to proving or disapproving that she is lying. For example, women who make a complaint and have considerable physical injuries are still asked whether they have just had a bit of rough sex with their boyfriend and are regretting it. We consider it unacceptable that women who have just been raped should be subjected to that kind of questioning.

We are also concerned about the lack of availability of female police casualty surgeons, which is a point that women consistently identify as something that is difficult for them. In Strathclyde, only two female police casualty surgeons are available to examine women after a rape or sexual assault. Our final concern about the police response is about women who make a complaint about being raped by a policeman. The fact that the employing police force investigates any such complaint is a matter for concern.

We are concerned about the common-law definition of rape, which does not reflect the reality of women's experience. The common-law definition of rape is carnal knowledge of a female by a male obtained by overcoming her will. That is restricted to penetration of a woman's vagina by a man's penis, and excludes anal rape, oral rape and penetration by objects. If a woman is raped while sleeping, she is deemed unable to withhold her consent and the accused can therefore be charged not with rape, but only with clandestine injury.

We are also concerned about the lack of information given to women throughout the criminal justice process. There is no consistency throughout Scotland with regard to how women are kept informed of proceedings. Women are not necessarily informed if the accused is released on bail or if the case is marked "no proceedings", which can leave women feeling powerless. There can be considerable delays in cases getting to court, which can cause considerable distress and disruption. One of the women with whom I am working has now been given her 12th court date in six months. It is inappropriate that a woman should be subjected to such delay, disruption and trauma.

It can be a traumatic experience or prospect for women to go to court, face the defendant again and have to give evidence. Some women have to undergo aggressive cross-examination in court. That is the part of the criminal justice system that women describe as being similar to being raped a second time. There has been a lot of publicity recently about cross-examination of the complainer by the defendant. The Scottish Rape Crisis Network regards it as a violation of a

woman's human rights to have to go through that experience. We welcome the Scottish Executive's commitment to stop women having to go through that ordeal, but we do not feel that it is helpful to consider the issue in isolation from what women go through generally at the hands of defence advocates in courts. In rape and sexual assault trials, aggressive cross-examination by the defence is commonplace; it is regarded as legitimate and justifiable by many within the criminal justice system.

09:45

We have particular concerns about the introduction of sexual history and sexual character evidence by the defence during rape and sexual assault trials in an attempt to discredit the complainer and to confuse juries. Legislation was implemented in 1986 under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, with the aim of limiting the introduction of such evidence. However, research carried out in 1992 found that evidence of that kind is introduced in around half trials by jury. In a significant minority of cases, the evidence is introduced without reference to the legislation, which means that the legislation is being broken.

The danger in rape trials is that neither the Crown nor the judge sees it as their role to intervene or object when the defence introduces such evidence. The researcher's view was that it should be generally known that the defence routinely tries to besmirch complainers, to call them liars, to bring in irrelevant evidence, to seize on any aspect of their sexuality and to construct motives for false allegations.

The research, which was carried out eight years ago, and anecdotal evidence from rape crisis centres give a clear picture of the shortcomings of the 1985 legislation and its implementation. The research also gave some clear recommendations on how the situation could be improved. However, our understanding is that the recommendations have gone nowhere. There is a clear and urgent need for a review of how the criminal justice system responds to complainers of rape and sexual assault.

We would like a number of issues to be considered, including the implementation of the existing recommendations on police response in the Convention of Scottish Local Authorities' response to violence against women, an examination of the common-law definition of rape and the establishment of structured provision of information to women throughout the criminal justice system. We feel that there is a strong need for tighter implementation of existing legislation on the introduction of evidence on sexual character and sexual history and we want the ending of the cross-examination of complainers by the defendant. We also want mandatory training of all criminal justice personnel to raise awareness of the effects of sexual violence on women.

We believe that consideration should also be given to the introduction of special prosecutors to prosecute crimes of sexual violence. We want adequate funding of rape crisis centres to enable us effectively to support women going through the criminal justice system. Finally, review and monitoring structures must be built into any changes of strategy to ensure that the changes are working and that women are able to receive protection and justice in our criminal justice system.

The Convener: Thanks. We will proceed to questions, but first I want to clarify one point. Do you accept that in a criminal trial the complainer must be subjected to cross-examination?

Sandy Brindley: Yes.

The Convener: It is just so that we understand the basis from which we are starting.

Are there any questions?

Phil Gallie: I had not intended to enter the discussion quite so early but, given the silence, I will. Can you give me an idea of the percentage of those who are charged with rape who elect to conduct their own defence?

Sandy Brindley: The percentage is very small. Until a year and a half ago, there had been no cases in Scotland. Since then, I understand that there have been around four cases.

Phil Gallie: Therefore the problem is not immense, but it is very distressing. In those cases, how many of the individuals were found guilty?

Sandy Brindley: The legal system would be more able to advise you on the specifics than I can. I know that the most recent case was not proven and that the verdict in the case before that was guilty. Our concern is that the publicity around the cases may lead to more defendants opting for that tactic in court. That seems to be the situation, given that there had been no cases at all a year and a half ago and there have now been three or four in a short period.

Phil Gallie: The purpose of the question was to find out whether, in your opinion, the fact that someone conducts their own defence creates an intimidatory situation, which proves to be to the defendant's benefit.

Sandy Brindley: Our experience is that it is a very traumatic ordeal for women. My knowledge of the previous two cases will be similar to the committee's in that it is taken from press reports. In some cases the verdict is guilty; in some it is not.

Phil Gallie: I apologise for my lack of knowledge—I have picked up on the recent case only through the press. I note that a 13-year-old girl was involved and was interrogated. Was that done behind barriers, by television or in full, open court?

Sandy Brindley: The most recent case was held in full court. There is provision for child witnesses to have the use of screens or live TV links to minimise their distress, but that was not done in this case. My understanding is that that was because the time scales were too tight for that to be implemented after the young woman requested it.

Phil Gallie: My understanding of the Children (Scotland) Act 1995 is that a minor, such as that 13-year-old, would have been entitled to be treated out of court, behind barriers or whatever. Is that the case or not? I am prepared to be corrected.

Sandy Brindley: She would have been entitled to the use of screens or live TV links. My understanding is that that was requested prior to the court case, but that she was informed that it would lead to delay.

The Convener: It is not automatic. It is decided case by case.

Phil Gallie: I seek your guidance, convener. Is it the case that the child would have had the right to demand such use?

The Convener: I think that there is always the right to ask for such things—you cannot prevent anybody from asking—but whether or not they are granted is for the court to decide.

Phil Gallie: Perhaps the Law Society of Scotland will pick up on that. Thank you, Sandy.

Mrs Lyndsay McIntosh (Central Scotland) (Con): Good morning, Sandy. I notice that in your opening remarks you mentioned that, in between 2 and 4 per cent of reported cases, the allegations are false. What do you think should happen about false allegations, which must put back your case?

Sandy Brindley: We feel strongly that it is important to see the situation in context, which does not always happen in press reporting of such cases. The percentage is a tiny minority and is similar to the percentage of false allegations of other crimes. There have been various approaches within the criminal justice system. Women have been charged or penalised for making what the court judges to be a false allegation. In our view, a custodial sentence is not necessarily helpful in such circumstances. I repeat that we do not want the issue to be over-emphasised, given that it accounts for such a small minority of cases.

Mrs McIntosh: Would not it be fair to say that such allegations trivialise the real trauma of women who have been through a rape?

Sandy Brindley: That is difficult, because there are issues when a woman makes an allegation that is deemed to be false. In some circumstances, the only way in which a woman who is being intimidated or who feels unable to go through with the case can pull out of the criminal justice system is to say that she made up the allegation. Confidence in the criminal justice system is not considerable, so it is our view that not every allegation that is said to be false should be seen as being false.

Mrs McIntosh: You mentioned confidence in the system. I notice in your submission that you state that on average only 20 per cent of women who use a rape crisis centre report the incident to the police. Why is that?

Sandy Brindley: Women give various reasons. Often, it is simply that they cannot face reporting the incident, having just been raped, as that requires spending up to six hours and sometimes longer in a police station, being examined by a male doctor and being subjected to distressing and personal experiences with a number of police or CID officers. Other reasons are fear of not being believed by the police and the criminal justice system, particularly if the woman knows the man accused of the incident. There is also increasing awareness in society and among women that the case will involve an ordeal in the courtroom. Women say that they cannot face being ripped to shreds by defence lawyers.

Mrs McIntosh: We have a note of some of the physical effects. Pregnancy is mentioned. What percentage of rapes end in pregnancy?

Sandy Brindley: It is a very small percentage. If I remember the research correctly, it is around 4 per cent.

Mr Gil Paterson (Central Scotland) (SNP): Sandy, the legal profession would have us believe that under human rights legislation there are difficulties when an accused person chooses to defend themselves. In the worst-case scenario, would a way round that be for a third party to be present? If a deaf and dumb person were involved in a trial in a normal court, a third party would need to intervene to interpret. Would it be acceptable to your organisation if an interpreter—whether a court official, a lawyer or someone like that—were put in place to get round the human rights problems? A person could formally conduct their own defence, but when it came to the cross-examination, they would be in a separate room and an interpreter would take over.

Sandy Brindley: I am not completely clear what you are suggesting.

Mr Paterson: If we cannot get round the human rights problem and a person is allowed to conduct their own defence and to cross-examine, could an interpreter come in for the face-to-face confrontation? The questions could be put by the accused to the interpreter and passed on.

The Convener: Gil, perhaps instead of using the word "interpreter" you might use the word "intermediary". The suggestion is that somebody would repeat the questions that the accused would have asked, instead of the accused asking them. The questions would be channelled through the intermediary, but they would be the accused's questions.

Mr Paterson: Yes, but put through a third party. That is perhaps a better description.

Sandy Brindley: That would be a far from ideal solution. We want the complete removal of the right of the defendant to cross-examine the main witness, who will be the complainer. Various measures that have been suggested, including the use of video links, could slightly reduce the distress of the ordeal, but would not significantly address our concerns. In our view, human rights should not be seen in absolute terms. The European convention on human rights, which refers to protecting people from degrading and humiliating treatment, can be interpreted as making a clear case for ending the ordeal that women go through in such circumstances. Your suggestion is an interesting one, but it is not one with which we would be fully comfortable.

Mr Paterson: You touched on another issue. At present, the complainer is somewhat remote from the procedures before the trial, which means that they may become out of touch with the accused's evidence. Should the emphasis change, so that the complainer becomes in effect a client of the prosecution and is kept informed at every stage of the trial? Would that help?

Sandy Brindley: There are other ways of ensuring that structured information is passed to the complainer. Some problems arise from the fact that there is no one in the courtroom representing the woman. The Crown represents the public interest, which may not necessarily coincide with the interests of the woman.

I do not know whether the most feasible way forward would be to make the complainer a client of the prosecution. There are other ways of ensuring that women are kept fully informed. Our understanding of the system that has been introduced in some states in America, whereby special prosecutors are used in these cases, is that it has substantially increased conviction rates and has ensured that there is considerable contact between the complainer and the prosecution prior to the trial. That is essential to enable women to give useful evidence, and it also means that women are kept more fully informed. Therefore, there are other ways of improving the situation with regard to information without such a radical change to current law practice.

10:00

Mr Paterson: My understanding is, as you said, that a woman's sexual history and what she was wearing would for whatever reason be brought to bear on a case. To balance the situation, would it be acceptable if the same information, on the sexual history of the accused, was made available to the court? Would that in any way satisfy you, or should not the sexual history of either party be brought to bear?

Sandy Brindley: One of the recommendations of the research that was commissioned by the Scottish Office in 1992 was that the prosecution should be encouraged, whenever the defence introduces sexual-history and sexual-character evidence, to attack similarly the credibility or the character of the defence. When the legislation was introduced, we recommended a ban on sexual-history and sexual-character evidence, except when it had forensic significance.

Legislation is in place. Our view is that the situation could be improved considerably without having to resort to legislative change. There could be much tighter guidelines and better implementation of existing legislation. In particular, the Crown and judges could be encouraged to intervene if inappropriate questions are being led by the defence or if evidence that is contrary to our legislation is being led by the defence.

Mr Paterson: My final question is general. Are there ways in which procedures could be tightened up to enable survivors to recover more fully?

Sandy Brindley: Absolutely. I tried to indicate in my opening statement that a range of specific measures could significantly improve women's experience of the criminal justice system. It is frustrating that a lot of the work has already been done but has not been implemented. I refer to the COSLA guidelines and the police response, and to the research that was carried out as a matter of good practice after the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 was introduced. That research gave a clear picture of the shortcomings and made clear recommendations, but none of them has been implemented.

Michael Matheson (Central Scotland) (SNP): I would like to pick up on an issue that I raised in the committee last week with Alison Paterson of Victim Support Scotland. You gave a number of reasons why women do not press charges in rape cases. Does media reporting of rape and serious

sexual assault cases have an influence on whether women choose to press charges?

Sandy Brindley: The focus on the few cases of false allegations, or on cases where the allegation is deemed to be false, is not helpful. Greater public awareness of what women go through when they go to court is deterring some women from making a complaint of rape. Rather than take media coverage as the starting point, we should look at how we can improve the situation so that women do not have to decide whether it is too much of an ordeal to go through.

It will always be traumatic for women to make a complaint of rape and go through the criminal justice procedure. We need to address how we can make the procedure as undramatic as possible, and how we can balance the interests of the defendant and the interests of the complainer.

Michael Matheson: I am conscious that there are complex reasons behind a woman choosing not to press charges. I know that the media can be an important factor—not only in reporting the case, but in the recovery from the trauma of what a woman has had to go through.

My understanding is that when a witness—it may be the complainer—is giving evidence, the sheriff can order the court to be cleared of the public, but not of the media. Consequently, the evidence can be on the front pages of the papers the next day. Some are concerned that if we exclude the media we prevent justice from being seen to be done, but I am conscious of the fact that vulnerable witnesses may be put off by the idea that when they get up the following day their story can be on the front page of the paper, although their name may not. That must be a traumatic experience.

The Convener: Could you get to a question, Michael?

Michael Matheson: Yes. I am also aware that in England, tighter restrictions are being placed on the reporting of sexual assault and rape cases. Do you have a view on whether greater restrictions should be placed on press reporting of such cases? That may mean excluding the press when there is a vulnerable witness or restricting the number of press who can be present while evidence is being given.

Sandy Brindley: Our experience is that it has not been a considerable problem because, as you know, by convention the press does not release details that would identify the woman involved. However, it can be startling for women to see their cases or experiences in the papers, so there is room to consider measures similar to those that have been introduced in England and Wales. That would be a benefit because it can be intimidating if a considerable number of people are in court when you give evidence. We would welcome the consideration of measures to restrict the number of press in court when a woman is giving evidence.

Michael Matheson: So you would support the English proposal that one member of the press be allowed to remain behind and report to the rest of the press?

Sandy Brindley: Yes.

Michael Matheson: Do you find inconsistencies across the country in police and Crown Office assessments of witnesses to determine whether they are particularly vulnerable and should be provided with further support?

Sandy Brindley: There is inconsistency and a lack of communication throughout Scotland. Our view is that “Towards a Just Conclusion” was not helpful. There are startling gaps in it and we are not clear where the consultation, which we provided a full response to, and the recommendations have gone.

Christine Grahame (South of Scotland) (SNP): Could you clear up some figures you gave? You said that 2 to 4 per cent of rape proves to be false. In what context? Is that in the context of trials, complaints, or prosecutions for false reporting?

Sandy Brindley: The figures come from a variety of sources. The first came from a New York crime study, which found that 2 per cent of women had made false complaints. That came from tracking them through the criminal justice system. The Soroptomists used the figure of 4 per cent in a recent report on rape.

Christine Grahame: When you say false, is that prosecutions for false reporting or what? What does the figure of 4 per cent relate to? What is its context?

Sandy Brindley: With regard to the Soroptomists, my understanding is that the figure relates to the legal system and the number of allegations that are found to be false. The figure from New York was based on tracking women through the criminal justice system from when they first made a complaint. Again, the figure was based on the number of complaints that were found to be false by the courts.

Christine Grahame: The system in New York is different from that in Scotland. I am trying to get the figure for Scotland.

Sandy Brindley: Research from different countries has come to a similar figure, and that figure is similar to that for other crimes. The Soroptomists’ figure is based on UK statistics, as far as I know; the other figure is based on New York statistics.

Christine Grahame: I am still not clear. Does the range of 2 to 4 per cent relate to the outcome of trials?

Sandy Brindley: Yes.

Christine Grahame: I am trying to link that to what you said about the fact said that there are few cases in which the alleged perpetrator cross-examines the alleged victim in court. That is a serious matter, but I am concerned about the conviction rate. Your submission says that there is a conviction rate of 9 per cent in rape trials. I take it that 91 per cent of rape trials end in not guilty or not proven verdicts.

Sandy Brindley: The figure of 9 per cent is taken from the beginning of the criminal justice process. Our figures are from 1994, and are the most up-to-date figures that we have on the criminal justice system. The figure is calculated from when a report of rape is made to the police.

Christine Grahame: So it does not refer to trials.

Sandy Brindley: No. The figure shows that 9 per cent of reported rapes lead to a conviction. There is a considerable attrition rate relating to cases that do not get to court in the first place. It would be useful to have figures on the number of complaints that come to court. The acquittal rate in the courtroom is about 78 per cent. That figure comes from research that I have mentioned. The conviction rate is low.

Christine Grahame: I understand what you are saying; I want to clarify that the figures do not apply to trials, but to the point at which a complaint is made. So there is a 78 per cent acquittal rate. Do you know how that figure breaks down between not proven and not guilty verdicts?

The Convener: Christine, I do not want us to start going down the line of trying to establish the difference between not proven and not guilty in Scots law; nobody has been able to do that.

Christine Grahame: I was wondering about the percentage split. I am aiming to address the point that seems to be at the back of this, which is the alleged lack of success in prosecutions by the state against alleged rapists.

I want to move on to the problem that you raised about the common law definition of rape. As you and I know, sexual assault can often be a lot worse in many respects than rape, but the public does not know that. Before we address the definition, should there be an education process for the public on what sexual assault means—I do not want to get into the graphic details here—so that the terms rape and sexual assault do not become interchangeable? Your organisation is called the rape crisis network, but no doubt you deal with many vicious sexual assaults.

Sandy Brindley: We do not see a hierarchy of experiences—some of which are worse for women than others—because for every woman their experience can be traumatic, irrespective of whether there is vaginal penetration. There is a clear need for public education, given that juries are derived from the public at large and there are still attitudes in our society that condone violence against women. A lot of positive work has been started on that issue by, for example, the Zero Tolerance campaign.

The issue about the common law definition is that it does not reflect the reality of women's experiences. It is particularly difficult to explain to women that if they have been raped while they are sleeping, that is not regarded as rape.

Christine Grahame: I was actually drawing attention to the fact that the public will think, "How did that man get three years for rape and this man got 10 years for sexual assault?" Sexual assault can often be far worse than rape. I wanted to make that clear because quite often the two are seen as interchangeable. There is a distinction.

You mentioned the use of video links and screens in court rooms. A psychiatrist whose work I was reading said that video links and screens might make the experience worse for the alleged victim because they make it harder to judge the body language of the questioner. Do you give any credence to that?

10:15

Sandy Brindley: Are you talking about women being cross-examined by the defendant or by the defence?

Christine Grahame: By the defendant.

The Convener: We should keep to Scottish terminology and say "the accused". I would also like us to be clear when we are talking about the accused doing the cross-examination themselves and when we are talking about the defence in general doing the cross-examination. They are not the same thing.

Christine Grahame: The psychiatrist said that if the accused were behind a screen, that might be more traumatic for the alleged victim as she would be unable to judge the body language. What is your view on that?

Sandy Brindley: I think I know the psychologist to whom you refer. I agree with her statements about the accused being behind a screen. The complainer's being unable to see the accused could be traumatic in itself. I read the article you mentioned. I was not sure whether her comments were restricted to cross-examination by the accused. Obviously, measures such as screens and video links are useful in some circumstances,

such as when they are used by advocates in cases involving children or vulnerable witnesses, but their use would not reduce the trauma that is experienced by a complainer who is cross-examined by the accused.

Christine Grahame: Do you agree that the defence has the right to test the credibility of any witness?

Sandy Brindley: Yes. Our concerns are to do with aggressive and inappropriate cross-examination, which is against the legislation of this country.

Pauline McNeill (Glasgow Kelvin) (Lab): In the past week, it has become apparent that a body of opinion is opposed to the idea of the Executive legislating in the area of cross-examination. How do you think we should legislate to remove the right of the accused to defend themselves?

The Convener: Pauline, can we be clear about this? We are talking about taking away not the right of the accused to defend themselves but the right of the accused to cross-examine the complainer. We have to be clear about that as they are not the same thing.

Pauline McNeill: Sandy, bearing in mind the convener's correction of my question, how do you think it should be done?

Sandy Brindley: It has been suggested that the accused should be able to carry out his own defence except for cross-examination of the complainer. Ideally, we would like the accused to be unable to cross-examine prosecution witnesses. It could be distressing to a woman whose daughter has been raped to be cross-examined by the man who is accused of raping her. However, we would be content if the Executive focused only on the complainer's being cross-examined by the accused.

Pauline McNeill: Why do you think an accused would want to cross-examine the complainer? Has any research been done? It strikes me as odd that someone would choose to do that rather than use the skill of a lawyer.

Sandy Brindley: I am not aware of any research that has been done in Scotland. The issue has been considered only recently. One reason an accused would want to cross-examine the complainer might be to intimidate or harass them. Obviously, though, that is only my view.

Pauline McNeill: You talked about your concern about aggressive cross-examination. Are you saying that there is a difference between aggressive cross-examination by an advocate and aggressive cross-examination by the accused?

Sandy Brindley: There are links between what women go through at the hands of the accused and what they experience at the hands of a defence advocate. The research to which I referred was carried out before the issue of complainers being cross-examined by the accused came up in Scotland. It deals with the tactics of defence advocates, about which we are also deeply concerned.

Pauline McNeill: How could we stop the advocate, who has every right to test the credibility of the complainer, being aggressive while conducting the cross-examination?

Sandy Brindley: That is why we feel it is unhelpful to consider the cross-examination of witnesses by the accused in isolation from what happens in court rooms generally. There are particular traumas associated with being cross-examined by the accused, but it would be useful to take a holistic look at what happens in the court room when a woman is giving evidence. As I mentioned, there are clear recommendations based on good research about how the situation could be improved, some of which would require legislative work and others of which would not.

Pauline McNeill: In relation to the tactics of the defence, you talked about breaches of the Law Reform (Miscellaneous Provisions) Act 1985, which says that a woman's sexual history may not be referred to. Sometimes, the judge is not good at stopping that happening.

My understanding is that if a previous conviction of the accused is referred to directly or indirectly, it could form the basis of an appeal. Could a correlation be drawn between that situation and a breach of the 1985 act?

Sandy Brindley: I understand that in solemn procedure in the High Court, the appeal opportunities are purely for the defence.

Pauline McNeill: The alleged victim in the most recent high-profile case was 13 years old. Should we separately legislate for those under the age of 16?

Sandy Brindley: Strong arguments could be made for having family courts to remove vulnerable young witnesses from what can be an intimidating criminal justice system. There is a lot of expertise in Scotland on this issue. In Dundee, an organisation called the Young Women's Centre works specifically with young women who have experienced any form of abuse. Such organisations would be happy to give advice to the committee on issues facing young women in the criminal justice system.

Maureen Macmillan (Highlands and Islands) (Lab): Pauline McNeill has covered a lot of the ground that I wanted to ask about. Are you saying that the best way to deal with an accused who wants to conduct his own cross-examination is to

say that it must be done through an advocate?

Sandy Brindley: Yes.

Maureen Macmillan: We realise that that can still involve aggressive questioning. Are the regulations that are in place sufficient if they are properly adhered to?

Sandy Brindley: Given the urgency of the situation, we would say that there are measures that could be taken without resorting to legislative change and which would significantly improve the situation. If the Executive went down that route, the situation should be monitored and reviewed to enable us to judge whether further, legislative, change is necessary.

As it works just now, the legislation obliges the defence to apply to the judge for permission to introduce evidence relating to sexual history or character. It bans such evidence being submitted, with three general exceptions. In some ways, there is far too much discretion. Also, it does not deal with the need to prevent more subtle character attacks.

Maureen Macmillan: Does the European convention on human rights have implications for the aggressive treatment of the victim?

Sandy Brindley: Yes, I am sure it does. The concern of many women's groups is that human rights are being seen in absolute terms with regard to the accused. There are articles in the European convention that deal with degrading and humiliating treatment. They could be used by women who have been cross-examined by the accused.

The Convener: I want to clarify what you said about age. Do you think that there should be a difference between how the courts might deal with adult complainers and how they deal with those under the age of 16?

Sandy Brindley: Yes.

The Convener: What is the real problem with securing convictions for rape? What aspect of your proposed changes would achieve an increase in the number of convictions? That is what we are actually talking about.

Sandy Brindley: Our main concern is about the introduction of sexual-history and sexual-character evidence. We are also concerned with the subtle character attacks that are designed to confuse the jury and which can contribute to verdicts of not proven.

Implementation of the existing regulations needs to be tightened. Related to that is the introduction of special prosecutors who are well acquainted with the relevant legislation and have a lot of experience of prosecuting the kind of case that we are talking about. Those measures would increase the rate of convictions.

The Convener: Thank you for coming before us again. I ask the witnesses from the Law Society of Scotland to come to the table.

Good morning. Please introduce yourselves and explain your roles. I make a plea that this introduction should be as short as possible and should not be a long speech. I am having enough difficulty keeping members from making speeches instead of asking questions. It would help if we could all keep our questions and statements as brief as possible.

Gerard Brown (Law Society of Scotland): I will be brief as this is a fixed-fee appearance.

I am Gerard Brown, a member of the criminal law committee of the Law Society. Anne Keenan is the deputy director of the Law Society. Her responsibilities include law reform, particularly criminal law. Andrew Berry is a member of the criminal law committee, as is Michael McSherry. We are grateful for this opportunity to speak to you. Anne will say a few words that might provide a framework for our position.

Anne Keenan (Law Society of Scotland): We believe that witnesses have a special place in the justice system and that efforts should be made to ensure that they are treated with dignity and respect. To this end, the process of giving evidence should be made as congenial as possible.

Much of what you have been asking about today has centred on the cross-examination of vulnerable witnesses, particularly by the accused. In that regard, we can comment only on our observations. The fact that an accused person is conducting the examination means that the defence solicitor has been removed from the process at that stage. We therefore comment as interested disinterested observers.

10:30

The Convener: You mean, as people who have been sacked by their clients. [*Laughter.*]

Anne Keenan: While we are able to comment on the prospect of change in that area of the law, it would be a matter for the Executive, the Crown Office and the judiciary to consider.

Having said that, we have given this important matter some considerable thought, as sensitive cases are involved. The committee may wish to consider two options, the first of which is an extension of the provisions that are available to vulnerable witnesses and which the committee has already discussed, under section 271 of the Criminal Procedure (Scotland) Act 1995. Those provisions enable vulnerable witnesses, as they

are described in the section, to give evidence in a number of ways, and members have discussed already the giving of evidence by way of TV links and through the use of screens. Crucially, vulnerable witnesses are defined in section 271(12) as children under the age of 16 and those who suffer from a mental disorder as defined in one of the mental health acts—those that apply either north or south of the border—or who suffer from

"significant impairment of intelligence and social functioning".

Therefore, the provisions of section 271 do not apply to the situations that the committee is considering today.

The Law Society considers that there may be merit in extending those provisions to all vulnerable witnesses, and that efforts could be made at an early stage in proceedings for consideration to be given to the particular status and capacity of the witness, to the way in which they wish to give their evidence and to taking into account their specific views. I will not dwell on that point further, as members may wish to ask questions about it.

The second option considered by the Law Society is that legislation similar to the provisions of the Youth Justice and Criminal Evidence Act 1999, which is being brought into force in England and Wales, could be considered in Scotland. The provisions of that act prohibit an accused person who is charged with a sexual offence from cross-examining a complainer in the case. If cross-examination is considered necessary, the accused will be given the opportunity to appoint a solicitor within a specified time. As I understand that legislation, if the accused does not appoint a solicitor within that time, the court will appoint a solicitor. Strangely enough, the solicitor appointed in those circumstances has no responsibility to the accused.

Whatever option is chosen by the Executive, it will have to have its eye on Europe and the ECHR. The convention may have implications for the latter option, which may be subject to challenge under it. All of us are familiar with article 6 of the ECHR, which provides for the right to a fair trial before an independent and impartial tribunal. Paragraph 3d of article 6 provides for a number of minimum rights for an accused person who is charged with a criminal offence, including the right

"to examine or have examined witnesses against him".

Therefore, the Executive will have to consider those rights.

Should the committee wish to take further evidence on that line, it may be helpful to find out about the advice given to the Home Office on those rights or to ascertain from Strasbourg the view that might be taken of such a line.

I hope that my statement has been of some help to the committee. We are happy to take further questions.

The Convener: I do not know how much you are aware of the English legislation—I am not conversant with the detail of it. Are you able to comment on the role of the solicitor who is appointed under the provisions of the Youth Justice and Criminal Evidence Act 1999? Would such an appointment be the same as an agent taking on the role of the kind of intermediary that Gil Paterson referred to? Does the solicitor become simply a mouthpiece for the complainer? You said that there was a slightly confused role for the solicitor in those circumstances. Can you expand on that?

Michael McSherry (Law Society of Scotland): The accused's legal representative will have been sacked by the time that such an appointment is made and there must have been a reason for that sacking. Often, that reason is that the legal representative is unwilling, and thinks that it is improper, to put certain questions to the complainer. One could insert a mouthpiece, but the mouthpiece would only slavishly ask the questions that the accused would like to ask. The imposition of a lawyer amounts to precisely the same thing. The Youth Justice and Criminal Evidence Act 1999 provides that any lawyer so appointed will not be responsible to the accused. Therefore, it will be very difficult to get a lawyer to act in those circumstances.

Gerard Brown: I understand that the English legislation has only recently come into force. Our inquiries, while not fully complete, reveal that, so far, that legislation has not been tested. Although people have been able to take human rights issues to Strasbourg since 1967, the Human Rights Act 1998 is not in force yet in England.

The Convener: It comes into force on 3 October.

Gerard Brown: That is why Anne Keenan suggested in her initial comments that the committee may wish to get views from, for example, the Home Office, on how it envisages that the legislation will work.

The other, vitally important, issue is that the system in England is radically different from the Scottish system. In committal proceedings in matters of a serious nature, attested statements are still provided. The same happens in less serious proceedings in the magistrates court. Therefore, a judge who is making a decision under the terms of the 1999 act would have before him or her the statement of the complainer, which might be 10, 50 or 100 pages long. At that stage, there is the potential to address with an

unrepresented accused the main issues of the case and to focus those issues.

That is not the case with our system, where a judge comes into a court without any knowledge of the case at all. No statements are provided other than, in summary proceedings, police statements, which are provided on a variable basis. We do not dismiss the option of following the English legislation. We come before the committee with positive thoughts, having spent a long time thinking about and discussing this issue. However, we think that there are problems with the English legislation, which has yet to be tested.

The Convener: Those problems are in the context of the English legislation, much less with trying to transplant those provisions into Scottish law.

Gerard Brown: That is correct.

The Convener: A number of members wish to ask questions.

Pauline McNeill: I was going to ask you to explain how ECHR could be contravened in certain situations, Anne, but you have addressed that issue.

I will focus on article 6. You said, rightly, that paragraph 3d of article 6 deal with the minimum right of the accused

"to examine or have examined witnesses against him".

Surely the phrase "or have examined" implies that the right of an accused to cross-examine directly the complainer is not absolute? The inference is that a third party—a solicitor—could be appointed. I do not see how the provisions of the English legislation contravene article 6.

Anne Keenan: We have discussed that point and we have considered the effect of the English legislation in imposing a solicitor in those circumstances—that is, we have considered whether that imposition would comply with paragraph 3d of article 6. We have examined the case law of the European Court of Human Rights as it pertains to this matter, and have not come across any case that is directly analogous or in point to this issue. However, I accept that the situation is not clear-cut and that the phrase "to have examined" may offer a way around the problem.

Michael McSherry: Before one could properly examine a witness, that examination would have to be informed—one would have had to have taken some instructions from the accused person as to his defence. In the difficult situation that we are discussing, a lawyer has been catapulted into the courtroom, against the wishes of an unwilling and recalcitrant client.

Pauline McNeill: I asked Sandy Brindley my next question. While I hear what you said about the lawyer being sacked and about your views being those of a disinterested bystander, are you able to shed light on why an accused person would choose to cross-examine a witness himself, rather than using the skills of a lawyer?

Michael McSherry: In my experience, sex is the main motive in some rape offences, although it is also to subject someone to a degree of control. Some people might choose to defend themselves in person in order to intimidate physically the alleged victim—the motive is control freakery.

Pauline McNeill: Again, I put this question to Sandy Brindley and I would like to put it to you. I understand that grounds for appeal include the situation where a solicitor refers to previous convictions in the course of a criminal trial. Is that correct?

Michael McSherry: Yes. In the normal course of events, an accused person is entitled to go before a jury without his previous criminal record being made known. However, there are situations where, if the accused attacks the character of a witness in an unnecessary manner, he can be cross-examined as to his previous convictions.

Pauline McNeill: When you considered evidence in rape trials, did the issue of a woman's sexual history being brought in, despite the provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, appear to be one that is out of balance? I think that Women's Aid suggested that the prosecution should raise the sexual history of the accused, if the judge does not stand in the way of the introduction of evidence on the sexual history of the woman, to counteract that lack of balance.

Michael McSherry: I do not think that there is any provision for raising the sexual history of the accused, unless he has a previous conviction for rape and he attacks the character of a witness. Before the victim can be asked about her sexual history, application has to be made to the judge. I do not have the statistics on how many such applications have been granted, but in my experience they are granted rarely. In fact, the leading case on this issue was a refusal to allow the defence to open up the sexual history of the alleged victim.

Pauline McNeill: Does the Law Society favour a review of the definition of the crime of rape?

Michael McSherry: I am not being disrespectful to Sandy Brindley, but she omitted an important matter in her definition of rape, as there must be an absence on the part of the accused of reasonable belief that the woman consented to the act. That is a peculiarly personal matter, which perhaps leads juries to have some doubt about the case and may explain why there is a low

conviction rate. The Crown has to prove not just penetration and the mechanics of the matter but that there was no reasonable belief that the woman consented—that is a great stumbling block.

Pauline McNeill: Do you think that the law should be reviewed, or is the common-law definition is sufficient?

10:45

Michael McSherry: It seems to be a perfectly adequate definition. Members were talking about object penetration and oral sex, but those are categories that are well recognised by the law. They are serious matters, which are punished as separate offences. A person could be sentenced to the same amount of imprisonment for anal penetration as for rape. As far as the Law Society is concerned, it might be simpler to stay with the categories that we understand well.

Mr Paterson: Can I go back to the right of the accused to "examine" or to "have examined" the complainer? Are they equal and is that the issue that you are considering? If we were able to drop "to examine" and keep simply "have examined", would that satisfy the human rights requirement?

Michael McSherry: Not if it was not an informed examination.

Mr Paterson: Can you explain that?

Michael McSherry: We are talking about the worst-case scenario in which the accused has refused to have a lawyer and the court has catapulted in a lawyer. We would be dealing with someone who has sacked previous lawyers left, right and centre. The lawyer who has been catapulted in must find out what the defence is before he can put proper questions. The defence might be that the accused was not there, that it was a case of mistaken identity or that there was consent. The cross-examination would have to be informed.

Mr Paterson: I see.

Gerard Brown: We would need to be clear about an informed cross-examination. Would the lawyer come in simply for the cross-examination of the complainer or would he remain there for the course of the trial? There was some discussion about other witnesses who may not want to be questioned. Does the accused have the right to cross-examine those other witnesses or does the lawyer continue to be involved?

There is a solution somewhere, but it will have to be thought out very carefully and worked at very hard in the context of our distinct Scottish system.

Mr Paterson: Yes. The nub of the difficulty is that a person who is a victim can be subjected to harassment by an accused, who is using it as a tactic. As I said earlier, if someone is deaf and dumb, they can conduct a trial through a solicitor by indicating to an interpreter. Surely we could find a way for a third party—not necessarily a solicitor—to be involved in that element, which is the part that seems to be unacceptable to people who say that they have been raped. The message is coming across loud and clear from society in general that the way in which women are treated in that context is unacceptable.

Andrew Berry (Law Society of Scotland): In terms of the English legislation, that is the best attempt to get round the difficulty that we are discussing. We are trying to project the difficulties that we, as lawyers, would anticipate arising in such cases. There is provision within English legislation for the lawyer who is appointed by the court to be given certain papers and to be in an informed position. However, a lawyer has several duties; he has a duty to the client, but he also has a duty to the court. In a situation where the individual has got rid of a lawyer, experience tells us that, often, more than one team of lawyers will have tried to give advice that the accused did not find palatable. For practical purposes, one could see that the type of questioning that the accused would wish to pursue would be wholly inappropriate, and because the lawyer who has been appointed has general duties to the court, he may find himself in a stymied position. It is an interesting concept, but is fraught with difficulty.

Mr Paterson: Most people accept that it is someone else's judgment whether questioning about sexual history is allowed to happen. However, in a case where sexual history is admitted, would it not be fair and equitable to bring into play the sexual history of the accused at the same time? In your view, is it reasonable to have a one-sided argument, where someone's sexual history is used against him or her, whereas another person's sexual history remains unspoken?

Gerard Brown: We would have to go back to basic principles and we would have to change those principles before we could go down certain roads. The basic principles are the presumption of innocence and the onus of proof by corroborated evidence. I urge the committee to consider carefully section 275(1) of the Criminal Procedure (Scotland) Act 1995, which allows certain types of questioning—Michael McSherry referred to the type of questioning that is not allowed—on application by the accused. The application is made by the accused to the presiding judge, irrespective of whether the accused is represented. On hearing the arguments of both the Crown and the defence, the judge makes a decision on whether to allow those questions. That decision is considered very carefully. Some study

should be made of how many applications are made and how many are successful. As Michael McSherry can tell you, a judge will not allow certain types of evidence without such an application.

Mr Paterson: To press you further on that, does it not seem presumptuous to assume that a person making a complaint is guilty of something because of their sexual history? I say that as a layman.

Gerard Brown: The sexual history may not be a matter of guilt, because it might not be a criminal offence.

Mr Paterson: That is the point. However, it is often used as a tactic to discriminate against a witness and to prove to the jury that the witness is unreliable.

Gerard Brown: That is a method, which is allowed on application, to test the credibility and reliability of the witness.

The Convener: That is what a trial is about—establishing credibility and reliability.

Mr Paterson: I understand that. With all due respect, convener, I am talking about the balance in a trial, because it seems rather one-sided. However, that is a layman's point of view.

Given the different organisations involved, there seems to be a lack of understanding and provision for people who claim to have been raped to get information about the legal processes. Is there a simple, straightforward mechanism to address that? I have described that as the complainer becoming the client; that is a difficult concept, which I use as a layman. It would be helpful if there were someone who could give the appropriate information.

For example, I was involved in a normal trial, and I was kept informed all the time, which meant that I could react to what was being said. There was something that had a bearing on the trial and I was able to provide more information on that, having been told what was happening—that was very successful. In the case of a rape trial, do you think that the complainer should be given the opportunity to augment, not to enhance but to bring more information, following a reaction from the accused?

Anne Keenan: You have raised several issues. The Law Society has always thought that there should be a greater flow of information throughout the system, from as early a stage as possible. At the initial stages—the first contact with the police, rape crisis or whomever the victim chooses to tell their story to—every effort should be made to ensure that the person is treated with compassion, that full information is taken and passed on, so that the lines of communication are fully opened up. It is important that all the information goes into a police report, so that the procurator fiscal is fully aware of all the circumstances. That is particularly important in cases where there is vulnerability.

Mechanisms should be used to identify whether a witness is vulnerable—in some cases they are already being used. The procurator fiscal should then take adequate steps to ensure that they cater for that witness in the best way. In certain cases, it may be that one prosecutor should deal with the matter throughout the system. That would mean that the witness would have one person that he or she can contact during the course of the trial, who will know what will be happening and who could provide a channel of information to the witness. Of course, that information should not affect the fair running of the trial, but should increase co-operation between the justice systems and the witnesses.

It is also important that the defence is given that information as early as possible, perhaps when the list of witnesses is sent out. That would highlight who should be treated sensitively at the precognition stage. We have written to the Crown Office as part of a consultation exercise, suggesting that as one way to address this issue. The defence could then be fully prepared. The Law Society issues guidance to its members on methods of cross-examination. We have a code of conduct for criminal work, to which all criminal practitioners must have regard. The code says that, when being precognosced, such victims must be treated sensitively and dealt with in a proper manner. That code is being revised. We have a meeting on Friday and we have written to the Crown Office and Victim Support to ask what problems they have experienced, so that we can ensure that the victims are treated sensitively. If all those measures are put in place, we hope that a vulnerable witness will be identified at an early stage so that appropriate safeguards, such as the provision of screens or a TV link, could be put in place to make their experience more congenial.

The Convener: I plead with members to keep their questions focused.

Michael Matheson: Of course, convener.

Christine Grahame: She is always much harder on her own team.

Michael Matheson: You have already covered a couple of the issues about which I wanted to ask. However, having heard your opening statement, an element of doubt crept into my mind. I had thought that I had got to the bottom of the use of TV links and screens, but I am no longer too sure. What is the present status of the use of TV links and screens in Scottish courts?

Anne Keenan: An application has to be made to the court by the procurator fiscal. In particular

cases where the procurator fiscal has identified that a witness is vulnerable, they will produce evidence such as a report by a psychologist or, in the case of a child, from a teacher. That is intimated to the defence and the court will decide whether it is appropriate in terms of section 271 of the Criminal Procedure (Scotland) Act 1995 to allow screens or a CCTV link to be used.

Michael Matheson: Are there time scales relating to that process? Does the procurator fiscal have to make an application within a certain time, prior to the beginning of the court proceedings?

Gerard Brown: Yes. The time scale is 14 days for a TV link. The next witnesses may correct me, but I understand that there are TV links only in Glasgow or Edinburgh. Clearly a case can be put off or adjourned if an application is made too late.

Anne Keenan: In the case of screens, an application could be made on the morning of the trial.

Michael Matheson: I want to go back to your opening comments. My understanding is that you come at the changes that we are considering making to the way in which vulnerable witnesses are dealt with from the angle that it is not so much the nature of the crime, as the status of the witness that should be the main focus. Is that correct?

Anne Keenan: That is absolutely right.

Michael McSherry: We draw no distinction between summary and solemn proceedings, whether in front of a jury or before a sheriff on his own. If a witness is vulnerable, the situation should be witness-led.

11:00

Michael Matheson: Would any decision that changes should apply only to cases of rape or serious sexual assault be legally tenable in the long term?

Michael McSherry: As we are examining the problem from the point of view of the victim and as the television link provides an opportunity for the witness to be properly cross-examined, I do not see any difference in principle between an elderly lady whose house has been broken into and an unfortunate woman who has been raped.

Michael Matheson: Going back to the status of the witness, you talked about the assessment of witnesses. You have mentioned that you are undertaking a review of the guidance issued to members of your society. Do you have a view on how the system could be improved and, in particular, on the stage at which any report on a witness's vulnerability should be provided to the sheriff?

Gerard Brown: Anne Keenan mentioned that one of the difficulties is identifying vulnerable witnesses. All that is provided is a list of witnesses. There is no additional information, even on the indictment. If the charges are sensitive, many experienced solicitors instruct specialised investigators or do the work themselves—there are certain areas of work that solicitors should carry out in difficult cases. It would assist our members to have notification as early as possible of sensitive cases and vulnerable witnesses. It would also assist the witnesses and everyone concerned if the time scale within which such cases were dealt with was shorter than usual, so that the evidence was fresher and more readily available.

Michael Matheson: The problem is ensuring that there is a proper mechanism for identifying vulnerable witnesses and ensuring that the appropriate information is passed to the sheriff within an appropriate time scale. Some of the evidence that we have received—even this morning—suggests that there is an inconsistency across the country in the way in which the police and the Crown Office identify vulnerable witnesses.

Gerard Brown: In sheriff summary proceedings there are intermediate diets, which are the point at which that should be brought into focus. In sheriff and jury proceedings in the sheriff court, there are first diets, which is the point at which that should be brought into focus. There are no first diets in the High Court, but I have known of cases in which the Crown has made applications for, for example, live television links. Such applications should be addressed at that stage, before the trial diet, so that the witness is aware of how the trial will be dealt with. However, sometimes—this may not be too far from the case in the recent publicity—witnesses do not want the live television link or the screen when the option is put to them. They want to deal with the matter directly.

Michael Matheson: Do you have any knowledge of similar difficulties in other countries and how they have gone about tackling the problem?

Gerard Brown: Because our system is unique, we have found that difficult. We have examined the systems in some continental countries, but they are not adversarial—they do not have examination and cross-examination. Their systems are inquisitorial. In France, for example, a judge is appointed to investigate a murder. The provisions in Germany are similar. In Spain, the victim has a voice in court. We will look again, but so far, we have not found another jurisdiction that can assist us.

Michael McSherry: What Gerry Brown is saying is that we are vulnerable witnesses on that point.

Michael Matheson: Would you have any objections to having a similar provision to that which is proposed in England, for the restriction of the number of media representatives who can be present while a vulnerable witness is being cross-examined?

Andrew Berry: It was observed earlier that the court can be cleared by the judge in certain circumstances, but that the media cannot be made to leave. I do not think that that is correct. In Scotland, the court can be cleared of virtually everyone except the relevant personnel to deal with the passage of evidence.

Michael Matheson: From what the Lord Advocate has said, I understand that the media can stay.

Andrew Berry: The media have been thrown out in cases in which I have been involved.

Michael Matheson: Have they? [*Laughter.*] That is interesting.

Michael McSherry: I have never known the media not to be present. If it is requested that part of a trial not be reported, an application would have to be made to the judge under the Contempt of Court Act 1981, which restricts the reporting of proceedings.

Michael Matheson: Therefore, there have been cases in which the media have been sent out of the court.

Gerard Brown: Yes. I have been involved in cases in which the media have been invited to leave the court and have accepted that invitation.

Michael Matheson: Should they decline the invitation, they do not have to leave.

Gerard Brown: I do not know what members of the press who are present today will think about this, but most of the media accept that invitation. When they are present during a sensitive case, most of the responsible media deal with the situation in that way. Restricting media access is not something that we have discussed in the committee, and I can give only my personal opinion. With respect, if it was agreed that only one journalist should be present during a sensitive case, thereafter to report to others, that should not be a major issue.

Christine Grahame: Convener, you will be pleased to know that I have lost the questions on my list. I am pleased that we have focused on the vulnerability of the witness rather than on specific crimes, and I take your point about the elderly lady being a victim, which I had raised before.

I understand that video links are available only to a certain kind of vulnerable witness. Would it be a means of resolving that matter to amend section 271—or the relevant schedule—of the Criminal Procedures (Scotland) Act 1995, to introduce a definition that would take us at least part of the way forward?

Michael McSherry: We have considered that. A vulnerable witness is a complainer in a sexual offence case.

Christine Grahame: You would restrict it to cases of sexual offence, and would not include other kinds of vulnerable witnesses?

Michael McSherry: Specifically for the purposes of cross-examination.

Christine Grahame: Okay.

We have been told of the 78 per cent failure rate of rape trials, and mention was made of special prosecutors. What comment do you have to make on that issue?

Michael McSherry: I am not happy with the use of the phrase "failure rate".

Christine Grahame: Let us use the phrase "success in the defence", then.

Michael McSherry: Let us just say that there is a conviction rate of 22 per cent. That does not mean that the prosecution has failed. The duty of the prosecutor is to set the information before the jury, and it is for the jury to decide whether to acquit.

Christine Grahame: However, the jury's decision could depend on how well the prosecutor has prepared. I mention no specific cases. I am asking for your view on the proposal that was put to us, concerning special prosecutors who have expertise in such cases.

Gerard Brown: In the procurator fiscal system, people move between departments to gain experience. Anne Keenan's suggestion was that a prosecutor could take on a case when it is first reported and handle it until it comes to the High Court, where most of these cases are dealt with. The case would then be passed to Crown counsel, but the prosecutor could be available, as has happened in extremely complex and difficult cases. Normally, a precognition officer is involved as well. To say that those are special prosecutors is misleading, however. All prosecutors are special in their own way, but they have to gain a range of experience. Communication is the biggest issue.

Prosecution in the High Court is done by specialist prosecutors, who are QCs and advocates appointed by the Lord Advocate.

Christine Grahame: Therefore, you do not think that there should be special prosecutors for sexual crimes.

Paragraph 1 of article 6 of the European convention on human rights includes certain

prescriptions for excluding the press. I note that at the moment attendance is by invitation only, but could the ECHR provision be used?

Gerard Brown: There is an issue of what is and is not public.

Michael McSherry: Come October, the courts will be subject to the European convention on human rights. One of the articles of the convention concerns the right to be spared degrading and inhumane treatment. That will have to be thought about carefully. Judges have the right to control questioning and the way in which witnesses are examined. The convention might provide an added impulse for judicial intervention.

Christine Grahame: That takes me to my last question, which relates to the role of the judge and training of judges. What are your views on the training of judges in Scottish courts and the fact that we have so few women judges? Does that have an impact?

Gerard Brown: There are more now.

Christine Grahame: Yes, but there are not very many in the Court of Session and the High Court.

Gerard Brown: I saw one this morning.

Mr Paterson: You can remember it.

Christine Grahame: Seriously, do you think that we need to consider the training of judges and the fact that there are so few women sitting in the supreme courts?

Gerard Brown: We have discussed training, and we are not privy to what training is involved. You would have to ask the trainers; I think that there is a judicial studies committee. We think that the sections and applications referred to already merit careful consideration in training.

Christine Grahame: Do you think that the fact that there are so few women in the High Court is relevant?

The Convener: I ask the witnesses to answer that question briefly. We can discuss judicial appointments on another occasion.

Anne Keenan: We must ensure that the existing members of the judiciary can carry out their function impartially. They should be there because of particular characteristics that they have, rather than merely because of their sex. If judges are carrying out their functions in a professional manner, that is sufficient.

I would like to add something to what Gerry Brown said about the training of judges. Under the Criminal Procedures (Scotland) Act 1995, the Lord Justice-Clerk already issues guidance on how sheriffs and judges should deal with child witness cases. Perhaps that could be extended to vulnerable witness cases.

Christine Grahame: That is interesting. Thank you.

Scott Barrie: You will be pleased to know, convener, that Michael Matheson asked most of the questions that I wanted to ask. However, I would like to make two points.

Do you think that it would be useful if the presumption was always that young people, particularly those under the age of 16, were vulnerable witnesses, instead of them having to apply for that status, given the possibility that they might be cross-examined by an accused person? I know from having supported young people in giving evidence that they can seem perfectly okay until they enter the intimidating environment of the court, when they break down and have difficulties.

Andrew Berry: Part of the problem is that a vulnerable witness has to be identified by someone. If they are identified by the prosecution, that often happens relatively late in the day. An application has to be made to the court, and if there are applications for screens and so on, that can cause a delay in the proceedings.

I can understand the reasonableness of the argument for all witnesses under the age of 16 being designated as vulnerable—these are merely my thoughts on the issue, rather than a conclusive position. If, when they were intimated, witnesses were flagged up as being potentially vulnerable, at an intermediate diet in a summary case or a first diet in a solemn case in the sheriff court, or by some other procedure in the High Court, it might be decided finally whether they should be treated in the proceedings as a vulnerable witness. It would be helpful if they had that status earlier.

Scott Barrie: I am aware of the way in which these things work at present. I have supported young people in the process and know how important it is to apply at an early stage. Would it be useful to change the rules of court so that there was an automatic presumption of that status rather than it being something for which one must apply?

Gerard Brown: You are talking about an absolute situation. We have not gone as far as that. Our proposal is to extend the category of vulnerable person and/or witness to the whole range. The test as to how a person is vulnerable should remain and there should still be application. Many people who are aged under 16 are confident in giving evidence. We have not considered extending the category further.

11:15

Scott Barrie: Is there any difference between the legal process in England and Wales and that in Scotland, which explains why different rules

might apply in the two court systems? It seems easier to exclude the cross-examination of alleged victims in England and Wales than it is in Scotland.

Michael McSherry: If the Scottish Parliament wanted to abolish the right of an unrepresented accused person to cross-examine an alleged victim, the Law Society—

Phil Gallie: Would you speak into the microphone, as we cannot hear you?

Michael McSherry: The Law Society is not saying that you cannot legislate to stop cross-examination. We are saying that it is an untested situation and we might fall foul of the European convention on human rights.

The Convener: I think that you said right at the start that in English courts there are extremely lengthy statements before the trial starts. That is not the case in Scotland.

Scott Barrie: That is why I asked whether there was an intrinsic difference between the court systems.

The Convener: The witnesses gave evidence on that right at the beginning.

Phil Gallie: I have a brief question. You mentioned the European convention on human rights. Last week, our learned counsel said here that we should not impinge on the right of the accused to defend themselves, and that if we did that, we would breach the ECHR. Today, Sandy Brindley told us that the rights of victims under the ECHR are being infringed by the interrogation method. In other words, we cannot get the system right with respect to the ECHR. Do you have any views on that?

Michael McSherry: Yes.

The Convener: I hope that they are brief.

Michael McSherry: We are giving you a halfway house. We are saying that the appropriate solution to the problem is to continue to allow cross-examination, under proper control by the judge, via a television link. That would ameliorate some of the difficulties that unfortunate witnesses have to experience.

The Convener: I will ask a question that I had hoped would have been asked by now. Could one of you tell me what the main stumbling block is to increasing the rate of convictions for rape?

Andrew Berry: My difficulty with that question is that the assumption is that the guilty are getting off and that they are doing so for no good reason. The Law Society can comment on the procedures that are followed within court proceedings. It would be difficult for us to give a definitive answer on how the rate of conviction might be increased.

The Convener: You have no view on that?

Andrew Berry: I might have a personal view, but it would be difficult for the Law Society to give a view on how the rate of conviction could be increased.

The Convener: You referred earlier to the issue of reasonable belief, which was not picked up in questions. It has been my observation over many years that sometimes quite unreasonable belief has been accepted in courts as being reasonable. There is case law to suggest that it is accepted that the man believes, no matter how ludicrous that belief might be in some cases. Do you agree that that has happened? Do you accept that a tightening-up might be appropriate in that area?

Gerard Brown: As you are well aware, if the jury accepts the evidence of the accused and regards it as credible and reliable, and if that evidence encompasses reasonable belief, that is the end of the matter. I would have to consider what tightening-up is being referred to, as I do not know what the proposals would be. Certainly, we are happy to examine any proposals that arise out of the consultation and evidence.

The Convener: I think that you would accept that there are cases in which, on any objective view, the accused's belief could hardly have been reasonable.

Gerard Brown: There are cases in which juries have accepted that the belief is reasonable.

The Convener: Apart from the case last week, are you aware of cases in which an agent has been sacked, the accused has then represented themselves, presumably against the agent's advice, and has then won?

Gerard Brown: Do you mean in cases of the same sensitivity?

The Convener: In cases of the same sensitivity and in other cases—you can separate the two types if you think that there is a difference.

Gerard Brown: We have discussed that. I think that our view is that the percentage of cases that are involved is very small. I think that Sandy Brindley said that it was less than 1 per cent. Even in other proceedings, research shows that the number of unrepresented people who proceed to the trial diet is very limited. Some people would ask how big a problem it is and I think—

The Convener: I am more concerned with the success and failure rate and whether that encourages other people to try to do the same thing. I am also concerned with it as a reflection of the fact that an agent has been sacked.

Gerard Brown: We know from other countries of copycat elements taking advantage of the system. Many members will know of cases in

California in which accused people pick the worst counsel, so that they have a cast-iron appeal if they are convicted—I am not looking at anyone around the table. There is a risk that, if one goes too far down a certain route, people will copy others and use the system for their own benefit.

The Convener: On the narrow point about the projected change to the right of the accused to carry out the cross-examination themselves, in practice, how would that work if the accused refused to co-operate with any imposed agent? Presumably, there has been non-co-operation, which has led to this situation.

Gerard Brown: In that case, the agent would have to put the questions forward without having any instruction from the accused and would have to develop a line of questioning as he thought appropriate.

The Convener: Thank you.

We still have to hear evidence from witnesses from the Crown Office and the Scottish Executive and are in grave danger of having to continue meeting until about 1 o'clock or half-past 1 if we do not deal with questions and answers in a more focused fashion than we have done until now.

I welcome Peter Beaton, who is head of the civil justice and international division in the justice department courts group; Barbara Brown, who is head of the evidence and civil justice branch; Gerald Byrne, who is in the police division of the Scottish Executive; and Dr Alastair Brown from the Crown Office. I also welcome Janet Cameron, who is not on my list; someone called Jane Richardson is on my list. Are you in place of her?

Janet Cameron (Crown Office): No, I am head of the High Court unit in the Crown Office.

The Convener: Okay.

I plead with members to ask short, focused questions. I also plead with the witnesses to give short and focused answers. I ask all five witnesses, if possible, not to answer the same question one after the other, because we are running desperately short of time.

I understand that Mr Beaton wants to make a short opening statement.

Peter Beaton (Scottish Executive Justice Department): This statement is on our joint behalf.

We are happy to be here to seek to assist the committee in its investigations into this important and sensitive subject. We have been asked at relatively short notice, but we will do our best to answer the questions raised by committee members.

I am afraid that we will not be able to deal with two aspects. The first relates to individual cases—we cannot be expected to comment on them. Secondly, in the circumstances in which we find ourselves, we cannot anticipate ministerial announcements that are due to be made in relation to the action plan to be published following the consultation on "Towards a Just Conclusion", which the committee has heard about. That action plan will be issued shortly.

We will be happy to discuss issues raised on the current legal position and in relation to existing arrangements for supporting witnesses and for dealing with victims of rape and other sexual crimes. We might be able to give an idea of issues on which the Executive is likely to make proposals, in this difficult policy area.

Members of the committee should be in no doubt that the Executive attaches the highest priority to dealing with those difficult matters. Leaving aside the recent publicity and concern expressed about several cases and understandable anxiety to see the law changed in Scotland, a wide range of issues have been discussed extensively in the media in recent days that require serious and careful consideration. We have heard further evidence this morning that reinforces that view.

Ministers have instructed us that we should develop proposals to deal with those issues. Ministers have begun to take advice on how that can be done. The proposals will examine the full range of issues involving the giving of evidence by witnesses in trials of crimes of a sexual nature, including not only the issue of cross-examination by the accused personally, but the issue of cross-examination of the victim in relation to the sexual history of the victim.

There are also more general and wider issues to be examined, such as the law and practice relating to the giving of evidence by witnesses who can be characterised as vulnerable or intimidated. Members of the committee do not need to be reminded how difficult and sensitive those issues are.

We must try to achieve a system that balances the rights of the victims to be treated with respect and to have appropriate support and protection both before and during the court process with the fundamental requirement for a fair trial for the accused person.

On the other hand, it should not be thought that the current position is that there is no protection at all for witnesses in rape and other sexual crime cases, or indeed generally in the Scottish courts. At common law, the courts have a duty to intervene to prevent or curtail abusive, intrusive, harassing or irrelevant treatment of witnesses by accused persons or anyone acting on their behalf.

That duty has been restated by the judiciary regularly. Such interventions can come direct from the judge or sheriff or can be triggered by objections from the prosecution. That applies equally to invasive cross-examination by agents or counsel. While questions have been raised as to whether those powers are exercised fully, our understanding is that judges and sheriffs are well aware of them.

With regard to sexual crime cases, specific provisions should prevent certain types of question from being asked of a victim witness about their previous sexual history. As we have heard, those provisions have been in force since 1986 in Scotland. The new provisions in England and Wales, which have recently been enacted, are fairly similar, but in some respects go further. However, as we readily acknowledge, there is some doubt as to whether the existing provisions in Scotland are observed fully and properly in all cases, and we will examine that matter.

Other issues include the inadvertent admission of questions of sexual history, and, as was raised by members this morning, the lack of a balancing factor, whereby the victim's previous behaviour is examined in detail, but the previous behaviour of an accused person can be concealed. We will want to consider those issues, but they are very difficult.

For many years, the police have provided special units to deal with complaints made by women and children in relation to rape and other sexual crimes, but we will have to consider how the arrangements—although they have been commended—can be strengthened and improved, with better information about them made known to the public.

There are also various victim support schemes in force, apart from the commendable and excellent work carried out by Victim Support Scotland and the rape crisis centres. There are court-based schemes in which Victim Support Scotland and others participate. They are supported strongly by the Crown Office and by the Scottish Court Service.

To assist in your wish to achieve expeditious business, convener, I propose that we try to deal with the questions with only one of us answering. However, some issues might require interventions from a number of us, as we deal with different policy areas.

11:30

The Convener: I would like to start by asking for a point of information. Is there detailed and current information anywhere about the extent of the use of an application under section 275(1) of the Criminal Procedure (Scotland) Act 1995 to allow sexual history to be entered into evidence? If there is information about the extent of the applications, do we know how many are successful and how many are unsuccessful? If you cannot answer that question today, but there is information, I would be happy if you sent it to the committee. It would be very useful.

Peter Beaton: I want to be very clear what you are talking about, convener. Are you talking about section 271 of the 1995 act, in relation to vulnerable witnesses?

The Convener: No. That is about the definition of vulnerable witnesses. I am talking about applications to bring sexual history into evidence.

Peter Beaton: I am not aware that there is any such information, but we will try to find it.

The Convener: That would be extremely useful. A study was carried out, but it was in 1992, eight years ago. There have been many cases since then.

You also referred to the need to continually restate the insistence that there should be no unreasonable questioning—let us call it that. You said that judges have the right to step in at any point and say that the questioning has got out of hand. To what would you attribute the need to continually restate that? Is it just defence agents pushing the envelope?

Peter Beaton: There was a case in 1998, in which the High Court took the opportunity of stating the principle of the duty of the courts to prevent abusive or intrusive cross-examination.

Gordon Jackson (Glasgow Govan) (Lab): Leaving aside detail, I want to deal with the broad brush first. We have had evidence before this committee seeking a blanket ban on a person charged with a sexual offence conducting their own defence or, for all practical purposes, conducting their own defence in their own cross-examination. I think that that is the Victim Support Scotland position.

There is another point of view, which says that, while improvements need to be made—we need a lot of changes, but I will not go into the detail—such a blanket prohibition is wrong in principle, not necessarily because it breaches ECHR—which is perhaps the second question. The first question for Scots lawyers is whether we want to do this.

Is there an Executive or Crown Office position on that approach, leaving aside the detail, which not only says that we should not allow men charged with a sexual offence to conduct their own defence, the blanket ban, but—and this is my position—that that is wrong in principle?

Dr Alastair Brown (Crown Office): I can give a very short answer on that from the Crown Office:

the policy on that matter is exclusively for the justice department. Although I have opinions on everything under the sun, it is not always appropriate for me to express them. I do not want to express any Crown Office position about what ought to be done in future.

Gordon Jackson: Now that the buck has been properly moved along the table, does the Executive or justice department have a position on the matter?

Peter Beaton: As I said in my initial statement, ministers have given instructions to develop techniques to prevent an accused person charged with a sex offence from personally cross-examining a victim and to strengthen provisions on cross-examination on sexual history. Although we as officials will collectively fulfil those instructions, at this stage we do not have any view about how that will be done or whether any particular proposal about how to do so is contrary to or conforms to any particular principle. However, we are aware that, in considering this issue, certain basic principles must be taken into account. As Mr Jackson did not want to enter into details, we might not do so at this time.

Gordon Jackson: I actually asked a broad-brush question. I have no problem with going into details.

The Convener: Well, I do.

Peter Beaton: We have heard a lot about ECHR. Although it is not up to us to go into all the detail about the convention, we should remember that it is not the only issue to consider. Mr Jackson is perfectly right—and the Law Society of Scotland's evidence bears it out—that a difficulty in Scotland is that someone who acts for the defence in a trial must be able to put the defence case to prosecution witnesses. A fundamental principle of our law is that unless prosecution witnesses are challenged on issues that the defence wishes to put in cause to establish a line of defence, those issues cannot be dealt with later.

Another fundamental principle under our law, which is also stated in article 6 of ECHR, is the presumption of innocence. That means that, as proposed in the provisions in England and Wales, any defence lawyer brought in will have to consider carefully how to fulfil his duties, even though under the English legislation he is not deemed to hold any responsibility vis-à-vis the accused person. However, the overriding responsibility under article 6.1 of the ECHR is to provide the accused with a fair trial. As a result, it is necessary to balance such aspects with the very real concerns under articles 3 and 8 of the ECHR about the position of witnesses.

Because we have been asked how we will enable that balance to be struck, we have to face up to all those issues. These debates are extremely helpful to us, and we hope to follow them up by discussing the matter with as many interests as possible that hold views on these complicated questions.

Gordon Jackson: It has been suggested that there is a gap in our law. For example, if an accused behaves inappropriately, he can be removed from court—which I know happens sometimes, although I do not know how often—and is then defended in his absence. However, I believe that the judge has no power to appoint someone in that situation. Have you thought about giving judges such a power? We might use that provision in such a way as to ensure that someone defending themselves could be removed if they behaved badly in court. In that situation, he could not complain that someone else was appointed.

Peter Beaton: That is true. Section 92 of the Criminal Procedure (Scotland) Act 1995 and the corresponding provision for summary procedure enable a trial to take place in the absence of an accused; however, the test is much higher and does not really relate to the nature of the situation that we have to address. People think that it is fundamentally wrong for a person accused of crimes of a sexual nature personally to cross-examine the victim, complainant or witness.

The threshold in section 92 is that the accused has to misconduct himself to such an extent that, in the view of the court, a proper trial cannot take place. A different set of criteria would have to be established. It is perfectly true that the court can appoint counsel or a solicitor in those situations, but we have no information as to how often that has happened, if at all.

I will ask Barbara Brown to give some specification about one area in which we would look to develop the law—that of strengthening the discretion of the court and providing additional and different criteria for dealing with the trial of crimes of a sexual nature. Barbara may be able to elaborate further on that.

Barbara Brown (Scottish Executive Justice Department): We want to consider how sexual history evidence, about which people are concerned, is introduced into a trial. With particular reference to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, there are some steps that we can take to tighten up the criteria for pursuing particular types of questioning. We could put more clearly the onus on the defence to show that such questioning is relevant, rather than simply designed to undermine the credibility of the witness. We could make a clearer duty on the court to intervene when that type of questioning occurs.

The Convener: Have you finished?

Barbara Brown: There are other issues, such as considering in more detail the provisions of the English legislation, as they seem to be slightly tighter than those in operation in Scotland. One provision that is in place in England and that we could take up deals with consent, which is to be examined only as a question of fact. The question should be "Did the complainer in fact consent to what took place?", rather than "Did the accused believe that she consented?" That goes to the issue of whether the accused had reasonable grounds for his belief. We want to consider that issue.

The Convener: Have you finished your questions, Gordon?

Gordon Jackson: I will never be finished, but I have stopped.

Phil Gallie: Executive press releases suggest that the minister's only concern about the issue of interrogation is that of compliance with ECHR. I recognise that I am close to the question that Gordon asked, but are you able to answer yes or no to the question of whether my perception is correct?

Peter Beaton: It is not entirely correct. As we have heard this morning, there are many concerns about our domestic procedure. We must spend a lot of time thinking about the ECHR in Scotland because, as part of our constitution, our Executive and our Parliament cannot act in a way that does not conform to the convention. The position under the Scotland Act 1998 is clear. Therefore, when we propose primary legislation, we wish to propose legislation that the Parliament will be able, and competent, to pass.

In England—

Phil Gallie: All right. I understand that. To be honest—

The Convener: Phil.

Phil Gallie: Sorry.

Peter Beaton: In England and Wales, the position is not the same, and will not be the same even after October, because the right of the Westminster Parliament to pass legislation has not been affected in the same way. Therefore, the test that we face in Scotland is stiffer than that faced in England and Wales. In a way, it is a salutary situation, because that means that we must think carefully about what we have to do. It also means that different barriers are created for us when we formulate policy.

Phil Gallie: I am sorry that I cut in, but I understand what you were saying and recognise that to be the case.

I come back to my point that the impression given by the minister was that ECHR was the only factor stopping him bringing in a blanket block on the interrogation of a witness by an accused person. As you pushed along the ECHR argument, I will go further. The evidence that we heard from the Law Society suggested that the non-confrontational approach in courts in other parts of Europe in comparison with our confrontational approach provides for special difficulties in Scotland and, perhaps, the UK. Does that suggest that, somewhere along the line, we must change our judicial process and move away from the confrontational methods used in courts today?

Peter Beaton: There are two answers to that. First, there is no suggestion that any provision in the convention on human rights requires us to change the adversarial nature of our procedure. It is recognised as a good way of testing evidence and of assuring a fair trial.

Lessons can be learned in certain respects, particularly with regard to the position of the victim in the process. As Gerard Brown said, in the French and other continental systems there is an inquisitorial process, which is part judgment and part investigation. In France, a juge d'instruction will be charged with full investigation and will interview all the witnesses personally. We do not have anything similar, although we have the process of judicial examination, which enables the accused to be interviewed, and the precognition system, which allows witnesses to be interviewed both by prosecution and by defence interests.

As part of the development of policy, we may want to build on the way in which the precognition system can be used to provide appropriate support to victims and other vulnerable witnesses. The main thing in the continental procedures is that the victim has a role in the process. In France, under the partie civile procedure, the victim can seek damages directly from the court and can influence to some extent the way in which proceedings unfold. That would be a major innovation in our procedure and one that would have to be considered carefully. It is not one that we can even begin to consider because we have to do more urgent things.

Dr Brown: That could be supplemented by telling the committee that there is a consensus among comparative lawyers that one effect of ECHR on continental systems has been to move them towards an adversarial model.

11:45

The Convener: Lawyers are always worried and defensive everywhere. [*Laughter.*]

Michael Matheson: We received evidence from the Law Society on dealing with cross-examination and with vulnerable witnesses. Its view on

vulnerable witnesses was that we should not focus so much on the nature of the crime as on the status of the witness. What could be done to improve identification of vulnerable witnesses? In some of the evidence we have received, there seems to be concern and confusion about how vulnerable witnesses are identified in the first place.

Peter Beaton: This is one case in which we will have to give several answers. I ask Barbara Brown to talk about the characterisation of vulnerable and intimidated witnesses first, and I invite my other colleagues to talk about early identification of such witnesses.

Barbara Brown: When we are talking about vulnerable witnesses, it is important to distinguish between witnesses who are vulnerable because of their particular circumstances or personal characteristics and witnesses who are intimidated, in the sense that their feeling distressed arises from their fear of the actions of other people, which may take place in or outwith the courtroom. That is an important distinction to make.

There may be an overlap—someone may be vulnerable because of their personal characteristics and intimidated because of what has happened to them. There may be people who, because of their characteristics, are more likely to be easily intimidated.

The current definition, as has been explained, applies to children—that is people under 16—and particular categories of people with mental disorder who have been subject to an order under the Mental Health (Scotland) Act 1984—that is the statutory definition at the moment, under section 271 of the 1995 act.

We could consider a range of options for widening that definition. We could widen the range of personal characteristics: for example, we could consider the person's age; whether they have a disability or suffer from mental illness; or their race, social or ethnic background. That has been done in the English legislation and we could consider applying that here.

We could look at categorising the vulnerability in relation to the particular type of crime, for instance, crimes of a sexual or violent nature. The circumstances of the witness or the victim, such as whether they have a relationship with the accused, might be relevant, as might be whether the offence was committed at home or at work. Such factors could be taken into account in extending the current definition.

Another way of doing that would be to give the court greater discretion in deciding whether a proposed witness was vulnerable. Alternatively, we could introduce certain assumptions in particular cases so that a victim of a sexual crime is presumed to be vulnerable and would be entitled to special measures.

In any case, the witness should have a choice about whether they want to be treated as vulnerable and should have access to special measures for giving evidence.

Dr Brown: There are two aspects to the question of who is a vulnerable witness. One is the definitional one: the criterion that will bring into play certain provisions. That is not the one with which the Crown Office is primarily concerned. We start from the position that rape and other sexual offences are odious and can have a traumatising effect on the victim. We want to ensure that we do not add to the degradation of the victim or trespass on their privacy any more than is absolutely essential to prosecute the case.

We try to identify at an early stage witnesses that are in need of support—I am not too concerned about precise definitions. If we want to call them vulnerable, fine. At the first stage, we are heavily dependent on the report that we receive from the police. The guidance that procurators fiscal have at the moment—which is on the point of being reinforced—is that, on receipt of the police report, procurators fiscal must decide whether the report contains sufficient information about the victim or whether a request for additional information is warranted. Plainly, if we do not have enough information to be sure whether the witness needs support, we need to go back to the police and get that information.

The Law Society asked about early intimation in relation to them. I heard the representations, and we will think about what could be done about that. In a serious case, the solicitor will get an informal provisional list of witnesses at an early stage. That is triggered by the appearance of the accused in court. It might be difficult to intimate at that stage that the witness is vulnerable because we might not have come to a conclusion on that ourselves. We will see what we can do about giving information to solicitors. I cannot make any promises about that, though.

Michael Matheson: There is concern about who will judge whether someone is a vulnerable witness. You mentioned the report that goes from the police to the procurator fiscal. Will the Crown, rather than the police, be ultimately responsible for deciding whether someone is a vulnerable witness?

Dr Brown: Ultimately, we will make our own decision, although we will pay close attention to what the police tell us—the assessment and the facts on which the assessment is based. We will make an independent assessment, first when we receive the police report and also when we precognosce the witness. The witness comes in

and someone who is experienced in such matters will interview the witness. It is the responsibility of that person to take an independent view. That is further down the line.

Mr Paterson: I have two quick points. We were promised a statement on "Towards a Just Conclusion" 90 days after the end of January, which would have been the end of April. Is that statement imminent?

I would also like to put it on record that I am unaware of any organisation, voluntary or otherwise, that is seeking a blanket ban on the right of an accused to conduct their own defence. However, some people are seeking to stop the cross-examination by the accused of an alleged victim. I make that point in reference to Gordon Jackson's comment.

The Convener: That was a question and a statement.

Peter Beaton: I dealt with the question in my opening statement, which promised that the action plan would be issued shortly.

The Convener: Let us not get into an argument about whether imminent and shortly mean the same thing.

Mr Paterson: In January it was promised that it would come out in 90 days. What is shortly after 90 days?

Christine Grahame: I want to return to the statistics on the lack of success in prosecution of rape and sexual offences. Could the Crown Office give me its figures for the percentage of cases that go to trial and result in a not guilty or not proven verdict and the percentage of cases that do not go beyond the complaint stage? I was given figures of 91 per cent of cases dropping out at complaint stage and 78 per cent dropping out at trial. I want to know what the figures are.

Dr Brown: We will give you statistics, although they are incomplete, because we had relatively short notice of this meeting. There is also a difficulty because people produce statistics, but count on different bases. Mrs Cameron is in possession of some figures, which I hope will be helpful.

Janet Cameron: We conducted a detailed review of all rape cases that were indicted to the High Court in 1998. It was quite a laborious and time-consuming exercise, because it involved retrieving the case papers for every rape case and consulting them to discover the circumstances of the rape and what conclusion could be drawn, if any, from the acquittal rate.

We found that the acquittal rate was 40 per cent in 1998. The conviction rate, which includes guilty pleas, conviction of rape and conviction of a lesser charge, was 43 per cent. The remaining 17 per cent are cases where a warrant is issued because the accused fails to appear and therefore the case does not reach a conclusion in the period of study.

Christine Grahame: That is very helpful. Perhaps you could provide us with the figures for sexual assaults another time.

When you trawl through, do you look for common threads to discover why the acquittal rate is 40 per cent, given that you thought that such cases would be successful or you would not have taken them to prosecution?

12:00

Janet Cameron: I have been interested in the committee's discussions on improving the conviction rate. The statutory prohibition on researching the reasons for juries' verdicts, under the Contempt of Court Act 1981, makes it unlawful to interview members of a jury or to ask them questions about deliberations in the jury room. It is therefore difficult to get hold of authoritative information on the factors that influence juries.

However, we identified some common threads in the cases that resulted in acquittal. For example, we found that a conviction was unlikely if the complainer had been drinking, if the parties had met in a social situation or if they had previous knowledge of each other. That may not come as a huge surprise to members of the committee. Reference has been made to the fact that members of the public who are chosen to sit on a jury and hear an indictment being read out may think that the attack has been carried out by a stranger, and that the complainer has not met the accused before.

The Convener: Do you think that one of the problems is that people think that rape is rape only if it is carried out by a stranger?

Janet Cameron: I would be wary about saying that categorically. The data suggest that we have more success in those cases, because the issue is not consent. It may be obvious that the complainer was raped; the only issue is the identity of the perpetrator. When the complainer and the accused are known to each other, identification is not an issue; the issue is consent.

Our policy on rape cases is to prosecute on the basis of a bare sufficiency. Members will be aware that, in Scots law, there must be corroboration. In a rape case, corroborated evidence can come from the complainer's testimony that she was raped, from the accused admitting that he had intercourse with the complainer, but with consent, or from the complainer exhibiting distress to a third party, who may corroborate her account that the act was against her will. In such cases, juries are

not confident about convicting without there being injuries or the evidence of independent third parties.

Christine Grahame: I was interested in what was said about the list of witnesses and the assessment about whether somebody is vulnerable. Are the procedures under review for keeping the vulnerable, prime witness informed of events? We have received a lot of evidence to suggest that they become out of touch with what is happening.

Dr Brown: I am aware of that. We should always keep the complainer involved; I know from personal experience that, by and large, we have done so. The policy to do that is in the process of being restated, but I am not going to inflict the detail of the draft on you again.

Christine Grahame: When will that be in the public domain?

Dr Brown: I do not know whether the information will be released into the public domain, but it contains the instructions that will be given to the procurators fiscal. The irony is that the process has been delayed by the need to prepare for the committee.

The clear instruction for procurators fiscal, which is being restated, is to keep complainers informed. I have personally reiterated that to every procurator fiscal and precognition officer in Scotland, in the context of ECHR training and particularly in relation to the rights of victims and witnesses in trials.

Christine Grahame: Does that extend to bail, which is an issue that has been raised with us? Is that being taken in hand?

Dr Brown: Yes. We should be ensuring that complainers are at least told of the position of someone who has been liberated on bail. Usually, it is easiest to do that through the police, who have immediate contact with the complainer at that early stage in proceedings—on the day that the accused is arrested or within a week of his arrest. We will usually get in touch with the reporting officer and ask him to pass on the information, because we will not have had direct contact with the complainer at that stage.

Christine Grahame: The issue of the exclusion of the press has been raised. Is any review under way of the possibility of excluding the press in certain circumstances?

Dr Brown: I can tell you about what happens at present; the justice department may want to comment on reviews. Under section 92(3) of the Criminal Procedure (Scotland) Act 1995, from the commencement of the leading of evidence in a trial for rape or the like, the judge may, if he thinks fit, cause all persons other than the accused, counsel and solicitors to be removed from the courtroom. I think that you pointed out that at the tail-end of article 6.1 of ECHR there is a specific reference to the possibility of excluding the press. I see no incompatibility between section 92(3) of the Criminal Procedure (Scotland) Act 1995 and article 6.1 of ECHR. A judge has the power to exclude the press from trials for rape and the like. I do not know whether a review is under way.

Christine Grahame: Therefore, the phrase "the judge invites" might be just a judicial courtesy; in fact, he has the power to oblige the press to leave.

Peter Beaton: In addition, there is a common-law power enabling courts to be cleared in certain circumstances. At the moment, there is no plan to review that. However, having heard the evidence that the committee has taken and having regard to the interests of the committee, we will consider that position.

Michael Matheson: I am interested to hear that there are legal provisions for a judge to order the press to be cleared from the court, as I have received correspondence from the Lord Advocate advising that it is not possible to clear the press from the court.

Dr Brown: It may depend on the nature of the offence.

Michael Matheson: The trial to which I refer is a rape case.

Dr Brown: If you can tell me a little more so that I can identify the file, I will get back to you on that. I am not in a position to comment on a particular case.

Michael Matheson: I will follow up that point with you through correspondence.

Christine Grahame: My final question is whether consideration is being given to amending section 271 of the Criminal Procedure (Scotland) Act 1995 to extend the definition of a vulnerable witness who can make use of video and closed-circuit television.

Barbara Brown: That is one of the issues that we are considering and about which I spoke earlier. We will be examining proposals to widen the definition.

Pauline McNeill: On cross-examination by the accused, I want to be clear about what you are saying about the legal issues. Am I right that there is a problem relating to ECHR and one relating to the presumption of innocence under Scots law, and that if we want to legislate we have to get round those issues taken together?

Barbara Brown: In any policy that we develop in this area, we have to balance two things. We have to support the victim and the witness to enable them to give the best evidence that he or

she can and to ensure that there is a fair trial for the accused—

Pauline McNeill: I am specifically asking whether, if we want to legislate on this—as the Executive has committed itself to doing—the only problem is ECHR or whether the presumption of innocence in Scots law is also a factor.

Barbara Brown: Of course that is also a factor. The presumption of innocence and the fact that a case must be proved beyond reasonable doubt underlies the whole process.

Pauline McNeill: I ask that because many questions have concentrated simply on how the convention is interpreted. Article 6.3d talks about the right of the accused

"to examine or have examined"

witnesses. How do you interpret the phrase "have examined"? Is that a third-party right or a personal right to examine witnesses?

Peter Beaton: At first sight, I think that it means either. The interpretation is simply that one way or another, either directly or through a third party—usually an agent or counsel—the accused has to be able to test the evidence against them. That is a fundamental principle.

Pauline McNeill: That is what I thought.

I will not quote them directly, as I cannot remember exactly what words were used, but, when asked why they thought that accused persons chose to represent themselves instead of employing a lawyer, the Law Society and others replied that the accused might want to retain control and intimidate the witness. Is that your view?

Peter Beaton: That is an extremely difficult, although important, question. If we were researching the reasons why it happened, that would be the first thing that we would ask the researchers to consider. As Sandy Brindley said, in cases of rape and other sexual crimes there has been an extremely small incidence of accused persons representing themselves, so it would be difficult to undertake any research. The indications from the well-known English case were that such a defence was undertaken deliberately by the accused for that purpose.

We cannot say definitely what the motivation is in such cases. The recent cases in Scotland, which have attracted much publicity, would not help us much even if we were allowed to discuss them. We must presume that there is a mixture of motives. Undoubtedly, in some such situations the motivation is simply that the accused has failed to prevail with members of his defence team on elements of the conduct of the defence and has got rid of them. That happens, regrettably, more frequently than we might think and much more frequently than the cross-examination by the accused of victims of sexual crimes. It causes huge difficulties, as it interferes with the progress of trials and poses problems for the people who succeed the defence team, who must decide what to do when advice has already been tendered with the best of intentions and following all professional rules.

One of the difficult questions that the Law Society has raised today concerns the sort of duty that should be placed on a defence team that is instructed by the court—or in whatever way—to take over when there is a prohibition on the accused person's acting in their own interest. In that situation, the most difficult problem is to achieve a balance between, on the one hand, our domestic procedures and the need for the defence to put its case to the prosecution witnesses and, on the other, the fundamental principle of a fair trial, which is enshrined in article 6 of the European convention on human rights. We cannot suggest to the Parliament anything that is likely to impugn that principle.

Maureen Macmillan: Rape Crisis Scotland has pointed out that it is not just the court processes that intimidate and distress witnesses, but the early stages of the investigation, which can be extremely traumatic. Are you reviewing the provision of police surgeons and the facilities that are available in police stations and elsewhere to support victims immediately after the crime has been committed? If so, are you considering the matter throughout Scotland? I know that the provision is scant in some areas of the country.

Gerald Byrne (Scottish Executive Justice Department): The short answer is that we are not actively reviewing those things. From the Soroptimist International report that we received from Mr Gil Paterson, we are aware of the many concerns, including the concern over the number of female police surgeons. The training that is given to police officers in this area is underpinned by Scottish Office guidance from 1985. When that guidance was first issued, the same concern over the number of female police surgeons had been raised, so the issue has obviously been around for a while.

We are not actively reviewing that provision at the moment, but we are aware of the concern. I regard the adequate provision of rape suites in each area, to meet the demand for that facility, as a matter for the police to examine. The Executive would not have a view on the correct number for each force. If strong concerns were expressed by organisations such as Rape Crisis Scotland, we would reconsider the matter, but the number and location of such facilities would be a matter for the chief constables to decide, at least in the first

instance.

Maureen Macmillan: Would you not discuss with chief constables what might be appropriate?

Gerald Byrne: Is that in terms of the detail of the provision of rape suites? We could do, but we would regard it as a matter for chief constables to decide operational priorities in their area, and resources for that provision would have to be balanced with other operational issues.

12:15

The Convener: That concludes the questions. I thank the witnesses for attending this meeting. The committee will discuss the evidence that we have heard; perhaps we can allocate some time on the agenda in the next few weeks for a committee debate on what we have heard to see whether there is a committee view that we can present to the relevant parties.

Petition

The Convener: Item 2 on the agenda is petition PE200 from Andrew Watt on legal aid. Committee members will have received note JH/00/22/7 by the assistant clerk. Two options are outlined for dealing with this petition. I do not think that the options are mutually exclusive, so I recommend that we both write to the Legal Aid Board to clarify the position and advise the petitioner that we will incorporate the issues that he has raised in the future review of legal aid in Scotland. It may be that we will consider this matter separately when we get a reply. We will also include this issue in the general legal aid review.

Phil Gallie: Given the time scale—the case goes back to 1988—can questions be asked about how many similar instances there have been?

The Convener: The letter seeking clarification from the Legal Aid Board will advise that the committee is not going to examine the specifics of this case. We want clarification from the Legal Aid Board on the general issue. Are members happy with that?

I assume that if nobody shouts “No”, that generally means that members are happy.

Future Business

The Convener: Item 3 is the forward programme. All committee members will have received the provisional forward programme for June and July 2000. We do not have details of our meetings after the recess.

Members will notice that we are in a fast-moving situation. Stage 1 of the Regulation of Investigatory Powers (Scotland) Bill will be debated in the chamber tomorrow afternoon. The deadline for amendments at stage 2 will be 5.30 pm on Monday and we will deal with stage 2 of that bill at the committee on the morning of Wednesday 21 June. The stage 1 debate on the Bail, Judicial Appointments etc (Scotland) Bill will be on Thursday 22 June. Amendments for stage 2 of that bill will require to be lodged by 5.30 pm on Friday 23 June, the day after the stage 1 debate. That situation is imposed on us by the fact that the standing orders have been suspended en bloc, but it seems an alarming state of affairs that the deadline for amendments will be 24 hours after the stage 1 debate.

Today's business bulletin contains a detailed announcement about amendments to both bills to alert members to the need for speed—if they miss the deadlines, that is it. Moreover, it would assist the clerks if members flagged up their amendments at the earliest opportunity.

The programme of business is provisional. At this stage we have no idea how long stage 2 will take for either of the bills. Only one meeting may be required for stage 2 on each of them, but we cannot know that at this stage.

Members will see that Michael Matheson will be reporting on judicial appointments on Tuesday 4 July. I believe that there will be some small opportunities for items to be put on the agenda other than the legislation that we have before us. Extensive time will not be available, but I am hoping to squeeze in time for a discussion of the evidence that we have heard on rape, so that we can at least draft a letter from the committee. I am also desperately seeking time for Maureen Macmillan to come back on the domestic violence bill. We will be doing our utmost to achieve those ends.

We are now moving into private session—

Christine Grahame: Could I ask that we have a written submission from the Police Federation on the evidence that we have heard on rape and how rape victims are treated from the time of going to the police station until trial, because that was passed over at the end. That would help us in taking a view.

Phil Gallie: Convener, despite the requirement on you to rush these issues, I must say that, if these time scales had been applied in the House of Commons, we would have been ridiculed. This is guillotining of the worst kind and this Parliament is failing totally by accepting such time limits.

The Convener: I have serious concerns, particularly about the stripping out of the two-week period between stage 1 and stage 2. That gives virtually no time whatever.

Christine Grahame: That is especially so with regard to the Bail, Judicial Appointments etc (Scotland) Bill, with which we have a lot of problems.

The Convener: To be fair, our stage 1 reports directly reflect that concern.

Phil Gallie: That does not seem to do any good, convener.

The Convener: No. As I have said previously, I am always grateful that you want me to go out there and face up to the Parliamentary Bureau, but I would need the entire committee to be behind me if we came to the point of flat out refusing to do something.

I think that we are now in private session.

12:22

Meeting continued in private until 12:56.

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