JUSTICE COMMITTEE

Tuesday 2 June 2009

Session 3

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

CONTENTS

Tuesday 2 June 2009

JUSTICE COMMITTEE
17th Meeting 2009, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Angela Constance (Livingston) (SNP)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*Paul Martin (Glasgow Springburn) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
*Dr Richard Simpson (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Dr Sarah Armstrong (University of Glasgow)
James Chalmers (University of Edinburgh)
Right Hon Lord Coulsfield
Ian Duguid QC (Faculty of Advocates)
Professor Jim Fraser (University of Strathclyde)
Professor Neil Hutton (University of Strathclyde)
Alan McCreadie (Law Society of Scotland)
Bill McVicar (Law Society of Scotland)
Tom Nelson (Scottish Police Services Authority)
Sarah Robertson (Scottish Parliament Chamber Office)
Dr Cyrus Tata (University of Strathclyde)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 2 June 2009

[THE CONVENER *opened the meeting at 10:04*]

Interests

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I remind everyone to switch off their mobile phones. No apologies have been received.

I welcome Richard Simpson MSP, who is here as a substitute for Bill Butler MSP, but only for the purposes of agenda item 2, as permitted by rules 12.2A.2 and 12.2A.3(b) of standing orders. Under agenda item 1, I ask Dr Simpson to declare any relevant interests.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): I draw members' attention to my written declaration of interests, but I do not believe that it contains anything that is particularly relevant to the work of the Justice Committee.

The Convener: Thank you. I formally welcome you to the committee.

Proposed Damages (Scotland) Bill

10:05

The Convener: Bill Butler has lodged a draft proposal for a bill on rights to damages in respect of personal injuries and death and a statement of reasons for not consulting on the proposal. The Parliamentary Bureau has referred the draft proposal and statement of reasons to the committee. At present, all that the committee is asked to decide is whether it is satisfied with the reasons that the member has given for not consulting on the draft proposal.

Standing orders do not permit Bill Butler to participate as a committee member in making the decision, and Dr Richard Simpson MSP is attending in his place. As Bill Butler is not attending this item in his capacity as a committee member, I welcome him as a witness. He is accompanied by Sarah Robertson from the non-Executive bills unit. I invite Mr Butler to make a brief opening statement.

Bill Butler (Glasgow Anniesland) (Lab): Thank you, convener. It is good to be here and to see the Justice Committee from a different vantage point.

Members will know that the legislation on damages in respect of death from personal injury is the Damages (Scotland) Act 1976. Two types of claims for damages arise on the death of a person from personal injury—the victim's own claim, which can transmit to his or her executor, and a claim by the deceased's relatives.

The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 changed the law on claims for damages when a person dies of mesothelioma. As a result, the deceased's immediate family can now claim damages for non-financial loss, such as loss of the deceased's society, support and services, even though the deceased might have obtained damages or settled their claim before they died.

When the Scottish Parliament debated the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill, the then Scottish ministers decided that some aspects of the law of damages for wrongful death merited further examination. The Scottish Law Commission was asked to review the law and particularly the provisions of the 1976 act. In its "Report on Damages for Wrongful Death", which was published on 30 September 2008, the SLC concluded that some areas of the law no longer reflect the economic realities of modern family structures and that reform is advisable. It also said that reform is necessary because the 1976 act has become overcomplicated and

contains inaccuracies because of the numerous amendments that have been made to it. I therefore contend that there is a need for the proposed legislation.

On the need or otherwise for further consultation, as members know, the Scottish Law Commission published its "Discussion Paper on Damages for Wrongful Death"—discussion paper 135—on 1 August 2007. The paper attracted 15 formal responses, the majority of which supported reform in the areas under discussion. The SLC adopted those views, which informed its final recommendations. It analysed all the responses and published its "Report on Damages for Wrongful Death" on 30 September 2008. The discussion paper and report can be viewed on the Scottish Law Commission's website.

I do not believe that further consultation is required, for the following reasons. The Scottish Law Commission carried out a wide consultation that was robust, open and transparent. It ensured that the consultation paper was specifically targeted at certain organisations in an attempt to attract impartial analysis. Key stakeholders and members of the public had further opportunities to express their views on the proposed subject matter as the discussion paper has been available on the SLC's website since August 2007. There have been no developments or changes in the damages system in Scotland since the consultation ended, so there is no reason to issue another consultation paper on the same issues that were comprehensively covered in the SLC's discussion paper.

I consider that further consultation on the same proposal would duplicate effort and incur unnecessary cost and could create the impression of overconsultation. My view is that we should not send out the proposal for consultation again; that would be a public expense that would not be appropriate. We would have to start the whole process over again, and we do not need to do that.

The proposed major reform would simplify the way in which patrimonial loss to the deceased's family is calculated. The reform is sensible, would save legal costs and would result in the speedier and just resolution of cases. I therefore request that the Justice Committee considers my statement of reasons and confirms that it is satisfied with the reasons for not consulting further on the draft proposal.

The Convener: Thank you, Mr Butler. Do members have any questions?

Robert Brown (Glasgow) (LD): I understand where Mr Butler is coming from, but does he accept that we are dealing not only with the question of support or otherwise for the bill, but with the need to tease out the implications of some of the bill's proposals at a time when other legislation is imminent? Consultation in the normal way is laid down in the rules for a reason. I am a little concerned that even when we scrutinised the recent Damages (Asbestos-related Conditions) (Scotland) Bill, several matters came out of our discussions that might have been dealt with more easily had the Government carried out a full consultation on the bill. Do such considerations not apply many times over to the more complicated issues with which we are asked to deal in the proposed bill?

Bill Butler: As always, Robert Brown makes an important and serious point. He prays in aid the recent Damages (Asbestos-related Conditions) (Scotland) Bill, but that bill is not comparable with my proposal. If I may say so, that bill did not arise from about two years of deliberation by the Scottish Law Commission, including a discussion paper—number 135—to which I have referred, and a report—number 213—and interested parties were not consulted on it, either directly or through their lawyers. The Damages (Asbestos-related Conditions) (Scotland) Bill did not attract a broad consensus, whereas there are indications that the Law Commission's report does. The Damages (Asbestos-related Conditions) (Scotland) Bill was not commissioned by the Scottish Executive, now the Scottish Government, from the Law Commission, whereas the Scottish Law Commission's report, which was issued in September 2008, was and is available to all, including those in the Scottish Government. Therefore, I do not think that that bill and my proposed bill are comparable.

The Scottish Law Commission's report sought, as extensively and comprehensively as possible, views from interested parties. I draw members' attention to the fact that Lord Drummond Young, who chairs the Law Commission, is a Court of Session judge, and I know that Court of Session judges ensure that analysis is as comprehensive and detailed as possible.

There is no need for further consultation on my proposal because nothing has changed since the Scottish Law Commission report was published in September last year. Therefore, the same salient issues remain.

Mr Brown was absolutely right that the question is not whether members support the policy behind the proposed bill; the question is simply whether there has been adequate consultation. If we say that there has been, why then put the proposal out for further consultation? We do not need to do that; there is enough in the Scottish Law Commission consultation.

From some of the submissions from insurers, it is clear that they have misunderstood the process,

but today is not the end of that process. If the committee agrees that it is satisfied with the statement of reasons, which deals with the need or otherwise for the proposal to go out to consultation, this will be just the beginning of the process. We will have to seek the support of 18 members of the Parliament and, within the same 30-day period, the Scottish Government must say whether it agrees with the principles of the bill. Then we have to go through the call for written evidence, interrogation at stage 1, and the stage 2 and stage 3 amendments. The whole panoply of the Parliament will be engaged in the process and there will therefore be a chance for further interrogation. Although I accept that Mr Brown has made a serious and important point, I do not think that my proposal is comparable with the Damages (Asbestos-related Conditions) (Scotland) Bill.

10:15

Robert Brown: I will pursue the point, if that is all right, convener. Mr Butler mentioned the paper that he has put before us, which says, at the end, that the new formula

"has been approved by lawyers who represent the families of deceased persons and the defenders' insurance companies."

I am not entirely certain who was involved in providing that approval, because we have a wad of papers that suggests that agreement has not been reached with the insurance companies. Approval across the board is one thing, but a situation in which there is contention about such matters is slightly different. Can Mr Butler give us any background to the apparent discrepancy between what is in his statement of reasons and the documents that we have received from the insurance companies' representative bodies?

Bill Butler: The e-mail from the Forum of Scottish Claims Managers of 27 May 2009, which members have before them, demonstrates that the forum has been consulted. It says that it

"contributed to the consultation process by submitting a detailed written response in relation to the draft proposals."

Moreover, it fails to indicate how any submission that it might make to a further consultation might add to or differ from its original submission.

With regard to the memo from the Association of British Insurers by Briony Krikorian, I have to say that it is surprising that the ABI has not been aware of the proposed bill. Given that the Scottish Law Commission published its report together with a draft bill some time ago, I would have thought that the ABI, like everyone else, would have been aware of it.

The original response from the Forum of Insurance Lawyers shows that it has been adequately consulted on the issue. The forum's members have no doubt taken their insurance clients' instructions. The forum does not appear to be wholly against the proposed bill, but it calls for further consultation. I am suggesting to members that there is no need for further consultation at this stage. If the bill continues on its parliamentary route, the insurance lawyers can take part in the process, and I am sure that they will.

Perhaps my statement of reasons was too sweeping in that regard, but I take it from the three e-mailed submissions that the organisations concerned are not entirely against reform. They obviously have particular points that they wish to make. They made them during the consultation process and if the committee agrees to accept the statement of reasons, they will have the opportunity to make them again as part of the parliamentary procedure. Failure to hold another consultation would not prevent them from saying what they wish to say in a more finessed way or from raising points that are still of concern to them. That opportunity would still be open to them.

My response is that I am mindful of the three submissions that we have had from the insurance industry. I am not arguing that the insurance companies' representative bodies should be completely disregarded. Indeed, they are not being disregarded: they have taken part in the consultation and they will take part in the parliamentary process.

Robert Brown: My final, brief question is about the Scottish Government's position. Given that the bill proposal emerged from the previous Government's reference of the issue of damages for wrongful death to the Scottish Law Commission, it has gone through official channels, if you like. Do you have any indication, at this stage, of the Scottish Government's attitude to your proposed bill?

Bill Butler: I have no indication other than what Mr MacAskill said in response to an oral question that I asked about a month ago. He said that the Scottish Government was looking carefully at the recommendations that were made in the commission's report of last September and that he would comment "in due course".

I hope that the Scottish Government agrees to support my proposed bill or to take it over so that it becomes part of the Government's legislative programme, as that would be all to the good. I seek to gain the support not only of the Scottish Government, but of all parties. I do not want to stray into policy matters, but it seems to me that my proposal is about simple justice and modernising a process that needs to be modernised. If I may say so, no one disagrees that reform is necessary. There are inaccuracies and elements in the present system that need to be

revised. Those revisions would also form part of the bill.

Stewart Maxwell (West of Scotland) (SNP): I share some of Robert Brown's concerns, but not those about the policy issue or whether the proposed bill has merit, which is a discussion for another time. Does Mr Butler consider that outside consultation by a non-parliamentary body is acceptable pre-legislative consultation? Does he believe that there is perhaps a profile difference from a parliamentary consultation, when more people might get to see proposals who would not necessarily be—I hate to use this phrase—the usual suspects who are targeted for consultation responses? Does he think that putting a request for responses on the Scottish Law Commission's website is, in and of itself, insufficient in that regard?

Bill Butler: Mr Maxwell has raised serious and important points, to which I will try to respond. The Scottish Law Commission is of course a body that is outwith Parliament, but it is a creature of Parliament under the Law Commissions Act 1965. The commission published its report last September, but it was asked to consider the law on damages by the previous Scottish Executive, which felt that there were gaps in the law. At the time, we were dealing with the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill, which was addressing a gap. The then Minister for Justice thought that there were also gaps in other areas, such as road traffic accidents and industrial accidents, which needed to be considered. Provision for such gaps could not be made in the 2007 act, so the Scottish Law Commission was given the job of examining the gaps in the law and whether reform was needed.

The current Scottish Government has not demurred from that process or said that it is against the Scottish Law Commission report—there would be no reason to be against it. The Government has said that it is an interesting report that is full of recommendations that must be treated seriously. I am paraphrasing Mr MacAskill, but I believe that I am expressing the import of what he said.

The situation is unusual in a sense, because—I can be corrected if I am wrong about this—I believe that it is the first time that a Scottish Law Commission report has produced a proposed member's bill: appendix A of the report is the draft bill. That is the novelty, and Mr Maxwell is right to point that out. However, although that route has not been followed previously, it can be followed under the Parliament's rules and procedures.

On the question of the usual suspects, I would always hope to have as wide a consultation and range of responses as possible. Mr Maxwell will be aware that the consultation on possible changes to the law with regard to smoking had thousands of responses. There were about 30,000 responses to the consultation on the Government's subsequent Smoking, Health and Social Care (Scotland) Bill. For my previous member's bill, which was the Direct Elections to National Health Service Boards (Scotland) Bill, there were about 165 consultation responses—I would not have expected 30,000. The proposed damages (Scotland) bill obviously covers a much narrower policy area because, although it is about an issue of justice that applies broadly across the country, it is more esoteric, in the sense that it is about damages, the law of delict and insurers, and about lawyers seeing the need to modernise that part of the law of Scotland.

I therefore believe that, although the Scottish Law Commission is an outside body, its consultation has been as comprehensive as practicable in relation to the subject that it was asked to examine. It was asked to examine that subject by the previous Government, and its report continues to inform the thoughts of the Cabinet Secretary for Justice, Mr MacAskill. I hope that there is support for the recommendations in the commission's report.

Stewart Maxwell: Let me make one other small point. I would not disagree with, or seek to undermine, any work that the Scottish Law Commission has done, but there is clearly a difference between the Government implementing the commission's recommendations and an individual member picking up bits of a Scottish Law Commission report.

Bill Butler said that the full panoply of the parliamentary process would still be available, but that will obviously not be the case if we do not require the pre-legislative consultation, which is part of that full process. Obviously, pre-legislative consultation might not be required for a proposal that, after being consulted on, is introduced as a bill that then falls, either because there is an election or because the member in charge is appointed as a minister, and which is then picked up by another member.

Another possibility, as Robert Brown mentioned, is that consultation might not be required for an uncontentious proposal. However, given the amount of correspondence that we have received from a variety of lawyers and insurance bodies, it sounds as if Bill Butler's proposal is more contentious than one on which a consultation period might be avoided. Given the contentiousness of the issue, how can we be sure that we dot every i and cross every t in introducing the bill?

Bill Butler: I do not know that we can dot every i and cross every t, given that any bill can arouse differences of view and contention. I cannot

predict what will happen if the proposal proceeds, but the committee will obviously have time to amend, discuss and interrogate the bill.

The proposal has already been the subject of comprehensive consultation by the Scottish Law Commission but, although this is a new and novel procedure, the consultation is certainly not the worse for that—quite the contrary. My fear is that further delaying the measure by requiring a prolonged period of consultation could prejudice outcomes for those who are the victims of wrongful death, who include not only the persons who have died but their families. I believe that the statement of reasons on why no consultation should be required makes the reasonable case that the Scottish Law Commission's consultation was adequate, comprehensive and detailed. Not requiring further consultation on the proposal would not preclude others who have difficulties with the recommendations—as some do—from taking a full part in the parliamentary process.

Angela Constance (Livingston) (SNP): I appreciate that consultation is not just about quantity and must also take qualitative factors into consideration, but I want to find out how many responses—perhaps Mr Butler will know this—the Scottish Law Commission's consultation received. Also, was any consultation carried out on the conclusions that the commission reached? Would not a consultation on the bill proposal—whose introduction I am generally supportive of—provide an opportunity to consult on the commission's recommendations?

Bill Butler: Angela Constance makes an important and serious point, but my argument is that the consultation has been as wide, comprehensive and detailed as it possibly could be, given the rather specialised nature of the subject matter. The Scottish Law Commission has gathered in as many responses as possible in what is a fairly narrow area of public policy. I refer members to paragraphs 7 and 8 of my statement of reasons, which state:

"A Discussion Paper on Damages for Wrongful Death (no.135) was published by the Scottish Law Commission on 1 August 2007 … The discussion paper produced 15 formal responses and the majority of these expressed support for the idea of reform in the areas of the Bill under discussion. These views … informed its final recommendations."

I do not think that, with the best will in the world, we would get more than 15 responses if we consulted on the issue again. We might get one or two more, or one or two fewer, responses than the Scottish Law Commission got.

I concur with Ms Constance's phraseology when she referred to the qualitative nature of the responses. I do not think that the quantity could be inflated to much more than the level that the Law Commission achieved, so I feel that the consultation so far, on this narrow but important area of public policy, has been detailed and comprehensive.

10:30

In paragraph 19 of my statement of reasons why further consultation is not required, I say that

"we should not send the proposal out for consultation in the public domain again—at public expense—and start the process again."

I argue that the consultation has already been done. The quantity of responses could not be improved on, and I do not believe that the quality of the consultation could be improved on, either.

The recommendations in the SLC report have informed the bill. If the bill comes before Parliament, it will go through the full parliamentary process, as Stewart Maxwell has said. There will be calls for written and oral evidence; there will be interrogation at stage 1, followed by a stage 1 report; and there could be amendments at stages 2 and 3. I therefore urge members not to go down the road of consulting again on an issue that has already been fully consulted on.

The Convener: Obviously, going out to consultation would lead to additional costs, but would there also be an impact on the timing of the bill?

Bill Butler: I will hand over to Sarah Robertson of the non-Executive bills unit.

Sarah Robertson (Scottish Parliament Chamber Office): If Bill Butler had to consult again, there would be a mandatory 12-week period during which he would have to run his consultation. Before that, we would have to consider how to draft the consultation document, which might take a couple of weeks. Then, after the 12 weeks of consultation, there could be a further four weeks of analysis and summarising before we published the results of the consultation. Therefore, the delay could be around four or five months in total.

Bill Butler: From my previous experience of a member's bill, I know that a consultation period can add a little more than even the figure that Sarah Robertson has given. That figure was the absolute bare minimum.

The Convener: I take it that there is no accelerated process that could be followed.

Sarah Robertson: No, there is not.

Paul Martin (Glasgow Springburn) (Lab): It would not be unprecedented for a Government to use a Scottish Law Commission consultation process as a substitute for a new consultation process. For example, I think that a previous

Executive used a Scottish Law Commission report as consultation on a sexual offences bill.

Bill Butler: I am uncertain about that. However, what I am attempting to do is novel, in the sense that I am taking a draft bill from a Scottish Law Commission report and trying to adopt it as my member's bill. I am doing that to expedite what needs to be expedited if we are to deal with injustices, and also because I believe, albeit as a layperson, that the issue has been so fully consulted on that the bill is pretty good to start off with. I think that Lord Drummond Young would agree.

The Convener: I am sure that he would find that exceptionally comforting.

Bill Butler: I do not know about that, but I am comfortable with the fact that Lord Drummond Young agreed, as did all the members of the Scottish Law Commission, with the recommendations contained in the commission's report.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): In response to earlier questions, I think that you said that those who responded to the Scottish Law Commission's consultation generally agreed on the need to modernise and update the law.

Bill Butler: That is correct.

Cathie Craigie: We have received a written submission from the Forum of Insurance Lawyers. The forum accepts that the Scottish Law Commission's discussion paper was full and helpful, but it says that your bill is identical to the bill that was drafted by the commission. Is that correct?

Bill Butler: That is correct. The draft bill is appendix A of the report—I am attempting to take it off the shelf.

Cathie Craigie: Now that those facts have been established, do you agree that the issues that the Forum of Insurance Lawyers and the Forum of Scottish Claims Managers have raised with us today in writing would be better dealt with as part of the process of scrutinising any bill that you introduce, as they relate more to detail than to the consultation process? Both organisations have said that they took part in the consultation, which was full and detailed.

Bill Butler: They would have the opportunity to participate in the scrutiny process. They have also conceded that they had the opportunity to take part in the consultation process, which they said was helpful. If the statement of reasons is accepted today and the parliamentary process gets properly under way, they will have many opportunities to submit written evidence; the committee might also decide to take oral evidence from them, which would allow them to raise issues that are of concern to them. I am in no way seeking to prevent those with a valid interest in the proposed legislation from making their views known.

Dr Simpson: There are two fundamental questions. First, is the bill necessary and desirable? That question seems to have been answered—the SLC process appears to indicate that it is. Secondly, what issues might arise in relation to the bill? It is important to identify those issues in a consultation. Are you aware of any new issues that have arisen on the SLC's discussion site since the publication of its report in 2008? I take it that all the issues raised by FOIL, the ABI and the Forum of Scottish Claims Managers in their submissions were raised previously and that there are no new issues for the committee to address.

Bill Butler: Your assumption is correct. I believe that no new issues have arisen since the report was published in September last year. On that basis, the extant recommendations and proposed bill remain to be dealt with. There is no need for further consultation; I argue that the previous consultation was wholly adequate and that there is no new material.

Nigel Don (North East Scotland) (SNP): Good morning. One legal point that emerges in much of the evidence that we have received is the question whether damages should be calculated using a formula or whether each case should be decided on its facts. I understand that the draft bill proposes a formula, which can be and has been criticised. Is that part of the general principles of the bill?

Bill Butler: I will take direction from the convener, as I do not want to stray into policy areas. At the moment, in cases in which damages are claimed on behalf of a relative or spouse, the court must determine the level of financial support that they have lost through their partner's death. That causes a great deal of wrangling and distress. Under the reforms that the commission recommends, the courts would apply a rule that assumes that 25 per cent of the deceased's income was spent on their own living expenses, thus avoiding the need for litigation. That means that damages would be set at 75 per cent of the deceased's income.

The Convener: That is entering into a policy point that might be debated fully at a later stage.

Nigel Don: I am with you, convener, but we are looking at a bill that seems to be pushing towards a formula instead of allowing everything to be considered on its merits. If we had been talking about the Arbitration (Scotland) Bill, which was discussed in another committee last week, that would have been fine. However, if we are talking

about the substantive law for every case, I am worried.

Getting back to the process, not the policy, I am concerned that if we are moving towards a rough-and-ready numerical approach rather than an approach that considers everything on its merits, we need to ensure that we have considered every possibility. We are not looking for a rough-and-ready answer; we are looking for good, accurate, substantive law. I am therefore inclined to feel that if we have any doubts about the level of consultation, we should move towards ensuring that we have consultation.

Bill Butler: This might be the first time that a set of recommendations presided over by Lord Drummond Young has been called rough and ready.

I do not agree with Nigel Don. The bill is not simply about the formula—other modernisations, or tidying-up measures, are being suggested for the 1976 act, although I do not want to stray into those now. I argue strongly that further consultation is unnecessary. A full, detailed analysis has been carried out, and no new matter has been introduced following the publication of the Law Commission's report. We would be drawing the matter out, when justice needs to be served as quickly as possible.

As the convener will know, there are numerous deaths every year in industrial accidents and road traffic accidents and in more high-profile cases, such as the tragic overturning of the tug, the Flying Phantom, on the Clyde. The resolution of civil damages in all such cases would be delayed if people's personal circumstances were delved into, and people's earnings would be unjustifiably reduced. The challenge, which the bill deals with, is to avoid all of that. Such delay is unnecessary. The consultation has been full, detailed, analytical and impartial. That does not mean that there is no debate to be had, but I ask the committee to accept that there is no need to go out for further consultation. In my view, the consultation has been adequate.

Nigel Don: The FOIL statement, which I am sure that Mr Butler has seen, refers to a case in which the 25 per cent reduction in damages was changed to 30 per cent, and in which the judge—another lord—took into account something that would otherwise not have been taken into account. I merely make that point in order to assure Mr Butler that there are other views.

Bill Butler: I do not want to stray too much into policy, but I suggest that if the recommendations in the SLC report were taken into account and put into law the need for cases to be heard in court would be obviated. That would be a very good thing. However, I realise that I have inadvertently strayed into policy matters.

The Convener: Indeed. It is important to stress that we are not talking about the merits or demerits of the bill. One way or another, the matter will go through the parliamentary process.

I propose that we move to the question, which is whether the committee agrees that it is satisfied with the reasons given by the member for not consulting on the draft proposal. Are we all agreed?

Members: No.

The Convener: There will be a division.

FOR

Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0. Therefore, the proposal falls.

10:44

Meeting suspended.

10:45

On resuming—

Subordinate Legislation

Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) Revocation Order 2009 (SSI 2009/180)

The Convener: The committee will now deal with two Scottish statutory instruments under the negative procedure. The first, SSI 2009/180, is necessary to revoke the earlier instrument in respect of which the committee voted in favour of a motion to annul. Although the Subordinate Legislation Committee reported the instrument on the ground that the Government did not comply with the 21-day rule, it was content with the explanation that was given.

As members have no questions, are we content to note the order?

Members *indicated agreement*.

Parental Responsibilities and Parental Rights Agreement (Scotland) Amendment Regulations 2009 (SSI 2009/191)

The Convener: The second instrument is SSI 2009/191.

As members have no questions, are we content to note the regulations?

Members *indicated agreement*.

Criminal Justice and Licensing (Scotland) Bill: Stage 1

10:46

The Convener: Item 4 is continued consideration of the Criminal Justice and Licensing (Scotland) Bill. The evidence taken today will build on the evidence taken on parts 1 to 7 of the bill.

I welcome today's first panel, which consists of Alan McCreadie, deputy director with responsibility for law reform, and Bill McVicar, convener of the criminal law committee, who are both from the Law Society of Scotland; and Ian Duguid QC, chairman of the criminal bar association at the Faculty of Advocates. I thank you for your written submissions, and I assure you that they have all been carefully read.

We will move straight to questions, and I will ask the first one, on the Scottish sentencing council. Mr Duguid, the provisions in the bill that deal with the sentencing council have attracted criticism on the basis that they would undermine the independence of the judiciary. What are your views?

Ian Duguid QC (Faculty of Advocates): I agree substantially with that view. I read with interest the evidence that the Lord Justice General and the Lord Justice Clerk gave to the committee on a previous occasion. They were clearly concerned about the independence of the appeal court in respect of its ability to set the sentencing guidelines that currently operate for everyone who practises in the courts. They also questioned the necessity of having another body, which would be unelected, to provide guidelines. As far as I can see, there are clear difficulties with that.

Like the Lord Justice General and the Lord Justice Clerk, I do not see that there has been an inconsistency in sentencing to the point at which another body is required to set guidelines. They were also concerned with the composition of the body in its proposed form because there would not be a majority of judicial members, which would also be a concern for us. There is also a constitutional question, which it is not necessary for me to get into.

All those observations were substantially well founded. I am not sure that a difficulty currently exists. There was discussion about whether there is a perception that there is inconsistency and the idea that that is perhaps brought about by newspaper reports of sentences that members of the public find difficult to understand, but it is perhaps a matter of understanding more than anything else. One of the most obvious recent

examples is the case in England when the judge who was sentencing in the baby Peter case was, by all reports, strictly adhering to guidelines, which he was obliged to follow, but the outcome was, apparently—in the view of the editors of *The Sun* and the *Daily Mail*—totally unsatisfactory.

I am not sure that the setting up of a body that fixes guidelines and causes judges to adhere to those guidelines will really address all the problems that are thrown up by individual cases. The proposed body is expensive—the suggestion is that £1 million will be spent on establishing it and operating it. I question whether that expenditure on the legal system is necessary and appropriate at this time.

The Convener: Thank you. That is very clear.

Bill McVicar (Law Society of Scotland): I agree, in principle, with what Mr Duguid has said. We are concerned to understand what is meant by consistency in sentencing. Two apparently similar cases may attract different sentences for reasons that are particular to those cases; that is the difficulty in applying strict guidelines. The question is whether we want uniform sentences or consistent sentences—and what is meant by consistent sentences. It seems to me that such matters are not properly dealt with in the bill.

The other question is whether the Government is really looking for mandatory sentences of some description—sentences that must be imposed if certain criteria are met. There is an element of concern about the undermining of judicial independence in sentencing when one moves into the field of mandatory sentences. Judges are entitled to have their own personal views of particular cases as long as they act in a judicial way. One judge may take a different view of the gravity of a particular case from the view that is taken by another judge. Are we to say that one or the other of those judges is wrong?

The Convener: You have anticipated what I was going to ask. Could there be local circumstances in which sentencing disparity was appropriate?

Bill McVicar: Absolutely. It is crucial that, in some places, judges have regard to local circumstances in passing sentence.

The Convener: Do you adopt that argument, Mr Duguid?

Ian Duguid: I understand the reasoning for it, and I can think of some examples of local circumstances calling for different courses of action, but it is a difficult matter to reconcile. Fundamentally, people do not want to be treated differently in one part of the country from how they are treated in another part of the country. If there is a fundamental basis for the sentencing, the refining of the sentence can take into account local circumstances—I do not have any difficulty with that—but the creation of differences in sentencing and perhaps even a sentencing commission providing for different local circumstances is not a course that I would endorse.

I understand the basic principle of taking account of different local circumstances. I am thinking of, for example, road traffic offences that occur on the A9. Should the sheriffs who dispose of cases along the length of that route dispose of them differently from sheriffs who deal with such cases in and around the streets of suburban Edinburgh? Of course they should—there is a recognition of the fact that many accidents occur on the A9 and something has to be done about it. I totally agree with taking local circumstances into account for that sort of example, but I do not think that it would be right to set different fundamental principles in different jurisdictions.

Nigel Don: I want to challenge Mr Duguid on the idea that dangerous driving on the A9 is different from dangerous driving on the streets of Edinburgh. It is either dangerous driving or driving without due care and attention—or any other form of words that you would care to come up with—or it is not. That offence will have its own local context in terms of how fast drivers should be going and how much traffic there is around them, but if it is the same basic offence why should it attract a higher penalty on the A9 than in the suburbs of Edinburgh?

Ian Duguid: I am giving you my answer from anecdotal evidence. There has been a recognition that speeding occurs on the A9 and that, notwithstanding the fact that speeding can constitute dangerous driving, speeding in itself should be curbed to a significant extent on that road. The question is whether the penalties that are given in the sheriff courts in Perth and Inverness should be higher than those that are given in Edinburgh. Of course I do not want to suggest that speed is speed and dangerous driving is dangerous driving, but there is anecdotal evidence that the penalties that are imposed notoriously reflect the number of fatalities on the stretch of road—and that is certainly the case in my experience.

Nigel Don: I am quite prepared to believe that that is the case and that research would demonstrate it—we do not need to do the research—but I am still not sure that I could defend it as a matter of policy or principle.

Ian Duguid: I was not trying to defend it—

Nigel Don: Forgive me for interrupting, but if we want to reduce the speed on the A9 we should do it through road engineering or any number of other

mechanisms, and not by saying, "If you get caught, the penalty will be higher."

Ian Duguid: I do not think that we disagree about that. What I am saying is that local circumstances are reflected in the imposition of penalties. That is a fact. If you are asking me whether I endorse that principle, my answer is that the fundamental principle of dealing with dangerous driving is that everyone should face the same penalty, but if local sheriffs deal with local circumstances by imposing harsher penalties, that is a matter for them. They can choose to use the discretion that they have. Do the sheriffs in Edinburgh choose to exercise their discretion in the same way as sheriffs elsewhere? The anecdotal evidence is that they do not, but that does not alter the basic proposition that dangerous driving is an offence that carries the same penalty throughout the nation.

Nigel Don: Surely that brings us to the nub of the matter. If sheriffs in Perthshire, Aberdeenshire or wherever take different views—I am still not sure whether you think that that would be a good or a bad thing, but you are not on trial—surely that is wrong. Surely, in principle, the penalty for the offence should be the same throughout the country, albeit that the similarity of offences on different stretches of road might be difficult to measure. Is that not what equity and fairness are about?

Ian Duguid: The answer is yes. I think that the question that we started off with was, "Should account be taken of local circumstances in setting guidelines?" I broadly disagree with that as a principle, but I recognise that local circumstances are reflected every day in the sentences that judges impose. I am talking about sheriffs dealing with their different localities.

If you are asking me whether local circumstances should affect the decisions that are taken, the answer is that they can do that, but I do not agree that, as a matter of principle and across the board, it should be recognised that the sentence for dangerous driving will be X in one jurisdiction and Y in another. I am in favour of a universally applied penalty across the board. If individuals choose to use their discretion to reflect local circumstances and meet local difficulties, that is their business. That is what the discretion of presiding judges is all about.

Robert Brown: I am not necessarily following the line of Nigel Don's argument, but I have a question for Mr McVicar, who defended the discretion of individual sheriffs. Glasgow and Edinburgh sheriff courts have a number of different sheriffs and the different decisions that they make have an effect on whether people plead guilty at certain stages and so on, so the matter is a significant public issue. Do you have a view on how that should be tackled? Would the sentencing council approach, whether it was advisory or of the nature that the Government proposes, be a possible way forward?

Bill McVicar: I am not sure that a sentencing council and guidelines would necessarily deal with the matter. Every judge who imposes a sentence in a case has discretion. Unless we move to a system of mandatory sentences, it will always be possible for a problem to arise between different sheriffs in the same building.

I follow up on what Ian Duguid said with an example. If someone was dealing in drugs in Glasgow, an identifiable range of sentences would apply, but if they were the first person to be caught dealing in dangerous drugs in a small town or village, would the sheriff not be entitled, in the interest of deterrence, to impose a greater sentence? Is that not an example of something that would allow the judge to impose a sentence towards the higher end of the range of acceptable sentences?

The Convener: Gentlemen, you have made your views on the sentencing council clear. If, at the end of the day, it was the will of Parliament that such a council should be imposed, what changes would you suggest that might be beneficial?

11:00

Bill McVicar: With regard to the current proposals, I agree with what the Lord Justice General said about the need for a greater number of judicial members on the council, with a view to drawing on the greater experience of those who are involved in the sentencing process. As a practitioner of the imposition of sentences, that is the principal change for which I would argue.

The Convener: Do you adopt those arguments, Mr Duguid?

Ian Duguid: Yes, I agree with that view. The Law Society's submission identified the question of whether a member of the constabulary counted as a legally qualified person to sit on the council, but that is perhaps a matter of drafting. An issue of more general interest is whether a member of the constabulary should have any place on a sentencing body. Apart from those details, I broadly agree with the Law Society's submissions.

The Convener: Having dealt with the qualities of the constabulary and the issue of sheriff shopping, we turn to serious organised crime, which Paul Martin will deal with.

Paul Martin: Good morning, gentlemen. Are the new offences of involvement in and direction of serious organised crime necessary, given that

people can already be prosecuted for conspiring to commit crime or inciting others to commit a crime?

Ian Duguid: No, those provisions are not really necessary; I am not sure that they will add anything to the criminal justice system. We had a brief discussion before today's meeting about the supply of controlled drugs—or drug dealing, as some people refer to it—and we were questioning whether almost every supply of drugs has involvement in serious organised crime as its end result. The supply of drugs is in a sense simply perpetuating an organisation that is both serious and organised, and it is a serious crime.

There is potential for prejudice against an accused person simply by making the allegation that they are involved in serious organised crime. For example, if a jury considers whether a person is involved in the supply of drugs, will it be influenced in any way by a couple of lines at the end of the charge that state that it will be established that that individual is guilty of involvement in serious and organised crime? Where do we draw the line between defining someone as simply a drug dealer and as a drug dealer involved in serious organised crime? It is a difficult distinction to make.

One provision in the bill suggests that the evidence of only one person is required to prove that an offence is aggravated by a connection with serious organised crime. The law as it stands provides for a number of aggravations, such as racially aggravated offences and assault that is aggravated by the seriousness of injury, which each require evidence from only one source. The bill suggests that that will be the case with involvement in organised crime. There are issues to do with whether it is proper for such an aggravation to be addressed by the involvement of one witness and whether that evidence would be an opinion, such as that of a police officer who comes along and says, "Well, as far as I'm concerned, that individual is involved in serious organised crime." Would that be admissible and acceptable evidence? Such issues raise a number of problems, which, if the bill is passed in its current form, are likely to create difficulties and raise matters for the appeal court to resolve.

The framing of the legislation and its exactness is important. Your question was, "Do you think those provisions are really necessary?" From a practitioner's point of view, we question whether something like that really is necessary.

Paul Martin: Why do you think the Government has introduced those provisions? Have you picked up on anything that clarifies its reasons? The reasons must exist: the Government would surely not want to add to the current legal remedies unless something required it to do so.

Ian Duguid: One of the most interesting features of the provisions is that involvement in serious organised crime will carry a maximum sentence of 10 years, whereas directing serious organised crime will carry a maximum sentence of 14 years. One therefore assumes that the bill's drafters were concerned that persons who are in some way remote from involvement need to be picked up by the criminal law. I whole-heartedly agree with that proposition. If the bill's aim is to get to the bigger perpetrators and to the people who direct involvement while remaining at arm's length from crime, I wholly endorse it.

If the bill is trying to pursue persons who have a remote connection with serious organised crime, that is a perfectly laudable objective. That aspect of the provisions is well founded; the issue is whether enough care has been taken in the drafting and whether the bill will create more difficulties than it is trying to solve. Who is envisaged to be

"involved in serious organised crime"?

Is it every person across the board?

Paul Martin: Do the other witnesses want to add to those comments?

Bill McVicar: I presume that the Government is attempting to draw attention to its concerns about serious organised crime. The common law would probably deal with most of the matters that are covered in sections 25 to 28.

The bill seems to provide for two separate issues. First, being involved in offences that are connected with serious organised crime should carry a heavier penalty. That is a laudable aim in its own right, and I have no difficulty with it. Secondly, the bill seems to introduce an offence of directing serious organised crime, which I suppose might be regarded as a new offence. I have not studied the matter in great detail, but the intention might be to add to the law of conspiracy and incitement to commit crime. If so, that is also a laudable aim.

In our submission we expressed concern that section 28, "Failure to report serious organised crime", might be in conflict with article 8 of the European convention on human rights. We drew attention to a German case, which it might be worth considering in due course.

Paul Martin: The witnesses may take it as a compliment when I say that between them they have decades of experience in law. How would you define "serious organised crime"?

The Convener: Is that a question of which the witnesses would have preferred prior notice?

Paul Martin: What would the witnesses say is or is not serious organised crime?

Bill McVicar: The definition in section 25 appears reasonable, in that it draws attention to the fact that certain activities that go on should be regarded as more serious for future purposes. I suppose that the definition will cover activities such as drug dealing and people smuggling—although that is covered under different legislation—and the organisation of bank robberies, for example. The definition is fairly wide.

Paul Martin: Is the definition not as focused as it should be? Will it catch individuals who should not be caught? We heard about challenges in that regard during last week's meeting. For example, the Sheriffs Association suggested that two people who agreed to steal a meat pie would commit an offence that fell within the scope of the bill. Do you agree?

Alan McCreadie (Law Society of Scotland): I certainly think that the definition of "serious offence" as an indictable offence that is

"committed with the intention of securing a material benefit for any person"

is too wide and might need to be amended appropriately. I read the *Official Report* of last week's meeting, when the meat pie example came up. It is clear that it is not the intention of the Parliament—

Paul Martin: So you recognise that, as drafted, the legislation could result in the theft of a meat pie being categorised as a serious offence.

Alan McCreadie: As it stands, section 25 could be interpreted in that way.

Paul Martin: So the wording needs to be improved.

Alan McCreadie: I think that it has to be looked at.

Paul Martin: Do you have any views on the matter, Mr Duguid?

Ian Duguid: I have to say that, after looking at the bill's definition of serious offence and its reference to "material benefit", I am not sure that they cover, for example, a recent High Court case that I was involved in that involved eight paedophiles. That case was charged as a conspiracy, and one could not say that the offence itself was neither serious nor organised. The prosecution's case was extremely well investigated, presented and prosecuted, and it secured the conviction of people whose offence one would think should fall under the definition of serious organised crime. They were, after all, a group of paedophiles who were in contact with one another. I am simply not sure whether the aggravation set out in section 25 would really meet the case in which those individuals were involved.

Would the aggravation of serious organised crime have made any difference to the case? I do not think so. As anyone who listened to the evidence will appreciate, the offence was serious and organised, but it was charged and presented as a conspiracy. The case itself has not yet been resolved with regard to penalties, but I am not sure that it would fall within the scope of the definition in section 25. It presents an unusual difficulty for the drafters of the legislation.

Of course, that is only one example. The fact is that any paedophile ring will try to gain benefit, but only for its members' own corrupted pleasure. Even though most people would view it as serious organised crime, such an offence does not fall within the bill's definition.

Paul Martin: Do you therefore acknowledge that, although politicians talk about wanting to challenge serious organised crime, the fact is that we do not actually know what we mean by the phrase? The public and political view is that it is all to do with the Mr Bigs in the criminal underworld, but our challenge is to define the offence to ensure that we deal with those individuals.

Ian Duguid: I absolutely and fully appreciate the difficulties that you face. After all, you are the lawmakers: you pass the legislation and the courts simply apply the provisions. I also realise that it is difficult for drafters to include within a definition everything that can be envisaged, but you should ask yourself whether the common law already deals adequately and properly with these situations and whether, in that case, we require a statute that in some way restricts what should fall within the definition of serious organised crime.

Paul Martin: What are your views on the concerns expressed by High Court judges and the Sheriffs Association about the potentially very wide scope of the proposed offence of failing to report serious organised crime?

Ian Duguid: I share those concerns. Anyone who reads the press will know what such an offence might cover. It might, for example, cover the relatives of those charged with the terrorist offences prosecuted in London because they withheld information about the individuals' whereabouts and the plans. However, I do not know whether, under this widely framed offence, other persons whose involvement might be more difficult to define are at risk of being prosecuted for something of that nature.

Alan McCreadie: On section 28, Mr McVicar referred earlier to the possibility of a challenge under article 8 of ECHR with regard to the individual's right to privacy. We cited the German case of Niemietz v Germany and I note a reference in section 28(1)(b) to

"knowledge or suspicion originates from information obtained—

(i) in the course of the person's trade, profession, business or employment".

For the purposes of article 8 of the ECHR, that has been seen as the person's own private business, so there may be potential for a challenge.

Perhaps section 28 is too widely drafted and has unintended consequences. It must be properly considered who the provision is intended to capture.

11:15

The Convener: I suggest that someone is committing the cardinal sin of having their mobile phone switched on. Could we all ensure that our phones are off?

We turn to questions on extreme pornography.

Cathie Craigie: Section 34 of the bill would make it an offence for a person to be in possession of extreme pornographic images. Do the witnesses have any concerns about the scope of the provisions?

Bill McVicar: Our only concern is that there may be unintended consequences for what some people might regard as works of art. We suggest that it is necessary to clarify further the extent to which the definition will operate. Beyond that, we have nothing adverse to say about the proposal.

Cathie Craigie: That point has been raised by other witnesses, so we will pursue it.

Ian Duguid: I have no concerns over and above those that have already been expressed.

Cathie Craigie: The committee is aware that there has been consultation on how the law should deal with computer-generated images, cartoons and drawings that graphically depict children in a sexually abusive way. Should any future proposals to deal with that type of child pornography be extended to extreme adult pornography?

Ian Duguid: I am not sure that there is any great concern about that. Section 52 of the Civic Government (Scotland) Act 1982 deals with images, including what are, I think, described as pseudo-images in cartoon form and constructed in the way that you describe. The law recognises that at present.

Having just experienced a case in which the images were truly dreadful, I have no difficulty with section 34 of the bill. Nor do I have any difficulty with extending the provisions to cover extreme adult pornography. It is only proper that the law deal with such images, including computer-generated images. The difficulty that I can envisage concerns policing the internet, but I have no difficulty with the full weight of the law being applied when a fruitful investigation is undertaken that reveals images of that type. If the law requires to be amended as is proposed so that it reflects the public's attitude, that is perfectly reasonable as far as I am concerned.

Bill McVicar: I agree with Mr Duguid.

The Convener: We now turn to witness anonymity orders.

Bill Butler: Section 66 of the bill will allow judges, in appropriate cases, to order the use of measures to protect the anonymity of witnesses who give evidence in court. Does the Law Society or the Faculty of Advocates have any concerns about the practicality of the proposals or their compatibility with the right to a fair trial?

Ian Duguid: If I am correct, I was initially asked about this some months ago. There was concern that an accused person is generally entitled to see his accuser and to hear the accusations that are being made against him. I offered the view that there is legislation to protect the position of vulnerable witnesses to a substantial extent. I went through the provisions in some detail: safeguards seem to be provided in section 66 against abuse of an anonymity order, which is what a lawyer's concern would be. I have to say that the drafting of the provisions is thorough, as far as I can see. The prosecution of sexual offences is a thorny issue. I fully recognise that provisions for vulnerable witnesses give some protection to persons who claim to be victims. Abuse of anonymity orders is unlikely, given the various safeguards and I accept that there must be limited circumstances in which such orders will be required for a witness to give evidence. The drafting provides sufficient safeguards and I do not have any major concerns about abuse of anonymity orders.

Bill Butler: That is very clear.

Bill McVicar: Our concern related to proposed new section 271N(4)(c) of the Criminal Procedure (Scotland) Act 1995, which says "that the witness" should not be

"asked questions of any specified description that might lead to the identification of the witness".

One can consider cases in which difficulties might arise from the fact that a witness might have viewed an image in their house and in some cases it is difficult to know whether what the witness says is correct. It appears from proposed new section 271N(4)(c) that the defence would not be allowed to explore that avenue with a witness if it seemed appropriate. I wonder whether that subsection operates in compliance with article 6 of ECHR. If one is not able to explore properly the defence, there is at least a possibility that the right to a fair trial will be denied.

Bill Butler: Is that a continuing worry for you?

Bill McVicar: It is a concern that we mentioned in our written submission and which I mention now with particular reference to proposed new section 271N(4)(c). It might be that if we sat and thought about it more a few other bits and pieces would arise, but the concern might be met by the fact that the court would then prevent the trial from proceeding further if it were based to a fundamental extent on that witness's evidence.

Bill Butler: So there is possibly a need for amendment of that provision.

Bill McVicar: There is, but I do not know how one would go about it. We will be asked to think about amendments later on.

Bill Butler: Indeed—that is why I asked you the question in that particular fashion. There is a possible need for amendment.

Bill McVicar: Yes.

Bill Butler: That is clear. Thank you.

The Convener: We will follow that up in due course. Nigel Don will now ask about disclosure of evidence.

Nigel Don: Gentlemen, I wonder whether we can start not with disclosure of evidence as such, but with defence statements and their mandatory nature or otherwise in solemn cases. The Law Society has indicated clearly that it is against them; does Ian Duguid have any comments to make?

Ian Duguid: I am very much against defence statements.

Nigel Don: Do you feel a need to expand on that?

Ian Duguid: If I understand correctly, the committee that was chaired by Lord Coulsfield, from whom you will no doubt hear more today, did not recommend that defence statements be introduced. They are a concept that is particular to the law of England and Wales and are required there because they do not have the procedures that we have: for example, if it is planned that a special defence will be advanced in the course of a trial, it is required that that be intimated to the prosecution 14 days before the preliminary hearing. The defence statement provision relates to that very same requirement. If it is suggested that a defence such as self-defence, alibi or incrimination will be promoted, notice is required. Our procedures include a preliminary hearing at which the admissibility of evidence is addressed.

All such measures were introduced in 2004, following Lord Bonomy's High Court reforms. We have gone some way towards addressing the issues that defence statements were designed to address in England—I read in Lord Coulsfield's report that they were intended to assist in case management. We have such measures, so I am curious as to whether a defence statement will do anything over and above what we have, other than increase expenditure. If lawyers are going to commit themselves to a document that will be read to a jury and which, if it is not followed, will be the subject of comment by a trial judge, that process will—I presume—incur expense. Is any of it necessary? I was interested to hear that Lord Coulsfield thought that, on balance, it was not, perhaps for the reasons that I outlined. He can explain that more fully.

I am not sure how the measure found its way into the bill. I suspect that it is there because prosecutors think that they would be further assisted. We must ask ourselves whether the measure is necessary to address disclosure matters. I understand that the purpose of the defence statement is to ensure that, if the Crown has disclosed information and possesses further information, it will feel an obligation to disclose that.

Nigel Don: I think that that is the logic.

Ian Duguid: That situation should not arise under the present system. As I said, the system requires notification of a special defence and the holding of preliminary hearings, which do not apply in England and Wales. We can see why the idea was thought to be good for England and Wales, although Lord Coulsfield says that the statements have been found in general to be "late, unspecific and unhelpful."

I do not know how the provision would advance the procedure of disclosure. It would create a further tier that would be likely to delay trials and to cost money through the need for additional hearings and for documents to be drafted. I find nothing in the provision that persuades me that Lord Coulsfield's conclusion is unfounded. In fact, I thought, rather, that his approach and decision were well argued.

Nigel Don: Thank you for distinguishing eloquently between the two legal systems.

I will drag you on to the subject of disclosure. Disclosure is well established and is probably well understood, so I will draw you on to the provisions on non-disclosure. Are you concerned about whether the non-disclosure processes in the bill are compatible with the ECHR?

Bill McVicar: I understand that Lord Coulsfield proposed a relatively informal process of including information on schedules and inviting lawyers to consider whether they would want as a matter of right to see further information that had not been disclosed. However, the provisions in the bill are terribly complicated and they might—

unfortunately—complicate the system more than is necessary. The bill adopts more or less wholesale an English system that does not necessarily sit well with our procedures. That is not a criticism of the English system—the English do things differently from us—but that system would not fit terribly well with our procedures. I do not know whether the proposed special counsel system for hiding information from the defence—that is what it will come down to if the rules are enacted—is compatible with human rights.

11:30

Before I have no more opportunity to speak, I will return to defence statements. Among other provisions, subsection (6)(b) of proposed new section 70A of the 1995 act says that a "defence statement" means a statement that sets out

"any matters of fact on which the accused takes issue with the prosecution and the reason for doing so".

However, 14 days before a preliminary hearing or first diet in the sheriff court, we do not always know the facts that the prosecution will seek to establish. It is difficult to know how the defence will be able to deal with a requirement to set out

"matters of fact on which the accused takes issue with the prosecution".

Furthermore—others have said this and I agree—the danger is that, if the accused has to set things out in the detail that seems to be envisaged, their right to silence will be undermined.

Nigel Don: Does the Law Society or the Faculty of Advocates have other concerns on the law of disclosure?

Ian Duguid: No. I recognise that some provisions are necessary. Special counsel, which deals with public interest immunity, is, in a sense, an import from England. I recognise that the matter will have to be addressed in some shape or form. However, there are some questions. Are the proposals balanced? Do they take account of the need for disclosure, which—in statutory form—is appreciated and recognised? Also, are there enough safeguards for withholding of information? Clearly, there will be situations when the information will have to be withheld in the public interest. Some framework has to be provided for that situation.

Nigel Don: I am sure that we will hear a lot more about that.

I turn to witness statements and whether witnesses can refer to the written statements that they or others have made before the trial. Again, the matter appears to be contentious. Will you draw out the arguments or express an opinion on the subject?

Ian Duguid: I am totally against those provisions. Members of the constabulary are concerned about the onus that will be placed on them in taking statements. One probably has to be in practice in our courts to appreciate the frequency with which witness statements are placed in front of witnesses, either because they have forgotten that they gave one and want to see it again, or because they are giving evidence that is different from what is in the statement. Establishing whether the police officer noted correctly the statement can become a challenge.

The proposal is that, before a witness starts his evidence, he should have his statement placed in front of him. Will the accused be able to challenge a witness's credibility and reliability if the witness simply says, "I've said it before, so I'm saying it again. There you are"? The situation could become difficult to monitor accurately.

I am not suggesting that police officers routinely make up witness accounts. However, the bill makes no provision for the witnesses for the accused person—the defence witnesses. Usually, what is defined as a statement is what a police officer has recorded. A police officer does not have a recording facility; he meets the witness and writes down what he thinks that they said. In a rather obscure and odd way, the Scottish courts recognise that account as an admissible statement. However, if one sends a legally qualified solicitor to interview a witness for the defence and he does the same exercise, it is called a precognition, which is inadmissible in accordance with the practice of the courts.

The difficulty immediately arises that the prosecution is placed at an extreme advantage over the defence. The question arises whether the provision will ever be sustained as a matter of fairness to the accused. If prosecution witnesses can have a statement in front of them and read it out, and defence witnesses have no such facility, is that a recognition that defence witnesses are in a different position to prosecution witnesses? Of course it is not.

There is nothing in the bill to address that glaringly obvious difference. Of course, the difference has been brought about because of a recognition by the courts that, when a police officer takes a witness's account, it is a police statement and that, when another person takes a witness account, it is a precognition. The difference is that the court can admit a police statement but not a precognition. Until that difference is addressed, we will sometimes have to try to justify the most ridiculous descriptions. It is said, I suppose, that police officers routinely write down what a witness says. However, police officers, like everybody else, try to paraphrase that so that it does not take an age to complete.

It is a very difficult situation, which, in practice, creates a lot of difficulties for lawyers. The bill's provisions go nowhere near addressing that difficulty; rather, they will compound the difficulty and the difference between prosecution witnesses and defence witnesses. Unless some facility is introduced to deal with defence witnesses, I cannot see that the provisions will make for fairness to the accused in a trial.

Nigel Don: You have made an excellent case for the defence. Thank you.

Ian Duguid: I did not mean to.

The Convener: There is no need to go any further. You do not need to oversell a good case.

Bill McVicar: I respectfully agree with what Mr Duguid says. I also refer you to what the judges say in paragraphs 43 and 44 of their written submission:

"The Scottish system has traditionally looked with disfavour on the practice of 'trial by prior statement'".

They subsequently address the points that Mr Duguid has made and conclude that

"As police officers become aware of the greater reliance on evidence contained within police statements, it might affect the manner in which police officers take statements from civilian witnesses".

You might think that that is a good thing, but the judges continue that that would result

"in a further emphasis being placed on framing the statement in clear and comprehensible terms—whatever language may have been used by the witness when the statement was taken."

The problem is that the statement will not be the words of the witness. Having asked witnesses countless times about the statements that they have given to the police and whether what is contained in those statements is right, I can say that, unless almost every witness in the universe is telling lies about it, the police tend not to write down exactly what the witness has said.

The Convener: I think that that is the practicality of it. The final question is on unfitness for trial.

Bill Butler: Although the written submission from the Law Society generally welcomes the provisions on mental disorder and unfitness for trial, it suggests some changes, including that a volitional test be added to the cognitive test. What changes would you like to be made and why?

Bill McVicar: Rather than unfitness for trial, we are talking about the defence that is presently described as insanity. We suggest that the definition in the bill is too narrow. As our written submission states:

"To frame the defence of mental disorder solely on a cognitive test rooted in the accused's appreciation of the effects of his or her conduct at the time of the offence does not adequately reflect the variety of ways in which a person's mental disorder might impact on his or her actions … Adding the volitional test to the cognitive test would … more closely reflect the established common law of Scotland and would more appropriately define the situations in which a person should be relieved of criminal responsibility as a result of the effects of mental disorder."

That would not have the same effect with regard to a person's fitness for trial.

Our submission continues:

"For example, a person who kills his or her children while suffering from a depressive illness may be able to appreciate what he/she is doing and understand that it is wrong in the eyes of the law, but nonetheless be driven to commit the crime by his or her illness. In such a case his or her illness overcomes his or her volition. The Society notes that the Bill does not allow a special defence in these circumstances."

Mental disorders and the law are not comfortable bedfellows in many situations, and it is difficult to find even a couple of doctors who agree about anything in the criminal courts. We are concerned that, if the bill focuses too narrowly on the understanding of the accused person, we may miss cases in which the medical doctors regard a person as being, under the present law, insane.

Angela Constance: I agree with the Law Society's suggestion and I note that the Mental Welfare Commission for Scotland makes a similar point in its written submission.

I want to ask about the thorny issue of people with a sole diagnosis of a psychopathic personality disorder. As things stand, the defence of mental disorder would not apply to those individuals. That is quite right, but I understand that other personality disorders could give rise to the defence of mental disorder. What are the general views of panel members on that? In its submission, the Mental Welfare Commission for Scotland expresses concern about and looks for further clarification on that. It states:

"The Mental Health (Care and Treatment) (Scotland) Act 2003 … Definition provides that a 'mental disorder' means any illness, personality disorder, or learning disability however caused or manifested".

Ian Duguid: I cannot remember what the question was.

Angela Constance: In essence, I am saying that individuals with the sole diagnosis of a psychopathic personality disorder could not claim the defence of having a mental disorder, but people with other personality disorders could claim that defence. Do you, as legal practitioners, have any issues with that?

Ian Duguid: I recognise that I have no expertise in that matter. I do not think that I have any expertise in it beyond that which members of the committee have. As Mr McVicar said, experience

suggests that the law and mental health are difficult to reconcile. I suppose that in the defence of serious crimes, one investigates individuals with mental illnesses, mental disorders and personality disorders. In many ways, practitioners are guided by what the experts say, and I do not think that anyone involved in the law ever tries to intrude on their expertise.

I do not think that I will add anything to the committee's deliberations by trying to answer the question. Angela Constance is right: personality disorders are sometimes difficult to define and name. You are right to express concern if a problem is being established with people with psychopathic personality disorders and other personality disorders, but psychiatrists can probably best explain the differences and how they affect the workings of an individual's mind and their responsibility for criminal acts, for instance. Obviously, the bill addresses the commission of serious criminal acts.

I suspect that I have talked around your question without answering it. It would probably be better to ask an expert such as a psychiatrist the question.

Angela Constance: Okay. Perhaps I should ask a more specific legal question.

Section 117 in part 7 of the bill proposes to insert new section 51A(2) into the Criminal Procedure (Scotland) Act 1995. That new section states:

"But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct."

The Scottish Association for Mental Health has asked for a definition of

"abnormally aggressive or seriously irresponsible conduct."

As legal practitioners, do you think that a further definition of a psychopathic personality disorder is needed?

Ian Duguid: Examples must be given if the definition is to be enhanced. If the examples are not exhaustive—if you ask any expert, I think you will find that they will not be—it becomes difficult to expand on that definition.

I offer the example of a case that I was involved in quite recently. A young boy ended up killing another young boy by stabbing him in the course of a fight. However, in the days before the fight, the young boy who committed the stabbing had been climbing up on the top of buildings and threatening to throw himself off, had been jumping through the glass partitions of bus shelters, and had been throwing himself at shop windows. Not surprisingly, we consulted a psychiatrist to see what sort of difficulty he had. The psychiatrist described it not even as a personality disorder but as a behavioural disorder, which is less serious. You and I would regard it as seriously odd and extreme behaviour, but it does not come within what the law would require. However, it is right that if you are talking about serious crime and about people who are not fully responsible for their acts, the test must be made comparatively high. In the case of insanity, if you are dealing with people who not only are not responsible but are suffering from a genuine mental illness, that has to be identifiable in the clearest of situations.

Ms Constance is asking me whether the definition in the bill requires expansion: I suspect that that could be done only by giving a limited number of examples. However, unless a psychiatrist could say that the list was exhaustive, I am not sure that the attempted refinement would improve the situation.

Angela Constance: Thank you. I understand.

The Convener: Have you anything to add, Mr McVicar?

Bill McVicar: Not that I could properly set out in comprehensible language.

The Convener: As there seem to be no further questions for this panel of witnesses, I thank the gentlemen very much indeed for their attendance. That was a very useful session.

11:46

Meeting suspended.

11:49

On resuming—

The Convener: Our second panel of witnesses comprises Professor Jim Fraser, who is the director of the centre for forensic science at the University of Strathclyde, and Tom Nelson, who is the director of forensic services with the Scottish Police Services Authority. I should mention by means of introduction that, at the request of the Scottish Government, Professor Fraser reviewed and reported on the operation and effectiveness of Scotland's statutory regime governing the acquisition and retention of DNA and fingerprint data. He reported in July last year.

Welcome to the committee, gentlemen. I do not think that we need detain you too long. We will move straight to questions.

Bill Butler: Good morning, gentlemen. In light of the ruling by the European Court of Human Rights in the case of S and Marper v the United Kingdom, do the proposals in the bill on the retention of fingerprint and DNA data achieve an appropriate

balance between law enforcement and the rights of individuals?

Professor Jim Fraser (University of Strathclyde): Yes, I think they do. The main issue relates to the retention of samples from unconvicted people. Proportionality is a tricky issue, because there are not many data to allow detailed analysis. However, when I considered the three-year period, the available data showed that a considerable number of people reoffended during the period. That was a fairly short period, and the study related to serious offences, so the retention struck me as reasonable and balanced.

Bill Butler: Even in cases in which people were prosecuted but not convicted?

Professor Fraser: Yes. The situation seems to conform with S and Marper. The issue in England and Wales was not so much about the right to retain the data of someone who was unconvicted as about the right to retain the data indefinitely. The UK Government argued that the evidence base gave it the right to retain data indefinitely, but that argument was rejected by the European court.

Bill Butler: And any extension would have to be agreed by a sheriff, rather like what happens with a risk of sexual harm order. Is that a fair comparison?

Professor Fraser: A chief constable has the right to ask a sheriff, on the basis of evidence, for an extension of two years. That is a recurrent right; the chief constable can go back and ask for it again. The key point is that there is a legal process, so there is an expectation that evidence will be presented and independently assessed. Those things were missing in S and Marper.

Tom Nelson (Scottish Police Services Authority): I agree with Professor Fraser. The way forward that is being proposed for Scotland is supported by what is coming out of the European court. Scotland is held in very high regard because of how we manage and retain samples on the database. I do not think that we have any fears in that area.

Bill Butler: Thank you for those clear answers.

Stewart Maxwell: Good morning, gentlemen. What is your view of the difference between people who have committed an offence and been sent to jail, and whose DNA has been retained, and people who have accepted an alternative to prosecution, such as a fiscal fine, and whose DNA has not been retained?

Professor Fraser: I did not form a strong view on that; from recollection, it was not part of my terms of reference. The issue of direct disposals came up, and was referred to in my report, but I did not feel that I had the data to make any real sense of that. It strikes me that the purpose of such disposals is the speedy administration of justice. That purpose had not previously taken DNA into account, and I felt that the issue merited more research and more consideration, so I did not express a view.

Tom Nelson: Again, I agree with Jim Fraser. An opportunity may have been missed; we need to be careful, and more work is needed. If more cases take the road of alternatives to prosecution, I will be concerned about losing opportunities to get people's DNA profile and check it against the DNA database. A lot more work needs to be done in this area.

Stewart Maxwell: Do you mean that a lot more work needs to be done to prove the case for retention? Do you accept that it is illogical that DNA is retained in some cases but not in others?

Tom Nelson: I honestly believe that, if we do not have the opportunity to check against the DNA database samples from cases that are dealt with by fixed-penalty notices and fiscal fines, we will miss the opportunity to get matches on the database. We need to view that as a risk to our system.

The Convener: For the uninitiated, can you indicate the cost of taking and storing a DNA sample?

Tom Nelson: There is a cost, but I do not have the figure to hand. It includes the cost of police involvement and the purchase of the swab. At our laboratory in Dundee, there are up to 30 freezers full of samples, so storing samples in the most appropriate way is a significant issue.

The Convener: I will pursue the matter in a different direction.

Paul Martin: I want to return to the previous question and to relate it to the issue of fighting and preventing crime. Mr Nelson, did you make the point that we have an opportunity to prevent individuals who are subject to fiscal fines from committing violent crimes at a later stage?

Tom Nelson: That is the point that I hoped to make. At the end of the day, we know that people have a career in criminal activity. The more intervention we can have earlier on, the better we can assist those individuals, so that they do not become repeat or recidivist offenders. We have an opportunity to help people at an earlier stage.

Paul Martin: Politicians say that they want to get tough on crime and the causes of crime, and to prevent crime. You are suggesting that, by retaining more samples, we could prevent some crimes from taking place in the first place and save resources in the long term.

Tom Nelson: We must look at both sides. We also need to support the people concerned, to

help them to leave the career path that they are on. However, if we do not have their samples on a database, we will not be able to detect their involvement in crimes and the public's fear of crime will increase.

Paul Martin: Some concerns have been expressed about the proposal to allow the retention of fingerprint and DNA data from children who are dealt with through the children's hearings system. Why should samples from children who have not been prosecuted in the criminal courts be retained?

Professor Fraser: I was asked specifically to look at that issue, which is complex. It is made especially complex by the particular status of children's hearings, which are not criminal hearings. Nonetheless, I was asked to consider whether there was potential benefit in taking samples from children.

Before I discuss the data, I will comment on the consultation responses. As far as I recall, only one individual objected in principle to taking samples from children. Almost everyone else who responded to the consultation thought that there was some merit in sampling in certain cases, as long as it was balanced in some way and was limited to serious offences. The consultation took place before the case of S and Marper v the United Kingdom was decided by the European Court of Human Rights, and proportionality was a key issue. The general tenor of the responses that I received—from a wide range of organisations—was that the taking of samples from children was legitimate, provided that a balance was struck between infringing on the children's justice system in Scotland and public protection.

12:00

The data that I obtained related more to the management of the Scottish Children's Reporter Administration, so I did not have detailed criminological data. However, it was quite plain that the vast majority of the cohort of children who were dealt with by children's panels—something like two thirds of them—were referred not for an offence but for their own protection or for some other problem. Only about a third of the children were referred for an offence of some kind. Of those, a smaller proportion were referred for serious sexual and violent offences. Those figures relate to what the children were reported for, which was not necessarily what was found by the children's panel or the sheriff. We are talking about very small numbers of children.

In summary, I found that there was general agreement that a small group of those children plainly had the potential to commit violent offences and to develop a criminal career. My aim was to try to identify that small group of children. My recommendation was that a sample should be retained if the child accepted that he had committed, or was found by a sheriff to have committed, an offence in the narrow category of serious sexual and violent offences.

Because the numbers involved are small, and because the offences are serious and involve some sort of judicial proceedings—that is, some process whereby the child is represented—I feel that the recommendation strikes a good balance between looking after the welfare of the very small number of children involved and public protection.

Tom Nelson: I support Jim Fraser's words. We cannot get away from the fact that, although only a small number of people are involved, some within that age group will commit serious offences. The statistics from the database show that those who are aged 17 and under account for just over 3 per cent of the database entries but are responsible for 15 per cent of crime scene matches. They account for a very small percentage, but they are obviously active.

Paul Martin: For clarity, let me summarise the points that have been made. The data would be retained to identify people at an earlier stage of their criminal career both to prevent that criminal behaviour from continuing and to protect the public, who could be affected by that behaviour in the longer term. Is that a fair reflection of what has been said?

Professor Fraser: Let me just add one point. Tom Nelson referred to matches, which are the measured outputs from the database. However, there are some subtleties of interpretation in deciding whether a match becomes a detection and then a conviction. It is important that the data are seen for what they are. A match will not necessarily lead to the resolution of a criminal offence or to someone being convicted in court. However, I accept that general argument as a good summary.

Robert Brown: Taking the slightly opposite end of that argument, I want to ask whether Professor Fraser believes that the stamping of children as criminals by their DNA is actually a good thing. The background to my question is that the definition in proposed new section 18B(6) of the 1995 act—which section 59 of the bill would insert—refers to

"such relevant sexual offence or relevant violent offence as the Scottish Ministers may by order … prescribe."

That definition could cover not just the serious offences that have been mentioned but any sexual or violent offence, which—we should bear in mind—could go from, at one extreme, murder to, at the other extreme, a punch on the nose. Is that

definition sufficiently proportionate in dealing with children under the bill?

Professor Fraser: My intention in the recommendations was certainly not that a punch on the nose would ever merit sampling. I very much tried to identify those children who not only had committed violent or sexual offences but might go on to commit further offences. That brings in the issue of public protection. However, I do not think that such children would be stigmatised or criminalised by the retention of their DNA. If they were criminalised, the judgment would be made either by the children's panel or by a sheriff. The DNA sample would be taken after that and would be retained only in certain cases. Again, I think that the argument comes down to the numbers involved and the proportionality of the measures.

Angela Constance: You made a number of recommendations in your report that did not require legislation. For example, you made suggestions about governance arrangements for fingerprint and DNA databases. What progress has been made in implementing those recommendations?

Professor Fraser: I can speak only generally on that issue. I only know that a committee has been formed to consider governance arrangements and how the outputs from the database can be measured. Tom Nelson might be in a better position to reply.

Tom Nelson: The committee has been set up. Its first meeting will be in June, and it will consider governance and reporting and how we can meet the standards in James Fraser's report.

Within the Scottish Police Services Authority, we already manage other databases, such as the criminal history system. We will use people within our organisation to ensure that the same standards that apply to the other databases apply to the DNA and fingerprint database.

The Convener: As there are no further questions, I thank you for your attendance, gentlemen. The session has been brief but valuable.

12:06

Meeting suspended.

12:07

On resuming—

The Convener: Our next witness is the right hon Lord Coulsfield. The issue of disclosure has caused some excitement in Scottish legal circles, Lord Coulsfield is the author of the "Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland", which has been of great assistance to us.

Welcome to the committee, Lord Coulsfield. We will proceed straight to questions.

Your written submission suggests that it would be useful to set out the prosecution's duty of disclosure at the beginning of the relevant part of the bill. How would you improve the bill to that extent?

Right Hon Lord Coulsfield: As I hope you might have gathered from my written submission, I do not criticise the general approach of the bill in most areas, but I am extremely concerned about the way in which it has been drafted, particularly with regard to the length and complication of proceedings.

You might have seen in today's *Herald* Mr Gordon Meldrum of the Scottish Crime and Drug Enforcement Agency complaining about the potential bureaucratic implications of the bill. In one sense, that is not a well-founded complaint, because the work that will have be done on disclosure already has to be done. The general requirement of disclosing information to allow a fair trial to take place is a requirement that derives from the ECHR and, indeed, our own legal history, going back to the 17th century—even if we did not have the ECHR, courts would still have to grapple with the issue of fair trial. In modern conditions, where so much depends on background investigation, intelligence, the accumulation of detail and scientific evidence, achieving a fair trial in any circumstances requires the prosecution to tell the defence what it knows, whether that helps the prosecution or not.

In that sense, any complaint about work for the police must be regarded with a little care. However, given that there is such a duty on the police, it is extremely important that the ordinary serving officer knows in a clear, direct and simple form what they are supposed to do. That can be reduced to quite simple terms because, essentially, they are required to scrutinise the evidence as they get it and ask whether it will help the prosecution, and also whether it could help the defence, in which case they must record and disclose it.

I am concerned that the drafting of the bill tends to obscure that simple duty. I know that the Association of Chief Police Officers in Scotland has taken up the issue of ensuring that ordinary front-line officers know what they are supposed to do, and is setting up extensive training arrangements, under the supervision of Detective Chief Inspector Laurie, who worked with me on the report. My concern is that the drafting of the bill does not assist the police in fulfilling the obligation.

The Convener: Suppose the bill was passed in its present form. Could you conceive of difficulties in respect of appeals to the court of criminal appeal and, possibly, to Europe on the basis that the wording did not make the obligation clear?

Lord Coulsfield: I am not sure that I can envisage appeals to Europe, but I can certainly envisage a lot of procedural wrangling at the preliminary and, perhaps, trial stages of cases in Scotland.

Contrary to what I intended, the bill introduces a statutory requirement on the police to prepare schedules, which they should give to the procurator fiscal—there are provisions about handing them back and forward and changing them—and the procurator fiscal is statutorily required to hand over schedules to the defence. I can see a lot of scope for wrangling about whether the police have performed their statutory function, before we even get to the question of disclosure by the prosecution to the defence.

The Convener: The provisions seem to be a trifle convoluted. Is there scope for making them simpler, so that they can be more readily understood and the administrative wrangles that you mention can be avoided? For example, could the terminology that is used for the various types of orders—non-disclosure, exclusion and non-notification—be improved upon, and could some of the detail in that part of the bill be dealt with elsewhere in the bill?

Lord Coulsfield: It could certainly be dealt with elsewhere; my view is that a lot of it should not be in the bill at all.

In the report, I made the point that although I recommended the set-up that involves schedules and orders, I do not like it. The criticism that the set-up is cumbersome and convoluted is sound. One ought to have as simple a way of carrying out the task as possible.

The preparation of schedules and so on is only a mechanism to enable the fundamental duty of the disclosure of material evidence to be carried out. As a mechanism, it ought not to be in the bill at all. If anything, it should be in a code of practice that can be agreed. Of course, the Procurator Fiscal Service already has a disclosure manual, which is, to a certain extent, agreed with the police. The requirements should be in a code of practice, because then they can be changed. One hopes that, with time and experience of the disclosure mechanism, the situation will become easier and less fraught.

As I said earlier, fundamentally, the obligation on the police is a simple one. You do not want to confuse that situation with any more detailed rules about what is or is not disclosable. You do not want to divert police officers from thinking about the case in front of them by getting them to look up section 27 or paragraph 35 in a book to find out whether a particular piece of information is subject to disclosure. You want them to understand that, as police officers, they have a duty to consider not only what evidence helps the Crown case but what evidence might be material to the defence case.

I mentioned Detective Chief Inspector Laurie who, as I understand it, is now in charge of preparing training programmes for the police. He has continually made the point that it is a question of good policing; we are not talking about an extra requirement. A good police officer who carries out his duty properly will always be alive to the proposition that he may come across evidence that favours the defence. It is sound policing to note such evidence and to refer to it in information that is passed on.

When it comes to orders, you will appreciate from my report that I have deep concerns about some of the procedures for withholding information from the defence. In my view, issues to do with orders, such as the procedure for making them, the terms of orders and what kind of orders can be made, should all properly be found in subordinate legislation, because one hopes that, with experience, it will be possible to simplify and improve the procedure, so it should be easy to change.

12:15

The Convener: Robert Brown has a question, although, to an extent, you have anticipated it.

Robert Brown: You have made it clear that the present provisions are extremely elaborate. That is emphasised by the fact that part 6 runs to 15 pages. You have suggested that a code of practice would be a better way of tackling disclosure. Do you envisage taking most of part 6 out of the bill and replacing it with your statement of principle and a reference to the code of practice?

Lord Coulsfield: What I suggested in my submission is not necessarily a fully considered piece of drafting, but it sets out what I regard to be the essential principle that must be included in the bill. If that principle is set out, I do not think that sections 85 to 90 are necessary. They could be replaced by one or possibly two fairly short and simple sections.

Robert Brown: There has been a bit of coming and going on defence statements, on which the Government takes a different approach. Do you retain the view that, in most cases, defence statements are not advantageous from the point of view of equity and fairness? If so, how do you anticipate the provisions on defence statements

operating in practice if they remain mandatory? What difficulties do you envisage that causing?

Lord Coulsfield: I have not heard any argument that has led me to change the view that I expressed in my report, which is that defence statements are unnecessary in our procedure. Mr Duguid talked about the disadvantage of what is proposed and I think that, essentially, I agree with what he said. The defence statement provisions will add an extra stage of work and expense.

One of the problems of criminal trials is getting people to concentrate on getting on with the evidence. Given that the defence statement is supposed to state any facts that the defence challenges, an advocate depute who was presenting a case and who was not quite sure what to do next might, instead of getting on with the case, be tempted to say, "Why didn't you say that in your defence statement? What did you really mean by your defence statement?" People might get into a sterile argument about terminology, just as happens, in some cases, with prosecution statements.

Requiring the preparation of defence statements would have a cost in time and expense, and they could cause confusion and delay and add to complexity in the conduct of trials.

Robert Brown: There would also be a loss of focus on what it is all about.

Lord Coulsfield: Yes.

Stewart Maxwell: Are you saying that the Bonomy reforms should be left as they are?

Lord Coulsfield: I have not had the occasion to think about whether the Bonomy reforms as such need to be changed. The issue goes further back than Bonomy, of course. As Mr Duguid or Mr McVicar said, from a very early date Scottish procedure has required certain defences to be stated in advance of a trial as special defences: insanity, alibi, mental disturbance, self defence and so on. England never had any such requirement, and books about English criminal procedure are always talking about the problem of ambush defences—for example, when the defence suddenly produces a witness who says, "The accused wasn't there", and the prosecution has had no notice of that. In so far as the defence statement procedure has any benefit in England, it is as a means of catching up with the arrangements that we have had for centuries in requiring certain defences to be specified.

The Bonomy reforms carried the approach further, because they provided a procedure that gives every opportunity for such defences, and points about the admissibility of evidence and so on, to be brought out and considered in advance of the trial. I cannot see how a general requirement to have defence statements will add anything.

Stewart Maxwell: Are the proposed procedures on non-notification orders compatible with ECHR?

Lord Coulsfield: With any luck, we will have a much clearer idea about that by the end of the month. In March, the House of Lords in England heard a case that is concerned not with criminal prosecutions but with control orders under terrorism legislation, under which there is a procedure for the use of special counsel to consider information that is thought not to be suitable for public disclosure. The bill envisages the same sort of procedure, and the same sort of problem might arise. Special counsel were employed in the case and the Court of Appeal, by divided decision—two to one—held that the use of special counsel was compatible with ECHR article 6. The decision was appealed to the Lords, and a decision is expected in the next two or three weeks—I made an effort to get a hint of what the decision might be, but I am afraid that I was not successful.

Stewart Maxwell: Perhaps we should wait, too.

Lord Coulsfield: The issue has been highly controversial and has generated a great amount of academic writing as well as discussion in court decisions. Widely differing views have been held.

If we are asking ourselves whether the proposed system would be compatible with ECHR, the response must be that the system as it has been operating in England has so far survived all the challenges that have been made to it, but one cannot say whether it will continue to do so.

Stewart Maxwell: At our meeting last week, witnesses from ACPOS put forward a strong case that the proposed disclosure regime will create an enormous additional workload and told us how many extra officers or non-uniformed staff would have to be set aside to deal with each case. You suggested that you did not agree with that view. Is there a difference between what the police currently do and what they would have to do under the new regime? Would there be an additional workload? If so, can it be quantified?

Lord Coulsfield: I do not believe that the passing of the legislation will increase the workload. I hope that, with the passage of time, the legislation and the practice under it will reduce the workload or at least make it easier for the police—as they get into the work and get the appropriate training—to perform their duties.

What creates the workload is the existing requirement to ascertain and disclose all material that might be helpful to the defence, to use a broad terminology. I hope that legislation of the kind that I recommend will make it easier for the

police because it will clarify in their minds what their job is. I cannot see that there is any way in which the obligation can be fulfilled without a system of back-up and recording, which leads one back to schedules, unless somebody can think of something better.

Stewart Maxwell: Last week, we heard evidence from the police that, when such a system was introduced in England, it led to an exponential increase in the workload of police officers and forces that are involved in investigations. Why are the police arguing that the workload will increase? You said that you do not agree.

Lord Coulsfield: There was a massive increase in the English workload, but not because of the system that was introduced. The increase was due to the decisions in three European cases, which told the police that they had to ascertain, record and report the information. I do not deny that there was a massive increase in the workload in England, as there has been in Scotland. I have every sympathy with the police when they complain about the burdens on them and the difficulty of performing their duties, but those burdens arise as a result of the interpretation of the requirements of article 6 by the European Court. I will qualify that. We tend to blame the European convention on human rights for a lot of things, but as I think I said earlier, under modern conditions the courts and Parliament have to face up to the question of how to secure a fair trial, given the nature and quantity of the information that is involved in a major investigation, and it is difficult to see how that could be done without a considerable investment of time, energy and money by the police.

Stewart Maxwell: Is it fair to say that the bill just provides a framework for what is supposed to happen?

Lord Coulsfield: Yes. As I said, I do not think that the bill is particularly good at providing a clear framework and I would like it to be improved, but the idea is certainly to provide a structure. The police accept that they will have to do what is proposed. If the structure works and police officers are properly trained, that should improve the police's capacity to deal with the burdens that certainly arise as a result of the disclosure requirements.

Paul Martin: Earlier, we heard evidence from Mr Duguid about the quality of the witness statements that the police prepare and provide. Should we consider using information technology more effectively and perhaps using audio or video recording to improve the quality of witness statements?

Lord Coulsfield: I could talk for quite a long time about statements and the way in which modern practice has made them much more important than they were when I started in practice in 1960. Criminal practice has changed since I first appeared in the criminal courts, which was prior to criminal legal aid. For my first case, I got a copy of the indictment just before I got on the train to Glasgow and I saw my client when I arrived at the High Court; we then went into court and started the trial. Statements were virtually unknown then and it was certainly unknown for people to be referred to them. The assumption then was that we assembled our witnesses and went in, and what mattered was what the witnesses said at the trial. However, practice has changed materially since then.

12:30

I listened to Mr Duguid's earlier evidence. He made a particular point when he was answering, I think, Mr Martin, which I want to pick up. One of the reasons for having a provision for witnesses to see their statements is that of fairness to the witness. It has become common practice for a witness to give their evidence in chief, then to be asked questions along the lines of, "Did you say this?" or, "Have you ever said that?" or, "Did you tell a police officer the next thing?" Of course, currently, the questioner has the advantage of having the statement, but the witness has no such advantage, because they have never seen the statement. The witness can perhaps remember talking to a police officer, but they do not know what the officer recorded.

Paul Martin: But the quality of information that the police provide could be improved. We live in a video age, with YouTube and so on.

Lord Coulsfield: One of the ways of improving the quality of police information is by placing more emphasis on something that is already part of police training, which is that—I think that somebody referred to this earlier—they should, so far as possible, write down the witness's actual words. I rather doubt whether video recording would help. We must remember that quite a lot of statements are taken, for example, at eleven o'clock at night on Sauchiehall Street, with a number of people standing—

Paul Martin: Police headcams record such situations. You made a point about resources, but surely we could improve best use of resources to record properly what was said.

Lord Coulsfield: I do not know whether a video camera of some kind could be used in that way, because I have not looked at the issue. However, I know that Lothians and Borders Police is experimenting with a notebook that is essentially a personal digital assistant—perhaps you have heard about that experiment. The advantage of

using the PDA, of course, is that it records what the police officer writes on it—I am told that officers' handwriting has greatly improved since they started using that sort of thing—in blocks of text that are locked in after 10 words or so and cannot be changed. If a witness says that they want to correct what they said, the officer must write "Witness corrects the statement" and so on. It seems to me that that has potential for making a big improvement in the quality of police statements.

Nigel Don: Thank you, Lord Coulsfield, for your comment about the ECHR and the upcoming House of Lords decision. Can I ask you whether a House of Lords decision is now as relevant as it undoubtedly once was, or whether, if we are looking for a view on what the ECHR really means, we need a European Court of Justice decision? Obviously, a House of Lords decision is a statement of the view of the House of Lords and is therefore binding where it is binding, but does it actually give us a definitive answer these days?

Lord Coulsfield: No. You are perfectly right that, for some questions at least, the European Court of Justice is the final court. There is still an area of coming and going between Europe and the supreme courts of the various jurisdictions, because, while the European Court essentially interprets the European convention on human rights, the interpretation of domestic law is a matter for the supreme court, which in this case is the House of Lords. There is therefore an area in which the House of Lords still may make a final decision.

Nigel Don: I am sure that that is for another day.

Lord Coulsfield: Yes. In some cases, there is a subtle and complicated relationship between what the supreme court can decide and what the European court decides.

The Convener: While you are here, will you tell us the name of the outstanding case?

Lord Coulsfield: It is the Home Secretary against AF and others—it is reported with initials—and the reference in the Court of Appeal was [2008] EWCA Civ 1148. It appears in the civil judgments because it is not a criminal proceeding but a proceeding under the Prevention of Terrorism Act 2005 for a control order.

The Convener: I thank you very much for coming this morning. It has been extremely useful.

Lord Coulsfield: Thank you very much for giving me the opportunity.

The Convener: Delighted.

There will be a brief suspension.

12:35

Meeting suspended.

12:37

On resuming—

The Convener: I warmly welcome the final witnesses today: Professor Neil Hutton and Dr Cyrus Tata of the centre for sentencing research at the University of Strathclyde; James Chalmers, senior lecturer in the school of law at the University of Edinburgh; and Dr Sarah Armstrong, senior research fellow at the University of Glasgow.

Dr Armstrong and gentlemen, if there is consensus ad idem among you on any of the questions, there may be no need for you to say anything other than that you agree with the previous response.

Bill Butler: Good afternoon, Dr Armstrong and gentlemen. The bill's provisions on a sentencing council have attracted criticism on the basis that they would undermine the independence of the judiciary. What are your views on that claim?

Dr Cyrus Tata (University of Strathclyde): I will try to be brief. In principle, a sentencing council can do the opposite and can be a way of buttressing judicial independence rather than detracting from it, but it all depends on the detail that is in the bill. I have some concerns about the fact that the council that is proposed in the bill appears to report mainly to the Scottish ministers and, to some extent, the Lord Advocate. I would want it to be more distanced from the Executive and perhaps a little bit more accountable to the Parliament. However, in principle, a council could buttress independence if it was set up in the right way. It could provide a buffer between the heat of the moment—in electoral politics or a particular case—and judicial sentencing to enable a more coherent and calm development of policy.

Bill Butler: I am all for calm.

Professor Neil Hutton (University of Strathclyde): I agree with Cyrus Tata. For me, judicial independence means that a judge makes a decision in an individual case. It is entirely appropriate for a body such as a sentencing council to develop a broader sentencing policy or to decide what sentencing should be for particular types of cases. I do not think that that interferes with judicial independence at all; I think, as Cyrus does, that it offers the opportunity for judges to engage with one another and with others in developing a sentencing policy in a more transparent way than they are currently able to do.

Dr Sarah Armstrong (University of Glasgow): I concur with my colleagues on the panel, who are the experts on sentencing councils. I approach the

issue more from the perspective of considering prison populations. I cannot speak about the specific mechanics of a sentencing council, but the fact that we seem to send more of our population to prison every year than any other country in Europe does means that something is not right at the sentencing end. To the extent that a sentencing council would improve transparency and coherence—I am not sure that consistency is the only value that should be discussed—I wholly support my colleagues.

James Chalmers (University of Edinburgh): Given that the bill makes clear that the final decision on sentencing is still left to judges, I do not see how judicial independence is undermined.

Bill Butler: All right, that is very clear.

Dr Armstrong mentioned consistency of sentencing. What evidence is there of significant inconsistency in sentencing in Scotland? If there is, will the bill help to address that perceived inconsistency? Mr Chalmers can begin.

James Chalmers: I will have to defer to my colleagues on that matter.

Bill Butler: That is fair enough. Dr Armstrong?

Dr Armstrong: I know that Neil Hutton and Cyrus Tata are responsible for quite a lot of the evidence on consistency and inconsistency, so I will be brief. The judges may not feel that there is any evidence of inconsistency, but are they offering any evidence for consistency? The question suggests that there is a lack of evidence in general, and Neil and Cyrus have dealt with that issue, but if the judges are not sure about the consistency or inconsistency, there seems to be a strong argument to support some sort of mechanism that rationalises the process.

Bill Butler: That is a neat way of turning it round. I do not know what the judges would say, but I can guess.

Professor Hutton: Cyrus Tata and I carried out a study, which I will let him talk about. When proposals for a sentencing council were being drawn up in New Zealand, which has a pretty similar system to ours in that it allows for extensive judicial discretion, a national comparison was carried out. Substantial variations were found, which were unlikely to be attributable to differences in offences and offenders, and some courts were found to be systematically more severe than others. I would guess that if we carried out the same research in Scotland, we would come to similar conclusions.

Bill Butler: Are you saying that there is no research in Scotland?

Professor Hutton: Cyrus Tata will talk about the research that we conducted, which as far as I am aware is the only study of consistency in sentencing in Scotland. Judges talk about individualised sentencing, and how important it is to take account of the facts and circumstances of each case. I agree that that is important, but the other important aspect of justice and sentencing is fairness and treating like cases alike, and judges have no way to define what a like case is.

The onus is on the judiciary to tell us what they mean by consistency, and to explain that in a transparent way to the public. They do not have a language—that is a criticism not of judges but of the structure in which they work—that enables them to talk about consistency. That is why we need guidelines, and the sentencing council.

Bill Butler: That is very clear.

Dr Tata: Consistency should not be the be-all and end-all of our discussions about a sentencing council. It is more interesting to consider what a council could do, such as bolster independence. The issue has come up several times, and it has been claimed that there is not a shred of evidence of inconsistency. The response to that is that there is limited evidence of a degree of inconsistency in the courts, but also evidence of consistency, by which I mean—

Bill Butler: Why is the evidence so limited? Is there a problem in gathering evidence?

12:45

Dr Tata: There are various problems. First, to compare like cases is quite difficult. For example, I do not consider the Government statistics about different courts' rates of custody to be evidence of consistency or inconsistency because, as committee members have pointed out, those are bald statistics.

Bill Butler: So they are of as much use as league tables of school performance—in other words, useless.

Dr Tata: Exactly. They do not control for input. If you do not control for input, you are unable to control for output. The first point is a methodological one.

Secondly, as you are well aware, this is a very sensitive area, and it is natural that people will be somewhat reluctant, or careful, about co-operating with research in this area.

Bill Butler: Do you mean judges?

Dr Tata: Among others. Such reticence would be perfectly understandable, from their perspective.

Bill Butler: Is that not frustrating for you, though?

Dr Tata: It is understandable. As a researcher, one must always understand the pressures that people are under on a daily basis.

Bill Butler: I understand that, but a disinterested observer might say that the judges could be accused of blocking research. What do you think about that? I am not saying that they are guilty of that; I am just saying that they could be accused of it.

Professor Hutton: The study that Cyrus Tata and I did many years ago was at the invitation of some sheriffs. They asked us to consider the pattern of sentencing in three courts. In order to do that, we had to have some definition of consistency. We did that by asking the judges to help us to define consistency. They drew up a way of doing that—in effect, guidelines—and we demonstrated that there was a large degree of consistency but that one or two judges were out of line with the others. It is unusual for judges to participate.

Bill Butler: That is the point that I was just about to make. That is the exception rather than the rule.

Dr Tata: You raise a good question.

As well as the dedicated study that Professor Hutton mentioned, which was conducted some time ago and was a small study, a number of other pieces of research evidence come to mind. One involved the statistical risk of custody instruments that were developed for social work and so on but applied to sentencing. There is a degree of inconsistency, although I am not saying that it is wild inconsistency.

A third way in which inconsistency has been found is through simulation studies. That has been done as part of other, wider research studies, including work that we have done in which we have asked sentencing judges and sheriffs and so on to consider what kinds of sentence they would pass when, for example, they heard a mock plea mitigation about the case.

Fourthly, part of another piece of work that I did was to consider, among other things, the impact of sentence discount case law—recent case law such as Du Plooy and so on. That appears to have been interpreted in relatively different ways by different sentencers. That is not a criticism of individual sentencers; it is the way in which the structure in which one works—

Bill Butler: You would say that the thing to aim for is not uniformity but coherence.

Dr Tata: Indeed. Uniformity is not consistency. It is important that we compare like cases. We are not saying that all house break-ins must get the same sentence.

I want to mention briefly a further couple of pieces of evidence of inconsistency. The fifth is the awareness among practitioners, including sentencing judges and lawyers, of a degree of difference within the same court. All the evidence that I have mentioned goes beyond the defence of localised sentencing. We are talking about sentencing within the same busy court, for example. There is awareness among sentencing judges that if a case goes before another judge, it may well get a different sentence. The simulation studies are sometimes done in private among judges. There is an awareness of that.

Finally, the sentencing information system, which was introduced at the High Court some years ago at the judges' own request to assist them in their pursuit of consistency, showed a degree of variation but a great deal of consistency. The overall picture is rather like a bell curve, with a lot of consistency and some variation.

Bill Butler: That is very helpful. Will the bill help to tackle existing inconsistencies?

Professor Hutton: Well-crafted guidelines, the best example of which is probably the Minnesota guidelines, can help enormously. First of all, given that the range of penalty for an offence can be quite wide, there is scope for a warranted level of disparity—in other words, judges can sentence across a particular band. However, they can always depart from the guidelines. The Minnesota system builds in a 20 per cent departure rate, anticipating that judges will sentence outwith the guidelines in one case in every five and recognising, as judges keep telling us, that cases are very different and complicated and that guidelines cannot capture all of the many factors that have to be taken into account.

That said, guidelines can capture most things and, when judges depart from them, they will be able to give their reasons for doing so. Giving judges something to argue against helps to bolster judicial independence. If they decide to depart from the guidelines in a particular case, they can set out the range of penalties for the crime and then give a clear reason in public for their decision. Unlike the present situation, such a move blends consistency and individualised sentencing in a way that is transparent to the public.

Bill Butler: I am obliged to you for that very clear explanation.

Robert Brown: As you have clearly shown, this is not merely a simple matter of consistency and inconsistency; it is much more complicated than that and brings in many other issues, not least policy making on the basis of research. Are the judiciary in Scotland generally receptive to the idea of taking research on sentencing into account

in their determinations and decisions? I guess that that question is for Dr Tata or Professor Hutton.

Dr Tata: I will respond briefly and then pass over to Professor Hutton. Judges are routinely sent research reports, but they are extremely busy people who day after day have to think about individual cases. That is perhaps different from thinking about policy, but there is certainly room for more knowledge transfer, knowledge exchange and so on. A sentencing council would be able to assist in that, particularly if it were genuinely independent from the executive branch of government. I have to say, though, that my concerns in that respect are not shared to the same extent by my colleagues.

Professor Hutton: I am afraid that I do not know whether judges are receptive to research because, as Dr Tata pointed out, it is hard to see how such evidence would help them to make decisions on individual cases. On the other hand, a sentencing council or that kind of body would give judges the opportunity to get together to discuss issues not only with one another but with other people, to consider evidence and to develop sentencing policy for certain kinds of case or offence. As they have no institutional means for doing that at the moment, it is a bit difficult to answer your question.

That said, when I speak privately to judges, they appear to be very interested in research on, for example, the effectiveness of sentencing, but it is very difficult to see how they can take that into account in any systematic way, other than on a case-by-case basis.

Robert Brown: Does that raise the broader question whether we are using prison resources and other resources in the most effective way to achieve certain ends? For example, I was very struck by the tables of statistics in Dr Armstrong's submission, comparing Scotland's use of imprisonment with that of other countries. I wonder whether Dr Armstrong has any view on the suggestion that one benefit of the sentencing council approach might be that, as a matter of public policy, judges and others would be able to consider some of these themes, see whether we are getting best value out of prison and find out what we could do differently.

Dr Armstrong: Yes. At the moment, there is no centralised source of information and no mechanism for co-ordinating sentencing—that is probably what we want more than to tell the judges what to do—so that the prison population is turning out to be more like that of Slovakia than that of Sweden. If judges knew that we are heading towards Transinistria rather than Ireland, they would be surprised and worried. The fact is that it takes quite a lot of digging, on an individual basis, to figure that out. A sentencing council would therefore be an important resource for judges.

I agree with Neil Hutton and Cyrus Tata that, when one speaks to judges individually, one finds that quite a few are interested in research—in fact, they have invited us to do research—yet many others seem not to be aware of the research. It is instructive that the work on sentencing and the sentencing information system that has been done by the centre for sentencing research, which is dedicated to the study of sentencing in Scotland, was not mentioned in evidence when it was claimed that there is no research on the consistency or inconsistency of sentencing in Scotland. There is a mixture of opinions.

Judges would be worried and surprised to discover not only that Scottish prison practice more closely resembles that of an eastern European country than that of a western European country, but that the Scottish prison population is composed mainly of people serving short sentences. Our prison practice is eastern European not because we put bad people away for a long time but because we put so many people away for 23 days.

Robert Brown: Some of what you say points towards the general area of decisions and sentencing guidelines, but quite a lot of it points back to the Parliament and the Executive in terms of the bills that we pass and the administrative actions that are taken in support of the general courts system. Is that right? The sentencing council could be very narrow and deal only with one bit of that rather than having a wider, more general remit of sentencing reform. Is that fair?

Dr Armstrong: Yes, I think that that is right. Whatever evidence exists on the effectiveness of sentencing councils and on the consistency or inconsistency of sentencing, there is no evidence to tell you what values the criminal justice system should ultimately have. That is for the political system of the country.

In talking about consistency, I am reminded that, in the American south, prior to the existence of the United States Sentencing Commission and guidelines, sentencing was incredibly consistent—blacks got consistently higher sentences than anybody else. Consistency in the absence of values inserted into it by the political system is meaningless. That authority and conviction must come from a separate body working in co-ordination with the law.

Robert Brown: Would you like to speak a little on the benefits that a sentencing council could bring? We have begun to get into that area a bit with one or two things that have been said. Dr Tata, do you have any thoughts on that?

Dr Tata: The bill proposes that the sentencing council will prepare guidelines. However, I think that that is the less interesting part of what a sentencing council could do. There is a great deal of consensus around what others have said about the advisory possibilities of a council.

For example, the council could examine the relationship between front-door sentencing and back-door sentencing—release arrangements that will remain and are to do with the Custodial Sentences and Weapons (Scotland) Act 2007, which are problematic. Release has been a problem for us for decades and we have not been able to deal with it properly because front-door sentencing has been left to judges in individual cases whereas back-door sentencing has been given over to the Executive. We must reconsider those types of sentencing together, as a whole, in order to get a coherent policy. That is one thing that the council might do. It might also look at other policy areas, such as the increasing imprisonment of women and the incarceration of children. There is a whole bunch of things that the council might do.

The other thing that the council might do is develop research into public attitudes. Sentencers on a daily basis, quite rightly, say that although they are not led by public opinion they take it into account in some way or other. What do we know about public opinion and public attitudes beyond what the tabloid editors suppose that the public think? How can we find out more about that? Can we also develop greater public confidence in sentencing by providing more information about what goes on? For example, previous research has shown that most people think that rapists are typically given a non-custodial sentence, but that is simply wrong. How do we go about tackling that misinformation and misunderstanding? I have described just a few of the things that a council could do, in addition or as an alternative to issuing guidelines.

13:00

Robert Brown: Your comments are very helpful.

Professor Hutton: With the greatest respect to my colleague—as we always say when we are about to call what someone has said a load of rubbish—I am firmly of the belief that issuing guidelines is a vital part of a sentencing council's role. Guidelines are important because, as I have said before, they enable us to develop a language for talking about consistency in sentencing, which is vital to persuading the public that we are trying to do justice and to be fair. I agree with Cyrus Tata that it is important for a sentencing council to be involved in public engagement, public education and research into sentencing practice. The remit for the council that is proposed in the bill is fairly broad and would allow the council to do many different things. Whether it would do them is a different story and is related to the composition of the council, to which we will return.

James Chalmers: In the absence of guidelines, whether they come from a council or from somewhere else, it is difficult to have a proper public debate about appropriate sentencing, except at the level of individual cases. It would be much more helpful if we were able to have that debate at a more general, abstract level.

Robert Brown: My final question concerns the relationship between the sentencing council and other organisations. Dr Tata suggested that some of the constitutional issues might be overcome if the council's role were advisory. Do panel members have a view on the matter and on the linked issue of the legal effect of any guidelines that might emerge from the council's deliberations?

Dr Tata: I will try to be brief. I am anxious that, under the bill as it stands, the council will not be distant enough from Scottish ministers and the Lord Advocate. We need to put more distance between the two groups. The council needs to be a genuinely independent buffer, to protect judicial independence from the heat of the moment and from future justice ministers, whoever they may be, taking forward—

Robert Brown: Does the point not apply to the Parliament as much as to the Executive? It was suggested that there would not be the same issue if there were more parliamentary control. However, the separation of powers involves three stools—it does not apply only to the Executive.

Dr Tata: Indeed. However, I have less anxiety about the Parliament, simply because the Parliament, by its nature, is a much more open body.

Robert Brown: That is a helpful point.

Professor Hutton: I am less concerned about the issue—I am reasonably comfortable with the provision that the bill makes for the council's independence. I am a little less sure about its relationship with the appeal court, which is left a bit vague in the bill. One body must have the final say. In my view, that body should be the sentencing council, if it is providing sentencing guidelines at a general level. The appeal court can make decisions in individual cases, but broad decisions should be made by the sentencing council. If the appeal court does not like a guideline, it can refer that back to the council.

Robert Brown: Can you elaborate on why you think that the sentencing council should have the final say? The judges take the opposite view and

argue that guidelines should have the imprimatur of the assembled judiciary.

Professor Hutton: If there are to be sentencing guidelines, there must be one body—not two—that is responsible for issuing them.

Robert Brown: Why should it not be the appeal court, as has been suggested?

Professor Hutton: If we have a sentencing council whose task is to devise guidelines, it is appropriate that it should have final authority. That preserves judicial independence at a sufficient level, as it allows the appeal court to make decisions in individual cases. The court would be able to say to the council, "The guidelines do not work here—have another look at them." In the States, the commission that is responsible for the guidelines amends them if they are not working in practice.

Nigel Don: I return to the very beginning of part 1 of the bill, which sets out the purposes of sentencing, rather than an overarching principle. Someone—it may have been one of you, but I cannot remember—commented that perhaps we should start with an overarching principle of fairness, before worrying about consistency and coherence. If we started from the principle that the basis of the legal system, from which sentencing must derive, is fairness, would that be a fair point and would it be worth saying?

The Convener: It is appropriate for Professor Hutton to answer.

Professor Hutton: It was probably me who made the comment.

The Convener: It was—that is why I said you should answer.

Professor Hutton: We can try hard to deliver fairness, whereas it is much harder to be sure that sentencing can effectively reduce offending, so we should strive hard to deliver fairness. The first guideline that the English Sentencing Guidelines Council produced was a statement of overarching principles of fairness in sentencing. It is arguable that the Scottish sentencing council's first guideline should set an overarching framework in which to work.

The Convener: That is fair enough.

Cathie Craigie: Section 17 discourages the use of short sentences of six months or under. However, sheriffs have argued to the committee that short sentences can be useful. What are panel members' views?

The Convener: It might be appropriate for Dr Armstrong to lead the response.

Dr Armstrong: When I was at Barlinnie last Monday, I was asked what could possibly be done with all the inmates there who are serving sentences of between 20 and 30 days. That is just about enough time for officers to assess whether a person has a drug problem, will have a housing need when they are released or has family problems, before it is time for that person to go home.

Perhaps the judges might like to take a tour of the prisons, because I have not gained the impression from the people who work in them that six-month prison sentences are effective. The bill specifies six-month custodial sentences. That does not mean that six-month sentences do not work. A six-month sentence in the community that started immediately and involved a project that might relate to the person's drug offending, housing issues or work—

Cathie Craigie: I am sorry—we are talking about custodial sentences now, but we will discuss community sentences later.

Dr Armstrong: I was just making a comparison. When the press report a proposal to eliminate six-month sentences, that suggests that anyone who does something that is not very serious will experience no consequences.

The experience of those who work in prisons is that not much can be done with people who have short sentences. The Scottish Prisons Commission report found the phenomenon of life by instalments, whereby people endlessly serve short sentences of six months or under. They have a lifetime of sentences, but without the programming that is available to people who serve life sentences—they go in and come out and nothing happens, except that they become angrier about being incarcerated for short periods or they lose contact with whatever supportive social contacts they had. Some good research, which the commission's report cites, says that short prison stays are not only ineffective but criminogenic. People are more likely to engage in worse offending after they have been imprisoned than before.

Cathie Craigie: How do you respond to the sheriffs' point that in some cases—such as that of the repeat offender who has had community sentences and fines that have not worked—a short sentence can turn a person's life around?

Dr Armstrong: I have seen no anecdotal or empirical examples of that. I have heard the sheriffs say that, but I would like to see the person for whom that is true. Strathclyde Police's violence reduction unit, which has famously said that it needs more public health workers than police officers, issued a little handout of the story of David—I do not know whether the committee has seen it. The story follows the life of a young man who started by serving short sentences and who

ended up as a murderer with a long-term sentence. Such stories are telling. A series of short sentences leads to bad results. If the judges can produce another story—about Mary, for example—in which a six-month sentence causes her to bottom out and turn around, I would be interested in seeing it. I have not seen any such evidence; it would go against pretty much all the international research that exists.

Cathie Craigie: Have you carried out any research on why people are imprisoned for less than six months, such as for periods of 20 or 30 days? For what crimes are such people imprisoned?

Dr Armstrong: I have not conducted any research on that. I am currently doing a project that looks at remand and the use of backdated sentences, which is an interesting phenomenon. Some people do short-term sentences simply because they are on remand. By the time that they get to court, they are sentenced to whatever time they did on remand. The interesting thing about that group of people is that they tend to be remanded not because of the crime with which they are charged, but because of their history: they already have an extensive criminal history, or they were on bail, or they have previously failed to comply with bail conditions. That fits the model of feeling like a last resort, in that the people are remanded and are then given a short sentence. However, to answer your question, I have not done any research on that issue.

Dr Tata: As we discussed previously, for a couple of reasons I am rather more agnostic than Dr Armstrong is on the presumption against sentences of six months or under. If it is so difficult to deal with people who are in prison for short periods of time, the obvious answer—one can hear people saying it—is, "Well, send them to prison for longer if that will help them more." No. The issue that needs to be grappled with is not the length of time, although the six-month limit is problematic because it is not harmonious with the new summary powers for sentences of up to 12 months. Instead, we need to look at what types of cases, broadly speaking, should be imprisonable. If the argument behind the bill is that we should not imprison non-violent, non-dangerous offenders who might simply be feckless, we should focus on those types of cases. We should specify those cases, rather than a limit of six months, because the group of prisoners on sentences of six months or under will include—this will give the tabloids a field day—people who are convicted of dangerous and violent offences. That is what we should focus on.

I will make a couple of quick points about the argument—which I entirely understand—that says, "Look, I have lost patience with this person, who keeps coming back without fulfilling the conditions that are supposed to be carried out. I am at the end of my tether. As a last resort, I have to send this person to custody, even though the initial offence is not one that would warrant a custodial sentence." I can understand that sense of frustration, but we need to ask ourselves what prison is for and whether it should be used to incarcerate people who are not a risk to public safety.

It is sometimes assumed that people who fail to comply with the conditions of a community order do so wilfully. That might sometimes be the case, but an emerging body of recent research evidence shows that quite a large proportion of those people simply do not understand the conditions. Recent research by Dr Nancy Loucks shows that a high proportion of people who are given a community penalty or custodial sentence have quite serious learning difficulties. Such issues might be picked up on even when they are mentioned in the social inquiry report.

We need to be a little bit careful with the argument that says, "We are at the end of our tether, so this person must go to custody." The issue is a little bit more complex than that. In addition, there is no objective standard as to where one might reach the end of one's tolerance and different sheriffs will have different tolerance levels. The issue is a little bit more complicated than that.

Cathie Craigie: Where should the needs of victims be taken into account? The written submission from either Dr Tata or Professor Hutton—as sod's law would have it, I cannot find the relevant paragraph—suggests that the purposes of sentencing should include the issue of fairness. How is it fair to a community not to imprison a person who, without being violent, has been noisy and has engaged persistently in antisocial behaviour, for which fines have already been imposed? If that behaviour goes on and on, where does fairness for the victim come in? Perhaps a short prison sentence might give both the community the respite that it needs and the offender the shock that is needed to change that behaviour.

13:15

Professor Hutton: The problem of persistent but arguably not serious offenders is not unique to our jurisdiction. I accept that not particularly serious behaviour can cause people a lot of distress and trouble in some communities. However, every jurisdiction has the same problems and other jurisdictions seem to find more imaginative ways of dealing with it that do not result in the use of prison.

We have to bring resources into the matter. We have limited resources to spend on criminal justice and must decide how we will get the best value for that money. We have to make difficult choices about how to spend it. Do we want to spend it on putting people in prison for 20 days to give communities a brief respite or should we spend it on work in prison to try to reduce more serious offenders' offending behaviour so that, when they are released from prison—as they inevitably will be—they are less dangerous and less of a threat to the community?

It is about balancing two kinds of damaging behaviour and two different kinds of victims and deciding where best to spend our resources. If you look at it that way, it becomes a slightly different question.

The Convener: I am anxious to get as much out of this evidence-taking session as we can and I stress the need for the answers to be as brief as possible.

Angela Constance: The bill seeks to amend the custody provisions in the Custodial Sentences and Weapons (Scotland) Act 2007 prior to their being brought into force. It is intended that that will help to create an effective regime for managing offenders. What are the witnesses' views on that?

Dr Tata: I have concerns about the 2007 act. I gave evidence to the Justice 2 Committee about the Custodial Sentences and Weapons (Scotland) Bill, which I thought was a pretty poor piece of legislation, as many witnesses said. This bill seems to offer the hope of mitigating some of the worst problems of the 2007 act, particularly the 15-day cut-off whereby the act attempted to bring combined sentences down to 15 days. That was crazy, and it was recognised that that was simply not achievable. Instead, the bill talks about a "prescribed period". The policy memorandum suggests that that will be 12 months but it is not set out in the bill, and I have concerns about that.

The bill mitigates some of the problems of the 2007 act but, in doing so, passes discretion over to the Executive, which is problematic. I return to the point—I am trying to be brief, convener—that we need to consider front-door and back-door sentencing in the round. A sentencing council could help in that. It is the only way that we will be able to deal with the problem of release, which has dogged successive Governments.

Professor Hutton: I agree with that and have nothing to add.

The Convener: You concur with your colleague.

Professor Hutton: Indeed.

The Convener: Does James Chalmers have anything to add?

James Chalmers: I do not.

Dr Armstrong: I agree with Dr Tata.

Nigel Don: That takes us on to alternatives to prison, about which the Scottish Prisons Commission had quite a lot to say. Will the witnesses give their perspective on the suggestions that have emerged for non-custodial, community sentences and whether they will be effective?

Dr Armstrong: I included a section on effectiveness in the materials that I circulated to the committee. What do we mean by effectiveness? Do we mean that community sentences will eliminate the likelihood of someone reoffending? There is some evidence that they will and that they work a little bit better than short prison sentences at doing that.

I have listed in my submission a few factors for when community sentences are at their most effective. They are most effective when they are administered immediately and are clearly packaged or labelled so that they are understandable to sentencers and those who are being sentenced. To the extent that the bill accomplishes those aims, it can be effective. There is some provision in the bill to encourage swiftness and clarity through the single community payback order, although some orders are excepted from that. The current financial climate might make it difficult to implement some of those aspirations.

Nigel Don: I want to pick up on what you said about immediacy. The timescale that is envisaged seems to be that the appropriate officer should be available and the community sentence should start within seven days, which does not seem immediate to me.

Dr Armstrong: You are right; it does not seem immediate to me, either. There is no magic number in the literature that defines "immediacy". The Scottish Prisons Commission considered community sanctions in various jurisdictions and found that in some places "immediacy" means the same day and in others it means within a week. What it does not mean is three to six months, which is the timescale in the current climate, after which there can be a further wait if the programme in which the person is at last allowed to enrol has a waiting list.

In Norway there is a reverse approach. There is a waiting list to get into prison, but community sentences start immediately. There is never a delay to get into a community programme, but when the prisons are full no one else is allowed in. Norway dealt with the resource issue by reversing the waiting list issue.

Cathie Craigie: What happens to the people who are waiting to go to prison?

Dr Armstrong: They stay at home until space opens up in prison for them.

Cathie Craigie: What if the person is a murderer?

Dr Armstrong: There are probably priority prisons, and there are secure—

Cathie Craigie: So there is not a waiting list; there are priority prisons—

Dr Armstrong: There are maximum security prisons. However, people who have been convicted of homicide might wait for a prison place. Bail is allowed for people on homicide charges.

Nigel Don: What do other members of the panel think about the immediacy issue?

Professor Hutton: If punishment is to be effective, the important issue is probably not immediacy after the decision to punish but immediacy after the commission of the offence, which is a different story altogether. How long do people have to wait before they come to court? That is a resource issue.

Nigel Don: That is an interesting perspective.

The Convener: The issue is also whether the offender pleads guilty at the earliest opportunity.

Professor Hutton: Indeed.

Nigel Don: My original question was about the effectiveness of community penalties. Do the witnesses have other views on what is proposed?

Professor Hutton: If judges are to have the capacity to attach a large number of conditions to a community penalty, I would be concerned that the more conditions are imposed, the greater the chance that they will be breached and the person will ultimately end up in prison. There needs to be proportionality of punishment in the context of community penalties. How many conditions will be imposed on a person? Will conditions relate to the seriousness of the offence, or will they be entirely about what is needed to make the offender become a better person or change their life? Such issues are not addressed in the bill.

Nigel Don: Is it fair to say that the Scottish sentencing council will be important precisely in that context? In other words, it will suggest to judges and sheriffs what is appropriate and say how many conditions might be imposed. The council could conduct research into such matters.

Professor Hutton: Indeed.

Angela Constance: Will the bill improve public understanding of community sentencing?

Professor Hutton: Probably not, on its own, but if the sentencing council works well it will be able to do much to improve public understanding.

Dr Tata: I concur with that. One issue is the implementation of the release arrangements, which are regarded as community penalties—although technically they are not. The bill does not make the position clear, which is unfortunate.

The sentencing council has the potential to improve public understanding, but the bill cannot do that and does not make things clearer.

Angela Constance: Is there more that we can do to improve public understanding?

Professor Hutton: Are you asking what the Parliament or the Government can do? I can give you an example of a sentencing council that has taken public engagement and education seriously. The Sentencing Advisory Council in Victoria, Australia, has been energetic in that regard. It runs a "you be the judge" roadshow for schools, trade unions, colleges and other places, at which judges and the community discuss sentencing.

It generates many reports about sentencing practice, it is good at disseminating that information, and it has good relationships with the media. It does not stop scare stories coming out, but it provides positive stories about sentencing, which are difficult to get into the media unless there is a relationship with them. Obviously, individual judges cannot talk to the media on a one-to-one basis, but a sentencing council can take a professional approach to communications and work with judges to communicate things more clearly. The Victoria council is a good example of a body that tries to build public engagement. Things will not change overnight. It is a matter of starting a cultural process that will take much longer.

Dr Tata: I agree. The Victoria council provides an excellent example of how to engage with the public. We also need to try to find out a little bit more about what the public think about specific issues and areas. At the policy level, there must be a two-way street between the public and the council.

The Convener: I have a couple of brief questions for clarification, the first of which is to Dr Armstrong. I thank you very much for your written submission, which is clear about incarceration levels elsewhere, and relates incarceration levels to populations. I am happy to accept the figures, but have you related incarceration levels to offending levels?

Dr Armstrong: No.

The Convener: Why not?

Dr Armstrong: Because the relationship between crime and imprisonment appears in Scotland, as in most jurisdictions, to be weak and not to explain sufficiently prison populations. Last night, Sonja Snacken, who is a professor in Belgium, gave a lecture at the University of Edinburgh in which she considered the relationship between crime and imprisonment. She surveyed research across Europe, which shows that there is less of a relationship between crime and imprisonment than there is between economic cycles and imprisonment or between political factors and imprisonment. In addition, various prison projections that were calculated using different crime versus criminal justice scenarios were included in the 2001 Halliday report on sentencing in England and Wales, and it was found that a change in crime levels has less impact on the prison population than a change in sentencing law.

The Convener: It strikes me that it is a little bit odd that nobody has related the number of people who have been jailed to the number of offences that have been committed, as the number of people who have been jailed is an obvious corollary of that.

Dr Armstrong: It is natural to think that, and that should be obvious. There should be a relationship between how much harm there is in a community and how many sanctions exist in it but, over time, we have found that there does not seem to be a very strong relationship between the two. A graphic in the Scottish Prisons Commission's report shows changes in the prison population. A line goes straight up while the crime rate in Scotland goes up, down or stays stable. The report points out that the prison population has gone up when crime rates have increased, stayed flat and declined. That is an interesting example from Scotland that shows that there does not seem to be a corollary relationship between crime and imprisonment.

James Chalmers: There are two difficulties.

The Convener: I am sorry, Mr Chalmers. I am aware that you have not really—

James Chalmers: I have less to say about sentencing than my colleagues have. It is not my specialist field.

As I was saying, there are two difficulties. One is obtaining comparable data on crime rates across jurisdictions as opposed to data on imprisonment, which can be quite reliably obtained. The second is that it is not clear where that will take us. If we found that the offending rate in Scotland was much higher than offending rates in other countries, we might conclude that more imprisonment was justified, or we might conclude that more imprisonment was not working. I do not know which answer would be correct.

The Convener: We must end the discussion; obviously, we have had to truncate it slightly. I thank the witnesses for coming to the meeting. I am sure that they would be more than happy to respond to any issues that we might ask them about in writing.

The meeting will now continue in private for a brief time.

13:29

Meeting continued in private until 13:32.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Thursday 11 June 2009

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by RR Donnelley and available from:

Blackwell's Bookshop

53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

Scottish Parliament

RNID Typetalk calls welcome on
18001 0131 348 5000
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by RR Donnelley