The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 14 May 2013

Session 4

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JUSTICE COMMITTEE
15th Meeting 2013, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Jenny Marra (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Colin Keir (Edinburgh Western) (SNP)
*Alison McInnes (North East Scotland) (LD)
David McLetchie (Lothian) (Con)
*Graeme Pearson (South Scotland) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Graham Ackerman (Scottish Government)
John Lamont (Ettrick, Roxburgh and Berwickshire) (Con) (Committee Substitute)
Kenny MacAskill (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 14 May 2013

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the 15th meeting in 2013 of the Justice Committee—it seems as if there have been many more. I ask everyone to switch off mobile phones and other electronic devices, as they interfere with the broadcasting system even when they are switched to silent. Apologies have been received from David McLetchie—to whom we give our best wishes—and John Lamont is attending as his substitute.

Under agenda item 1, I invite the committee to agree to take items 5, 6 and 7 in private. It is proposed that we take item 5 in private as it involves the committee's initial discussions on our draft stage 1 report on the Victims and Witnesses (Scotland) Bill, including possible recommendations. Holding that discussion in private will allow clerks and others to comment and enable us to come up with our themes.

Item 6 is consideration of our approach to reviewing the provisions of the Police and Fire Reform (Scotland) Act 2012 that relate to the Scottish Fire and Rescue Service. It is proposed that we take item 6 in private because it involves a discussion on potential witnesses. Finally, item 7 is consideration of a draft report on our inquiry into the effectiveness of the provisions in the Title Conditions (Scotland) Act 2003. That is another draft report, so taking item 7 in private will allow free discussion and intervention by the clerks.

Are members agreed that we will take items 5, 6 and 7 in private?

Members *indicated agreement.*

Victims and Witnesses (Scotland) Bill: Stage 1

10:01

The Convener: Item 2 is the final evidence session in our stage 1 inquiry on the Victims and Witnesses (Scotland) Bill.

I welcome the Cabinet Secretary for Justice, Kenny MacAskill; Graham Ackerman and Gary Cox, who are both from the Scottish Government's criminal law and licensing division; and Craig McGuffie, who is a principal legal officer in the Scottish Government. We move straight to questions.

Alison McInnes (North East Scotland) (LD): Good morning, cabinet secretary. I will explore some of the bill's provisions for vulnerable witnesses. The extension of the special measures to other categories has generally been welcomed, but we have received quite conflicting evidence on the provisions that would allow a challenge to those special measures. Victim Support Scotland argued that allowing the challenge to special measures was its "greatest concern", while the Faculty of Advocates, among others, said that the accused's lawyer must be able to challenge their use. Does the bill strike the right balance between the victims and the accused?

The Cabinet Secretary for Justice (Kenny MacAskill): Thank you for raising that important point. You are right to articulate the concerns that have been raised with the committee, and we have taken them on board. As a result of the European Union directive, we require to go in the direction that you outlined, but we are more than happy to discuss the matter with the Crown Office and Procurator Fiscal Service to ensure that we get the balance right. It is about achieving a balance. The points that have been raised cause us some concern, too, and we will liaise with the Crown on the matter.

Alison McInnes: Will you also liaise further with Victim Support Scotland?

Kenny MacAskill: Absolutely. I take that as read.

Alison McInnes: In what circumstances might objections to the standard special measures be lodged?

Kenny MacAskill: We think that they should not be lodged regularly, which is to some extent why the judiciary and the courts have to be involved. The issue is to get the right balance.

We might envisage a scenario in which there has been a gang fight and the accused is under the age of 16, but not significantly under that age,

and he—or, sadly, sometimes even she—might have known those who were involved. In such situations some variation might be deemed appropriate.

Alison McInnes: Do you envisage the mechanism being used in quite limited circumstances?

Kenny MacAskill: I tend to think so. The ethos of the bill is to provide protection, and I think that we should try to provide such protection. As the convener has said, we need to weigh in the scales of justice not only the rights of the victim but those of the accused. However, in the main we are here to provide protection and support for those who have to deal with these very stressful circumstances.

Alison McInnes: The representatives of victims and witnesses were at pains to stress in their evidence to us that they want to ensure that people are able to give their best evidence. They feel that the uncertainty that would arise from the possibility of an appeal would cause greater upset than is caused by the current system. Can you describe the timescale for an appeal and explain how an appeal would be processed?

Kenny MacAskill: I do not think that we can go into specific details, unless Graham Ackerman can help me out. Alison McInnes's point is quite valid: that situation would create uncertainty. However, we have to balance the right of the victim with the right of the accused. Such challenges will arise. Similar matters are already being dealt with in the courts, and they are always accelerated. Indeed, that would be our general intention, so that there is some certainty and so that the case can be dealt with quickly—not simply for the sake of the accused, but for all those involved, including the Crown and the defence.

Graham Ackerman (Scottish Government): On specific timings, any party in the proceedings can lodge an objection notice no later than seven days after a vulnerable witness notice or application has been lodged. The court can allow later objections to be lodged if it considers that to be appropriate in the circumstances.

It is worth noting that the existing procedure in the Criminal Procedure (Scotland) Act 1995 allows the court to review special measures once proceedings have started. I know that that issue was a subject of discussion at a previous committee meeting.

Colin Keir (Edinburgh Western) (SNP): A number of questions have been raised about victims and witnesses having the ability to "participate effectively", which is one of the principles in section 1(3). What is meant by that principle?

Kenny MacAskill: That is a high-level provision. I think that it relates to the EU directive. Clearly, we wish to engage with Victim Support Scotland, Scottish Women's Aid and Rape Crisis Scotland, as well as, in other matters, with those who represent the accused, such as the Law Society of Scotland and the Faculty of Advocates. High-level discussions take place regularly between Government officials, other parts of the judicial system, the Crown and Police Scotland. I know from experience—committee members are probably aware of this—that that process filters down, with courts having user panels. From discussion with the clerk at Edinburgh, I know that the courts engage with those who have been, for example, the victims of domestic violence, so that they can work out in practical measures what the user experience—if I can put it that way—has been or should be.

Colin Keir: Victims of crime might have raised expectations about what is on offer, or what is possible, in terms of effective participation. They might think that they have a bigger part to play, on a personal level, than is actually the case.

Kenny MacAskill: The whole ethos of Scots law is that we take the victim as we find him. In the legislation, the directives and protocols are laid down to deal with matters as best we can. That is why there are clear expectations for the Crown and the Scottish Court Service; that is how it should be. Equally, we must remember that victims come in all shapes and sizes and have different needs. We need to have an element of flexibility. What is intended here is that we engage at a high level, so that as the terrain changes—as needs arise, or as problems are brought to our attention—all those involved, not just the Government but those in the SCS, the Crown and the police, are able and willing to engage with that, while allowing for an individual's needs. That is what we hope to achieve.

John Finnie (Highlands and Islands) (Ind): We have received a letter in response to a matter that we raised with Police Scotland about the level of information in bail cases that is routinely provided in sheriff courts. Police Scotland's letter states:

> "police officers will highlight to the Procurator Fiscal any significant concerns they have that the quality of the evidence given by the victim or witness will be diminished by any fear or distress in connection with giving evidence at the trial or proceedings. In addition officers will also highlight the reaction of the victim or witness to the crime or to the accused and any personal characteristics exhibited by the victim or witness that might suggest vulnerability."

That sounds very good, except that the letter goes on to say:

> "In such cases it is not the role of the police to conduct a formal assessment of the victim".

The letter makes reference to guidance provided by the Lord Advocate. Can you say whether that guidance will be reviewed? Will there be training? Whose responsibility is it to provide the formal assessment of the victim?

Kenny MacAskill: Obviously, the guidance from the Lord Advocate is a matter for the Lord Advocate. The police are quite right in saying that such information should be made available to the procurator fiscal, but clearly there are limitations on what individual officers are able to do, given their skills and resources. The general principles of the bill are that each body that is involved—whether that is Police Scotland, the Crown Office or the Scottish Court Service—should make an assessment of the individual witness and, where possible, try to meet the witness's needs and requirements.

I am happy to feed back the issue to the Crown Office, which I imagine will review those matters. Clearly, the Crown Office has its own procedures, but I think that it is almost certain that it will seek to vary its guidance once the legislation goes through. I am more than happy to get further information for the member on that.

John Finnie: Convener, may I move on to other matters?

The Convener: Yes, unless you are poaching someone else's question. We will find out.

John Finnie: Well, my clairvoyant skills are not with me this morning.

Cabinet secretary, is it your understanding that it would be permissible for a defence agent to challenge any aspect of proceedings at any time, regardless of the consequences?

Kenny MacAskill: I will defer to Graham Ackerman on that, but I would have thought that, probably, yes, other than for spurious challenges. We would rely on the good sense of the judiciary on that.

Graham Ackerman: In its provisions on objections to special measures, the bill states that objections can be raised about the particular circumstances of the case and about the special measure that has been granted or notified. The grounds for such objections are not stated, but the bill states that the defence—or any party to proceedings—must set out the grounds on which the objection is raised and why the special measure would be inappropriate in the circumstances. As the cabinet secretary said, it would be for the judiciary to decide whether there was merit in the objection.

Kenny MacAskill: Equally, I can give you an assurance that I will liaise with Sheriff Tom Welsh of the Judicial Institute for Scotland to ensure that these matters are brought to the judiciary's attention. I cannot think of a way that we could preclude such matters—as you say, we are not clairvoyant—but we rest on the good sense of the judiciary. The same applies to how a witness is cross-examined. As you know from experience, firm questioning sometimes needs to be allowed for justice to be done. Equally, where that would constitute clear harassment, we expect that the judiciary would act to rule out the manner in which that questioning was being done.

I can give you an assurance that we will liaise with the judicial studies people to ensure that the work that is outstanding will take into account the necessary knowledge and information that should be provided to judges and sheriffs.

John Finnie: At the risk of poaching further questions from other members—

The Convener: Well, we will find out. I am not clairvoyant, either.

John Finnie: On the issue of oral representations that victims and their families may make to the Parole Board further down the line, can you confirm what the Parole Board said to us about such representations being made available to the prisoner and being open to challenge?

Graham Ackerman: Yes, that is correct. That is not a massive departure from what happens at the moment. Written representations can be made to the Parole Board, and those written representations are included in the dossier that is sent to Parole Board members. The dossier is also made available to the prisoner, who in due course can make representations to the board.

In the case of oral representations, the victim would make such representations to a member of the Parole Board. Those would then be put into an agreed statement, which would also go into that dossier and the same procedure would be followed.

The Convener: We will now find out whether any of Graeme Pearson's questions have been poached.

Graeme Pearson (South Scotland) (Lab): The issues have been covered very well so far.

First, I have a supplementary question on the oral submissions. In what format would the oral representations be received? Would the Parole Board member go to the victim's home, or would there be an arrangement whereby the victim would need to go to the prison? How is it envisaged that that would work?

Kenny MacAskill: We have tried to be flexible on that. The original idea came from Margaret Curran in the previous parliamentary session—it has also been suggested that it might have come from Margaret Smith—which is to her credit. Given

that people wish to make representations, we have tried to avoid a scenario in which the victim would need to go to the prison or be subject to cross-examination by the prisoner and his agents. Unfortunately, in terms of the European convention on human rights and fairness, that is where we would have gone. We have discussed with the Parole Board the ways in which we can allow families to make those appropriate and vital representations without having to endure such things.

10:15

Some of the details will have to be worked out with the Parole Board. I cannot imagine that the representations would take place in a prison for any reason. We are happy to allow some of the issues, such as whether the representations are held in the victim's home or in an office, to be worked out with regard to what is best for all parties, within reason.

There would have to be a balance with the need for formality so that the Parole Board can record the representations appropriately, but the driver for the bill is to allow victims' families to make representations without going to the prison or being subjected to cross-examination.

Graham Ackerman: That is absolutely right, and we have discussed those matters with the Parole Board.

When the Parole Board considered the costs for the financial memorandum, it recognised that some travel would probably be involved for Parole Board members and that a neutral location would perhaps be chosen. The board's concern is to make it easy for the victim and to ensure that—as the cabinet secretary said—they do not have to go to a prison or go through an overly formal process.

Graeme Pearson: First, the Scottish Prison Service—as it makes clear in its evidence to the committee—does not feel that it has the right environment or the necessary arrangements to cope with such oral representations. That should be borne in mind no matter what arrangements are made.

Secondly, a number of representations have been made—certainly in emails and letters to me—that suggest that the victim notification scheme is not particularly helpful. The witnesses, victims and families feel that they need to pursue information, chase after updates and so forth. The sudden shock of correspondence arriving on their doormat years later to indicate that there is a new phase in the case is very hurtful and takes them right back to the start of their terrible saga.

Thirdly, another concern that has been mentioned is that victims and witnesses do not know where the prisoner is and what their intentions might be, subject to decisions that are taken by the Parole Board. There is nothing in the bill that seems to address those issues. Do you intend to ensure that those sensibilities are fully considered and properly dealt with in policy?

Kenny MacAskill: Absolutely, and we recognise that there are difficulties. The VNS scheme is, in the main, very much welcomed, although there are difficulties and challenges that have been brought to me. Sometimes people have been released and that has caused a great shock, but the scheme has had to start from somewhere. There are people who are released as their cases pre-date the scheme, which causes distress, but that is not the scheme's fault as there had to be a start date.

The Scottish Prison Service's role is restricted in some areas, and matters must be dealt with through legislation and guidance under the Parole Board.

We are trying, through the bill, to deal with the issue that Margaret Curran correctly raised, as we undertook to do in the previous session of Parliament. We have to get the balance right. We could not go down the path of having an automatic right because that might result in the scenario that Graeme Pearson mentioned, in which the victim would have to go to the prison. That would be inappropriate, never mind the consequences thereafter.

Some aspects will have to be dealt with through bodies such as the Parole Board, but we intend that as much information as possible should be available. Most people have to be released at some point, and they have to have some rights in that regard, but we have to protect individuals, especially in cases in which there is a clear likelihood that people will run into each other.

Does Graham Ackerman have anything to add with regard to the Parole Board?

Graham Ackerman: No.

Graeme Pearson: There is a more substantive issue in which I have a particular interest. We have received powerful evidence from all the victims concerned to suggest that—as I described at a previous committee meeting—they feel like a parcel in the post. They are constantly being addressed and having to go over the various elements of the case, and they repeatedly have to give their name and background and the details of the crime. They are constantly telling people about it, and therefore constantly reliving the experience.

In the justice environment, as the cabinet secretary is aware, we have the police, the victim information and advice service, Victim Support Scotland, the Crown Office and Procurator Fiscal

Service, the Scottish Court Service and the defence agents, all of whom operate individually. No doubt they are all well meaning, but at the end of the process the victims and witnesses are left bruised and often deeply concerned at how they have been treated.

The idea of case companions has been mentioned. I am not suggesting that I would want case companions to be introduced at this stage. However, was it agreed that someone in the system should be seen as the key link with an individual so that other agencies would not need to go back to the victim constantly and take them through all the basic stuff yet again? The bill does not appear to address that issue, which seems to be a major concern for victims.

Kenny MacAskill: First, I state on record that we are introducing the legislation not simply because of the EU directive, but because we know that more needs to be done. We should recognise the considerable progress that has been made. The previous Lord Advocate, Dame Elish Angiolini, identified that issue—to her credit—even before I came into the Administration. However, we need to go further. The present Lord Advocate has, to his credit, identified that the process can be stressful and difficult not just for victims but for witnesses, which is why the bill addresses both those groups.

We have an adversarial system, and as a consequence certain things must be done. Victims have to endure certain elements because of the nature of how their evidence must be tested, and they are dealt with by police officers and the Crown Office because there are different roles as we need checks and balances. They have to have their evidence led in court if people plead not guilty, and that evidence has to be tested in cross-examination.

However, we believe that case companions as such are not necessary. We already have family liaison officers: the police do an outstanding job by identifying two officers to deal with those matters. The Crown Office also has systems by which it seeks to help victims, and organisations such as Victim Support Scotland, Rape Crisis Scotland and Scottish Women's Aid are available to provide support.

We need to ensure that the individual victim gets the support that they need from the appropriate authority. To some extent, there will always be different people who are representing a particular agency because of data protection and other issues, but Graeme Pearson is correct that the concept of supporting individuals through the system is vital. The police have recognised that for a while, and are addressing the issue with family liaison officers. The Crown Office has recognised it, and the Scottish Court Service provides a walk-through for victims who are wondering where and how they will give their evidence.

All those things are in place, and the concept of a case companion therefore exists in practice, but our system enables the individual to choose which person they want. Equally, the organisations must recognise that they have a role to play and that, although they might have to progress their work in order to put the case before the court or lead evidence in court, they must bear in mind the rights of and the need to respect the victim.

Graeme Pearson: Victims and witnesses did not complain so much about the adversarial situation in court, although many of them found that quite harrowing. They were concerned about the handover between agencies, and the apparent perception by a new player that the victim or witness was unknown so they had to go through everything almost from day 1. They had to go through the whole process, answering questions such as, "Why are you here?", "What are you complaining about?" and "Where do you live?"

There is an inability to carry through all the basic information that would ease the way for victims and witnesses. Even when they appear in court to give evidence, the person who meets them at the court does not seem to know who they are, what they are involved in or what arrangements have been made for them. They gave evidence to the committee on those issues, and it made a huge impact on us to listen to the concerns of folk who were already going through a very difficult experience on behalf of their families.

Kenny MacAskill: We can never rule anything out. I accept your point, but I would not want to cut across the current role of Victim Support Scotland, Scottish Women's Aid and Rape Crisis Scotland. In my experience—and doubtless even more so in Mr Pearson's experience—the police will refer to many of those organisations at the outset.

I would not want a scenario in which somebody was told, "You can't see Mr X—we are sending you to Miss Y." If it is felt that a new agency should be created, we would be happy to look at that to some extent. We hope to ensure—I say "hope", because sometimes things fall through the cracks, not by design but by accident or because things do not work out—through the Crown, the police and the good work with family liaison officers that when people need the support of a case companion, that support can be provided by organisations such as Victim Support Scotland, Rape Crisis Scotland and Scottish Women's Aid. Some such situations are case and crime specific. For example, the work that is done by Rape Crisis Scotland is outstanding, but it is deeply specialised. A case companion who was more generic, perhaps, might not be able to provide that level of care and support.

We rule nothing out. We would not wish to cut across the bows of the organisations that we have in Scotland. Our principal aim would be to help those organisations to do an even better job than they do already, rather than perhaps to create another agency when agencies already exist.

Graeme Pearson: Under section 3, on the disclosure of information about criminal proceedings, the bill requires the various agencies to supply information to designated people. When I asked the police whether they were in a position to supply that information to witnesses and victims in a timely manner, they indicated that they were not; their systems were not sufficiently subtle to offer that. I suspect that many of the other agencies involved are in a similar position.

How can that be dealt with immediately after the bill becomes an act, if it does?

Kenny MacAskill: We must ensure that we get an information technology system that enables us to have an appropriate exchange of information; some of the process will come down to doing that. Work is on-going: the bill is part of a making justice work programme that deals with a variety of matters, whether that is technology in courts or other aspects relating to police and crime. Technical difficulties exist that we must address. The bill is about principles and some practical matters. On administration, we will work with the police to ensure that their systems are appropriate, not just for dealing with victims but on all other aspects of justice that the police have to address.

Graeme Pearson: I did not see anything in the financial memorandum that might cover some of those additional costs—in terms of IT and so forth—for the various agencies. Was that aspect considered?

Kenny MacAskill: No, because the work that the police referred to me in relation to i6 information technology and other matters is getting done and progressed anyway. The work that is being done to allow the management of police information systems will, as a consequence, improve matters for victims, but it is being done to improve the system. Quite understandably, you have commented on that before. To some extent, therefore, although the costs are dealt with in other aspects of policing, they will have the benefit of improvement for victims.

Graeme Pearson: But i6 will not come soon.

Kenny MacAskill: We are on the case.

The Convener: Graeme Pearson is on the case as well—all over the place.

Before I move on to Sandra White, I am concerned by our use of the word "victim" throughout. At the end of the day, a person is only a victim because somebody has pled or because we have come to the end of a trial or an appeal. The committee has been talking about victims in the bill from the point of view of police involvement. Do you have any concerns that doing that impacts on the presumption of innocence until proven guilty beyond reasonable doubt, with the burden of proof on the Crown? That may not be an impact for you, but for the public there may be a perception that the person discussed is a victim, even though—as members have suggested—the "victim" might be somebody giving evidence against another gang leader. Under this bill, that person might be a victim.

Kenny MacAskill: We have to accept that, where somebody is the victim of a crime, they are a victim, whether they are a beacon of righteousness and truth—

The Convener: I will stop you right there. A person is not a victim of crime unless the crime has been proved against them. That is my problem with the definition in the bill that talks about victims pre-trial, at police stage, right through the process. In fact, there is a point of transition in a case where someone becomes a victim. For the Crown, a person might always be a victim, but they certainly are not so for the defence.

10:30

Kenny MacAskill: You could be a victim and there could be no case. Somebody could be assaulted and no perpetrator could ever be traced—no assailant could be found. They would remain a victim and to some extent the same definition that we have is accepted in the criminal injuries compensation scheme. For example, with criminal injuries there does not have to be a court case. You have to be the victim of what is perceived to be a crime, whether or not that assailant is ever identified and whether or not anything can be proven or taken to court. We hope, for justice's sake, that that would happen, but people can be victims without matters ever going to court. You are the victim of a crime if your car is scraped or damaged—

The Convener: You are teaching your granny to suck eggs. That is not my point. My point is that this would also be applicable during a court process, when there is a party in the dock who is accused of a crime against another party, who is being referred to throughout the bill as "the victim". That gives me concern about the language in the bill and I do not know why perhaps we could not have a definition in the bill about when a person is designated a victim and when they are not designated a victim.

Kenny MacAskill: That is for the judiciary to balance; we always have the presumption of innocence. The term "victim" is used in the bill in terms of the procedures. In terms of the leading evidence—in terms of evidence before the sheriff, before the sheriff and the jury or before the judge and the jury—doubtless the victim would be referred to by their own name unless anonymity was granted. The term is more for the systemic structure—for the existing bureaucracy—than for the language that would be used in the court. In my experience, the term "victim" is very rarely used within the precincts of the dock or indeed the witness box—you talk about the "individual".

The Convener: The Faculty of Advocates argues that the alleged victim of a crime—which is what we are talking about in a court process—should be referred to as the "complainer" rather than as the "victim" both before and during a trial. Of course, at the end of a trial, they may or may not be described as the victim of a crime, depending on the outcome. Do you see why I and perhaps others on the committee have issues about the use of language which, as a practitioner yourself, you know is terribly important in legislation?

Kenny MacAskill: In 20 years' practice, I do not remember somebody being referred to in a court trial as "the complainer". They were always referred to as "Mr X" or "Miss Y" or "the person that you see seated over there". Yes, language can be critical in terms of the definition in the bill but in the main, people should be dealt with respectfully. Also, it is in the best interests of those who are going through the process that we try to use language that is understandable. We have to have the term "complainer"—those of us at this meeting are aware of that term—but for a victim to be told that they are not the victim but the complainer might cause some consternation.

We can assure the Faculty of Advocates that the term "victim" in the bill is used in a broad sense, but it will vary on each of the specific matters. In terms of ensuring the balance between what is necessary in the scales of justice for the accused and for the victim, we can provide that. Equally, we have to have legal language, but I also encourage all those in the court system—those who are acting for the Crown or for the accused and indeed the judiciary—to use language wherever possible that is understandable to the man or woman in the street, such as the word "victim".

The Convener: My last point on this issue is that you have undermined your argument because you talked about using language that people understand. If people hear that somebody is being referred to as the victim in a case, they understand that that person is a victim when in fact that person may not be a victim at all. The problem for me is that the language in the bill makes an assertion in simple language that a person in a court process has been the victim of a crime when they may not have been a victim. That is the issue.

Kenny MacAskill: It has gone through investigation. We have the presumption of innocence. These things are not brought in on a whim or a fancy. There is a case to argue, which is why it is before the court. There is a case that has to be proven beyond reasonable doubt, which is a high standard. A case is not brought because a police officer thinks that somebody might have done it or on the basis that the Crown wants to satisfy the police. It happens because there is a case to be faced. We have other ways of providing protection for the accused to ensure that there is a fair trial. The word "victim" is used sparingly in the court when evidence is being given. However, it is important that we maintain flexibility in its definition in statute and so on.

The Convener: Perhaps there should be a definition in the bill then.

Kenny MacAskill: We think that the word changes in use. Equally, I understand that the definition that we use is the same as that used in the criminal injuries compensation legislation.

The Convener: That is an entirely different matter.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I share your concerns, convener. The Law Society also expressed concerns, although it looked at it from a slightly different perspective. Its argument for having a definition was so that individuals knew whether the bill—or the act, when the bill is enacted—would apply to them. It has suggested some wording to define "victim". I think that you are saying that you are not minded to accept its argument in favour of defining victim or indeed its suggested drafting.

Kenny MacAskill: I am happy to reflect on it. However, we have a definition of victim that is used generically throughout the legal system in Scotland, which is based on the Criminal Injuries Compensation Authority and is understandable to those using it. That suggestion has come from the Law Society and the Faculty of Advocates. Others in the system have no issues with the definition.

John Lamont: In the ordinary use of the language and the word "victim", are there any victims who will not be caught by the provisions in the bill?

Kenny MacAskill: Only those who have been victims of crime and have not reported it to the police or who suffer in silence. We would implore them to report the crime. We are here to take the victim as we find them, not to be judgmental.

There are other processes in the judicial system to address that. It is not for us, in introducing legislation, to decide whether there are any contributory factors and so on. That is why we have a court system.

Jenny Marra (North East Scotland) (Lab): On that point, cabinet secretary, you said that the term "victim" was used throughout legislation in the criminal justice system. In fact, the Criminal Procedure (Scotland) Act 1995 uses the word "complainer". You gave the example of criminal injuries. That is once a case has been brought, and guilt and a victim have been established. Would it not be more consistent to use the language in the 1995 act?

Kenny MacAskill: No, I do not believe so. A victim is a victim if a crime happens. It might be that no one saw your car being damaged. It might be that no one could trace the assailant who assaulted you. Just because a matter does not get to court does not mean that you are not a victim; you are a victim. Once we start using the term "complainer", everything is dependent on being in that judicial system.

We would prefer that we recognise that there are victims who will have to give evidence in court. That is why, as Alison McInnes and others have touched on, there are ways in which we have to provide for them and deal with them differently. However, we must recognise that a victim of a crime is not simply somebody who is going to be giving evidence in a court of law. There are probably many more victims of crime who will not give evidence in a court of law, which is why the definition has to be wide.

The Convener: But section 1(1) of the bill says:

"Each person mentioned in subsection (2) must have regard to the principles mentioned in subsection (3) in carrying out functions conferred on the person by or under any enactment in so far as those functions relate to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings."

That is the context.

Kenny MacAskill: If I phoned the police today to report that my car has been scratched or my wing mirror has been kicked off, a crime report will be recorded. I am a victim of crime. It does not mean that I will appear in court. It is possible that no one can identify who the accused is.

Graeme Pearson: Can I say something, convener?

The Convener: I have John Finnie waiting on this point. I am afraid that he has got there before you.

Graeme Pearson: He stole my question.

The Convener: We will see.

John Finnie: Cabinet secretary, we had a lot of representations from the children's commissioner and Children 1st. Although I would not put words in their mouths, I think that they would be greatly concerned if children were being referred to as alleged witnesses. Would that be your understanding?

The Convener: It is "alleged victims".

John Finnie: Alleged victims—I beg your pardon.

Kenny MacAskill: That is a fair point, and I agree with that.

Graeme Pearson: What I will say relates to some points that were made earlier. If someone reports a crime to the police and the police fill in the necessary form—or database, now—they are described as a complainer. The police officer taking the report would indicate that the complainer was John Smith, for instance. They would not be indicated as being the victim.

The Convener: I am grateful for that point. Sandra White has been patient. We have aired the matter, and there is clearly a dispute in the room as to whether we are content with the terms "victim" and "complainer".

Is your point about something different, Sandra?

Sandra White (Glasgow Kelvin) (SNP): It is. I have found something different. I am awfully glad that I am not a lawyer, a policeman or an ex-police officer. I see myself as a layperson—a punter. We have spent about 10 minutes discussing the semantics of whether people are victims or complainers, and that says an awful lot about the people—

The Convener: The ex-lawyers are sitting guffawing. It is about more than semantics, I am afraid.

Sandra White: That says a lot about why we need a bill that clarifies things for people—we can decide at the end whether they are victims or complainers. It is for people to get justice and to understand the justice system.

I was going to ask what Graeme Pearson has asked about. I have spoken to a number of people, and things have moved on as regards contacting complainers or potential witnesses, and there has been no appetite from organisations such as Victim Support Scotland for another agency, because the experience that exists could be watered down. That has been borne out in the evidence that we have received.

In relation to victims, John Finnie raised a point about child witnesses, or whatever they might be called at the end of this process. Children 1st was rather concerned regarding a minor amendment to the current arrangements whereby more children

under 12 might have to go to court to give evidence—not forced to go, which would be the wrong word; that is semantics again. Can the cabinet secretary or others clarify that point? Do you agree with Children 1st, and do you recognise its concerns in that regard?

Kenny MacAskill: We are taking that point on board. You have correctly identified the change that is being made under the bill, which will not force child witnesses to appear in court, nor will it make significant changes to the current presumption, which we believe is sensible, that young witnesses should give evidence remotely. The bill provides that, in cases where a child witness has expressed a desire to give evidence in court—that is for them—that preference is heeded, unless there is a good reason why it would be inappropriate.

We believe that the provision will give children more choice, not less, and the measure was welcomed by the Commissioner for Children and Young People in Scotland. It is a matter of building on what we already have. If there is a clear desire on the part of the child, it should be adhered to, unless there is some good reason otherwise. The court has to have the overarching right to reflect on that, however.

Sandra White: Do all children under 12 really have the capacity to make up their minds? Are they advised or helped in some way to make up their mind whether they want to appear in court?

Kenny MacAskill: In my experience, we have moved on a long way from when I appeared in courts, when the method of dealing with a child witness was for the sheriff to sit in the sheriff clerk's chair and take his wig and gown off. Tom Welsh and his predecessors at the Judicial Studies Committee moved on from that. Efforts have been made by the Scottish Court Service to ensure that any child understands the where, the what and the how, and that arrangements are in place to provide for them. The courts are now much better briefed about the understanding of a child and on how to decide whether the child should be able to give evidence.

Sandra White: I might come back later—but on a different issue.

10:45

Alison McInnes: I want to pursue this further because, as far as Children 1st is concerned, the issue is capacity and whether children understand what they are submitting themselves to when they say that they might want to be in court to give evidence instead of giving it remotely. Are you aware of any other jurisdictions where children under 12 give evidence directly in court?

Kenny MacAskill: I am not aware of any such comparisons, but my colleagues might be able to help me in that respect. I can say that the current presumption is that, in trials that concern certain offences, children under 12 will give evidence away from the court building, but what we are talking about is a minor amendment that seeks to place greater weight on the child's views. For example, they might wish to give evidence in court to avoid being separated from a parent. Of course, in addition to the presumption that I mentioned, the judiciary has a role in making such assessments and being cognisant of the child.

Alison McInnes: Although I am sure that the provision is well intentioned, I seek some assurance that research, perhaps on the longer-term impact of appearing in court, was carried out before you chose this option. If there is no such research, will you be able to carry some out in the run-up to stage 2 to further inform the debate?

Kenny MacAskill: We are happy to provide the information that we have, but it is fair to say that this has not been done without its being discussed by my officials, the children's commissioner and the children's charities. The provision is based on the best evidence about appropriate methods that has been built up over many years from all those involved with children.

Alison McInnes: I do not have the *Official Report* with me, but my recollection is that Children 1st was surprised by this measure and felt that it had not been consulted on it. I would certainly be grateful if you could provide the information that you have.

Kenny MacAskill: We will do so.

Roderick Campbell (North East Fife) (SNP): Good morning, cabinet secretary. I have a number of slightly unrelated questions.

First, do you have any thoughts on evidence from police representatives—the Association of Scottish Police Superintendents and the Scottish Police Federation—and written evidence from the Faculty of Advocates that consideration be given to extending restitution orders to others in the emergency services, not just policemen?

Kenny MacAskill: We have not ruled that out. The overwhelming majority of those in the uniformed services who suffer assault tend to be police officers, but I am aware that dreadful incidents also happen to others.

The point is that the police already have an organisation to which they can go. I do not preclude considering this particular suggestion, but I do not want to create a system in which the administrative costs and burden of running it outweigh any benefit. After all, courts are also able to hand out compensation orders. I think that we

should proceed with the police, who tend to comprise the majority of victims, who are already in a situation in which individuals can make a contribution and to whom we can provide treatment and restitution. I am happy to look at other issues in due course but I do not wish to burden certain organisations by establishing a system in which the running costs would outweigh the benefit to the individual who had suffered.

Roderick Campbell: Before I move on to my next question, I should refer members to my entry in the register of interests as a member of the Faculty of Advocates.

Do you have any views on the suggestion made by the Faculty of Advocates that, particularly with regard to the introduction of sexual history in section 275 applications, consideration be given to the participation of the victim—or the alleged victim or whatever they might be called—in that process and the possibility, I suppose, of that victim receiving legal advice?

Graham Ackerman: The issue has been raised both by the faculty and fairly recently by Rape Crisis Scotland. We are open to receiving further detail from them on the proposal; I certainly think that we need a bit more clarity about the role of legal representation in the process and whether it would, as you have suggested, be limited to those application hearings.

Roderick Campbell: I suspect so, but I do not want to speak for the Faculty of Advocates on that point.

Graham Ackerman: Quite.

Roderick Campbell: Has there been any academic review of the use of special measures to date and whether the best evidence in that respect has been given?

Graham Ackerman: No extensive research has been carried out on special measures in Scotland. A report published in 2008 covered the initial implementation phases—in other words, the year before and the two years after the introduction of the Vulnerable Witnesses (Scotland) Act 2004—and found that the act had raised awareness of vulnerability and had led to increased use of special measures to help vulnerable witnesses. However, the main point that it highlighted was a lack of data about the number of special measures being used and their effectiveness. Indeed, I think that that is probably still a bit of an issue.

Roderick Campbell: Do you have any further comments, cabinet secretary, on the reasoning behind closed courts being used as a special measure and ruling out the accused's right to be treated as vulnerable?

Kenny MacAskill: The court already has powers and rights to address the challenges that face those who are accused. The bill seeks to improve matters for victims and witnesses. If people have thoughts about changing the scales of justice or changing what we should be doing, I would be happy to consider them, but we already have methods for alleviating some issues for the accused. I think that the matter would best be considered separately.

Jenny Marra: I have two questions, one about the families of victims and one about witnesses.

Over the past few weeks, we have been aware from what we have read in the press and from what we have heard in the chamber of issues to do with witnesses coming to give scientific evidence. If there is a better understanding of witnesses giving scientific evidence among the jury, the judiciary and the prosecution and defence lawyers, justice is better served. A number of proposals have been made to improve the understanding of scientific evidence and the procedure for scientific witnesses in courts. Would the Scottish Government consider lodging an amendment to the bill to provide for the accreditation of scientific witnesses in courts?

Kenny MacAskill: Procedures are already available in courts to deal with any doubt or dubiety. I put on record my gratitude to the Lord President for taking a bold and appropriate step to clarify matters in that regard. Our position is that the legislative basis is already in place to ensure that we get the correct balance. I will be meeting the Lord President tomorrow, and we will doubtless be discussing the matter. The system already exists: we have procedures through which such matters can be tested if that is desired.

Jenny Marra: The feeling among the experts is that the current procedures are not sufficient to improve the understanding of scientific evidence in our courts. The English Law Commission has considered the matter recently, and the Scottish Law Commission might wish to consider it, too.

My specific question is about an accreditation process, which I do not think would have any resource or budgetary implication, but which would be a good measure in giving courts, prosecution and defence lawyers and the public confidence in the scientific evidence that they hear. Would the Government consider having a simple accreditation system for scientific witnesses under the bill?

Kenny MacAskill: If you want to specify who would accredit and on what basis, and who would staff the organisations that would be necessary to provide the accreditation, I would be more than happy to consider the proposal.

However, there are criminal procedures whereby, if there is any doubt or dubiety over a witness's competence or capability, evidence in

that respect can be led. We already have that provision. I do not think that additional bureaucracy is necessary, although I am happy to take on board any thoughts that you may care to send me.

Jenny Marra: This is more of a pre-emptive suggestion. If the accreditation is there, we would hope that things would not reach the point that you are talking about at which procedures have to kick in, which takes up more of the court's time.

Kenny MacAskill: That is why sheriffs and judges often have to sit with lay advisers in the course of their inquiries. Judicial knowledge tends to be legal, not scientific. I am open to suggestions about how someone in the judicial system with a lifetime's training in law would be qualified to decide whether or not somebody was an expert in a scientific field in which the judge had no knowledge. Some organisation would have to deal with that.

Normally, the witness would be put to the test by going through the evidence of their qualifications and what they have done. That is how we deal with that under the current system. We can pre-empt such issues and deal with them under the existing procedural systems if there is any doubt or dubiety over the individual's competence.

Jenny Marra: You have hit the nail on the head: there is not sufficient understanding of scientific evidence among the judiciary. One of the proposals that I put to the First Minister was to have scientific advisers in the court. If you would be open to consider such a measure, that would be very welcome.

Kenny MacAskill: I am happy to consider the cost.

The Convener: Would that fall within the purposes of the bill? It is described as

"An Act of the Scottish Parliament to make provision for certain rights and support for victims and witnesses".

It could be argued that such measures would be a support, but I am not sure.

Kenny MacAskill: I will be seeing the Lord President in the course of our normal catch-up sessions and meetings. I am grateful for the steps that he has taken. I am happy to engage with the Lord President, and I am also due to engage with Professor Sue Black when she is back, and I have been in correspondence with her.

Jenny Marra: Thank you, cabinet secretary. To clarify, convener, I am not raising the matter spuriously—I have taken some legal advice and I believe that such measures may be competent under the bill. We can investigate it on that basis.

The Convener: I was just taking my own legal advice—it may or may not be within the purposes of the bill.

Jenny Marra: I turn to an issue concerning the families of victims. We heard evidence last week from families of people who died in road collisions and fatal accidents. A campaign group is seeking to have a right to get information from the police and the Crown Office enshrined in the law, which an amendment to the bill could cover.

We understood from the evidence that was presented last week that families have a right to such information under the current guidelines. In practice, however, they are not receiving it, and they are not being told that they have such a right. Would you consider giving comfort to families that want the information—not all families do—by enshrining in the bill a right to receive such information on request?

Kenny MacAskill: I put on record my tribute to Margaret Dekker and her colleagues in Scotland's Campaign against Irresponsible Drivers, who have done a remarkable job in raising the issue and in pressing the Administration in which I serve and previous Administrations. I am grateful for that.

The Crown Office and Procurator Fiscal Service releases investigation documents to bereaved families who request them, unless criminal proceedings are on-going and could be prejudiced by the release of the documents. In those circumstances, release is delayed until the trial is concluded. You correctly point out that some families do not wish to receive such information.

We think that the balance is probably right, but we are happy to discuss with the Crown Office and Procurator Fiscal Service whether further measures can be taken. We do not believe that it is necessary to have a statutory right, as the Crown Office already releases documents. However, I am happy to discuss the matter with the Crown Office and to come back to the committee with its views.

Jenny Marra: I will press you on the matter. We discovered in evidence last week that the Crown Office does not in fact release the papers, and not enough information goes to families to tell them that they can request the information. The right that could be enshrined in law would give them that protection and allow them to make such a request. Would you consider that for those families?

Kenny MacAskill: I am happy to engage with the Crown Office to ensure that the appropriate level of information is given whenever possible. There are things that the Crown Office correctly disseminates. Sometimes the information and the evidence include distressing photographs of the deceased. We would not wish to send somebody

such pictures in a large pile of documents in accordance with their statutory right, and I do not think that that is envisaged.

As I say, I am happy to engage with the Crown Office, although I do not believe that a statutory right is necessary. I have no doubt that there may be further improvements that the Crown Office can and should make, and I am happy to liaise with it and then return to the committee. We have to take into account the rights of the accused, so that a trial is not prejudiced, but we should use common sense: before information goes out, it should perhaps be screened to ensure that it is not horrific and distressing for families.

John Lamont: I believe that the victim surcharge will apply to all offenders who are given a fine. Most of the victims groups from which we have heard evidence have welcomed the measure, which is a positive move. Who will be responsible for collecting the surcharge? How will the cabinet secretary ensure that the existing backlog of uncollected fines is not just added to?

11:00

Kenny MacAskill: I know that, sometimes in Scotland, people prefer the glass half empty to half full, but the court fine collection rate is 86 per cent—the committee has had assurances from Cliff Binning on that. We expect that the matter will be dealt with by the sheriff court service and that the service will do an outstanding job in collecting the surcharge, as it seeks to do in collecting fines. There are people who are reluctant to pay, but with good support and willingness and with further information now becoming available—I pay tribute to the Department for Work and Pensions on that—I think that matters will get better.

John Lamont: How much is owed in uncollected fines?

Kenny MacAskill: I do not have that information before me. However, as I said, we are at an 86 per cent collection rate.

John Lamont: That was not quite what I asked about.

My next question relates to automatic early release. The bill provides for information to be given to victims and gives them a role to an extent in the sentencing of offenders. One of the great frustrations that I hear from a lot of people—from my constituents—is about the practice of automatic early release. I am conscious that the Scottish National Party has had two election campaigns in which it has made a commitment to abolish automatic early release. Do you see the bill as a missed opportunity?

The Convener: Automatic early release is not covered in the bill, but never mind.

John Lamont: That is my point. Do you see the bill as a missed opportunity to abolish automatic early release?

Kenny MacAskill: No. The bill is a welcome opportunity to improve matters for victims and witnesses. I am aware of the long-standing issues relating to automatic unconditional early release, which was of course brought in by a Conservative Administration long before we even came to power.

We will look to work through those issues as and when appropriate in criminal justice bills. We prefer to keep our focus in the bill on those—too many people—who for too long were perhaps viewed without the respect that they were entitled to until, as I mentioned earlier, Elish Angiolini and Frank Mulholland drove matters forward, and they are the victims and witnesses of crime.

John Lamont: To clarify what you just said, is that a commitment to bring forward abolition of automatic early release in other criminal justice bills that are coming before Parliament in this session?

Kenny MacAskill: We have a manifesto commitment. We are also building on Henry McLeish's advice that automatic early release could not be addressed until prison numbers were reduced. However, we are considering matters, and we always look to ensure that Scotland is as safe as possible. We have inherited the Conservative Administration's policy of automatic early release from many years ago, but we are happy to discuss the issue. I have just signed off a letter to your party leader about it and I am happy to engage in such questions.

The Convener: I have no doubt that the party leader will share the information with Mr Lamont.

To return to the bill, section 5 is an important section that deals with certain sexual offences that are specified in section 5(5) and with the victim's right to specify the gender of an interviewer, which is, as my old history teacher used to say, a good idea. However, that will not always be practicable. Section 5(4) states:

"The investigating officer need not comply ... if ... it would not be reasonably practicable to do so."

In rural areas and so on, how possible will it be to put that right into practice, given the logistics in certain crimes of taking evidence early? How possible will it be to have an officer of the appropriate gender—or even culture—present to take evidence?

Kenny MacAskill: Obviously, that is fundamentally a police matter. However, one of the significant benefits of the single service is that we can move towards having a national rape investigation unit, which is long overdue. We have

a specialist crime division that has divisional areas, so the expertise is there. There is a consciousness that it is not just desirable but, quite often, necessary for a victim to be able to specify the gender of an interviewer.

There may be instances when that is not possible, but I think that they will be few and far between, because the police are working on the basis of ensuring that they have ready access. The first person on the spot may be a police officer of a different gender from that specified by the victim, but the single service, the establishment of a national rape investigation unit and the specialist crime division will allow the police to provide at a very early juncture the appropriate person with the relevant skills and the gender of choice.

The Convener: What you say sounds reasonable. Section 5 relates to interviews, and Rape Crisis Scotland, for example, wants it to be extended to forensic examinations. Would you be prepared to do that?

Kenny MacAskill: I am happy to look at that. Some such matters are more than one step removed. I cannot direct the police in such investigations—only the Lord Advocate can do so—and, simply going on my discussions with the police, I believe that police surgeons, who are one step removed from the police, would be involved in such procedures. However, we have seen a culture change and the recognition that questions such as who examines and investigates a person and how they do so matter.

I can certainly give you an assurance on behalf of Police Scotland and police surgeons that we will ensure that, whenever possible, we all work together on providing such support. After all, the process is traumatic, and anything that can be done to reduce distress will be important.

The Convener: So it might be possible to amend section 5 to extend its provisions beyond interviews to examinations.

Kenny MacAskill: I am happy to look at the suggestion, but the question is whether we need to amend the bill or whether we simply need to ensure that, with proper guidance, such practices happen. No one whom I am aware of who deals with such matters in the police, the Procurator Fiscal Service or the health service will want to compound the agony of the individuals involved. We want to ensure that there is flexibility to deal with any dreadful incident that might arise and that, no matter the shift pattern, the locality, the geographical element or whatever, people immediately know that they should ask the victim, "What can we do for you?" If the victim says that they want a doctor of a specific gender, we should seek to provide that doctor.

The Convener: Does Sandra White have a supplementary?

Sandra White: I am going to ask about compensation orders, convener. I tried to get in earlier when Rod Campbell mentioned the issue, but the questioning moved on.

Scottish Women's Aid has expressed concern about compensation orders. It suggested that victims should have a right to refuse such orders and that, if a compensation order was granted in a rape trial, the victim might then suffer distress from being in contact with the accused. Can there be flexibility to ensure that victims' views are taken on board before a compensation order is granted?

Kenny MacAskill: Absolutely. If someone did not want a compensation order because it might rub salt in the wound, it should not be granted. We will ensure that appropriate guidance is given and action taken.

Sandra White: Thank you.

The Convener: I hate saying, "As there are no more questions, we will move on quickly," because as soon as I do so someone puts their hand up.

As there are no more questions, we will move on quickly. I thank the witnesses for their attendance at what has been a comprehensive question-and-answer session.

Subordinate Legislation

Police Service of Scotland (Amendment) (No 2) Regulations 2013 (SSI 2013/125)

11:08

The Convener: The next item of business is consideration of a Scottish statutory instrument. The regulations, which are subject to negative procedure, make corrections and clarifying amendments to various regulations that set out conditions of service for members of Police Scotland. The Subordinate Legislation Committee draws the regulations to Parliament's attention on the ground that they should have been issued free of charge, in accordance with the Scottish Government's policy on issuing purely corrective instruments. If members have no comments on the SSI, are we content to make no recommendations to Parliament on it?

Members *indicated agreement.*

Annual Report

11:09

The Convener: The next item is consideration of the committee's draft annual report, which summarises its work over the past parliamentary year. Members might wish to note that the report has a prescribed format and word limit—I think that we are being told not to touch it—but does anyone have any comments? Roddy Campbell is pulling a face that suggests that a comment is coming.

Roderick Campbell: I had not realised that there was a prescribed word limit, which is probably why paragraph 40 on human rights seems a bit perfunctory and could be worded better. If there is a word limit, I will withdraw the suggestion.

The Convener: Thank you very much.

Jenny Marra: Did we not have a round-table session on the speech and language needs of prisoners, convener?

The Convener: Yes.

Jenny Marra: Perhaps we should refer to that and note the committee's concerns about the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. Obviously, that was passed outwith the period that the annual report covers, but questions have certainly been raised in committee about how the act has operated in practice.

The Convener: The problem is that we have not done any work on that matter. The report covers our actual work; we simply discussed and sent out correspondence on the issue that you have raised. However, you have put the point on the record. The issue will be covered in next year's report.

11:10

Meeting continued in private until 12:40.

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