The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 23 April 2013

Session 4

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JUSTICE COMMITTEE
12th 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:

Heather Baillie (Parole Board for Scotland)
John Lamont (Ettrick, Roxburgh and Berwickshire) (Con) (Committee Substitute)
Peter Lockhart (Law Society of Scotland)
Murdo MacLeod QC (Faculty of Advocates)
Colin McConnell (Scottish Prison Service)
Professor Alan Miller (Scottish Human Rights Commission)
John Watt (Parole Board for Scotland)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 23 April 2013

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

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning and welcome to the 12th meeting in 2013 of the Justice Committee. I ask everyone to completely switch off mobile phones and other electronic devices as they interfere with the broadcasting system even when switched to silent. Apologies have been received from David McLetchie, to whom I am sure we send our best wishes, and John Lamont is attending as his substitute.

Agenda item 1 is a decision on whether to take in private item 5, which is consideration of our work programme. As the programme itself is comprehensive and scarily lengthy and as we will be discussing potential witnesses for giving evidence, I would like the clerks to be able to contribute. Do we agree to take the item in private?

Members *indicated agreement.*

Victims and Witnesses (Scotland) Bill: Stage 1

10:01

The Convener: Agenda item 2 is our second evidence-taking session on the Victims and Witnesses (Scotland) Bill. I welcome the first of our two panels: Peter Lockhart from the criminal law committee of the Law Society of Scotland; Murdo MacLeod QC from the Faculty of Advocates; and Professor Alan Miller, chair of the Scottish Human Rights Commission. Thank you for coming and for your written submissions.

I do not want to single you out, Professor Miller, but I am advised that you have to leave at 11 am to give evidence to the Education and Culture Committee. You are a busy bee. As a result, if members have any questions specifically for Professor Miller, they should ask them before 11. Of course, we can if necessary go on a bit longer with the other panellists. This panel will focus on the balance of rights between the victim and the accused, but we are not limited to those issues—heaven forfend I should try to limit members in that way.

With that, I seek questions from members.

Roderick Campbell (North East Fife) (SNP): Good morning. I should first declare an interest as a member of the Faculty of Advocates and as someone who has worked with Murdo MacLeod in the not-too-distant past. What are the panel's views on the definition of "victim" in the bill? How should that term be defined?

The Convener: I should say that if the witnesses look up, I will pick them out. The microphones come on automatically.

Professor Alan Miller (Scottish Human Rights Commission): The term "victim" has been defined very much in the context of criminal justice. I note that, as far as international human rights are concerned, the definition would be broader than that in the bill and would include victims of human rights breaches that might or might not be the result of criminal offences against them. For example, the commission has been very much involved on behalf of survivors of historical child abuse. Some of those instances amount to criminal activity against residents in care homes; although other instances will not amount to criminal offences, those people will still be victims in the sense that everyone will understand.

My only comment, therefore, is that the definition of "victim" is contextualised in the criminal justice system and is not as broad as the definition under international human rights.

Murdo MacLeod QC (Faculty of Advocates): I urge a note of caution with regard to the definition of "victim". As the faculty's written submission makes clear, a victim should be called a victim only when a person is found guilty at the end of a trial. That said, I think that under the Criminal Procedure (Scotland) Act 1995, which dictates criminal procedure, the use of the term comes in only at that point.

Beyond saying that great care must be taken in using the term "victim" in an emotive sense, I have no comment to make. I am more interested in the debate on vulnerable witnesses and the provisions that apply to them.

The Convener: I have no doubt that we will come to that debate.

Peter Lockhart (Law Society of Scotland): I endorse my colleagues' comments and note that the point made by the Faculty of Advocates is good and valid.

As for the definition of "victim", I have to say that as a solicitor practising at the coalface I would not really want to take on the task of drafting legislation. However, as we say in our submission, it is important that we have a full, clear and unambiguous definition that people can understand.

The Convener: Does anyone have a supplementary on that?

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I have a question for Mr Lockhart on how the bill defines the term "victim". I acknowledge what you say about not being a bills drafter, but could you or the Law Society provide us with a bit more clarity or certainty about how you think that the bill's definition of "victim" could be improved?

Peter Lockhart: I am sure that we could attempt that, although I would not like to do it today as it is not an area in which I have practice. We would be happy to work with the Government to try to get a better definition that meets our criteria. The short answer is yes, we could.

The Convener: We look forward to amendments being lodged from some direction.

Alison McInnes (North East Scotland) (LD): I want to focus on the bill's provisions on vulnerable witnesses. You will be well aware that the bill will extend the categories to which special measures can apply and extend the child witness definition to all those under 18. I would like the panel to explore in detail whether the balance of rights between witnesses and the accused will be properly achieved by the provisions in the bill.

Murdo MacLeod: It is perhaps self-evident, but it bears repeating that an inevitable consequence of the adversarial process is an on-going tension between the Crown trying to secure a conviction and the defence trying to secure an acquittal. For years, the alleged victims, complainers or vulnerable witnesses have fallen into the middle ground and have been largely overlooked in the process.

Developments have been far reaching in the past 20 years or so, triggered by a Lord President or Lord Justice General's practice note in the early 1990s, which suggested, for example, that wigs and gowns should be taken off when children give evidence. That was the springboard and the 1995 act sets out the further special measures that are required. Those have been modified over the years, through the Vulnerable Witnesses (Scotland) Act 2004 and so forth.

Of course, there are mandatory special measures for children, the continuation of which the faculty agrees with. The faculty also agrees with the proposal that the age of a child should go up to 18, in accordance with the United Nations age of majority and many other jurisdictions, and because in certain crimes, such as human trafficking, it is obligatory. That mirrors Lord Carloway's proposal for accused people: he suggests that the rights that are afforded to children be extended to those up to the age of 18.

However, the current provisions draw a line there and stipulate that an application has to be made for special measures to be applied to other witnesses. Currently, judges study carefully the factors in those applications in determining whether that is appropriate. One of the factors, I have to concede, is the nature and circumstances of the alleged offence, but there are other factors such as the nature of evidence that witnesses are likely to give, the relationship between the accused and the complainer or alleged victim and so forth. It is a careful exercise that is carried out by the judge.

In my experience—Peter Lockhart will be able to confirm the experience at his coalface—it is routine for such applications to be granted. The defence looks carefully at them, takes instructions from its client and routinely, 90 to 95 per cent of the time, they go through on the nod, as it were. The question is whether the measures should be mandatory.

I may be wrong about this—I am sure that the committee will tell me if I am—but I have not seen any evidence to suggest that the current system, whereby the judge makes that determination, is not working. I think that it is estimated that these special measures will be automatically available to 18,000 witnesses, which we are concerned about. The reason for that concern, which is self-evident, is that the interests of justice, in terms of a fair trial for the accused and of allowing the jury to assess

a witness's demeanour—a very important function—are greatly assisted by having the witness present in a courtroom. That should always remain the presumption, in our opinion, and should be departed from only when a judge says so or in response to an application having been made.

In short, we are not satisfied that there is enough information or evidence to necessitate a departure from that test at present.

Peter Lockhart: I agree with all of that. Again, I am not entirely sure why the provision is being extended to domestic abuse and stalking cases, for example. Under the present legislation, if there is fear and distress on the part of the witness, there is vulnerability, and measures would be put in place. My experience is that in some, although not all, domestic abuse cases, applications are made by the Crown in relation to either the complainer or, for example, children who will be giving evidence. I would say that, in my experience, almost 98 per cent are granted. I cannot think of a single example in which an application has been placed before the court and has been refused. If that is the case, I wonder why we have to extend the provision.

It is not entirely clear to me how the proposal will work, from a practical point of view. I presume that, if it is automatic, there would be no need to lodge an application or a notification.

One of the difficulties that exist at the moment—I have seen this in quite a few domestic cases—is that the application will be framed based on information that has been supplied via the Procurator Fiscal Service. There is a statement to explain why there is vulnerability and why special measures are necessary. Sometimes, from the accused's point of view, damaging points are made in that application that go to the character of the accused, if I can put it that way.

I normally go through the notice with the client. In a recent case, the client said to me, basically, "I am hung, drawn and quartered before the judge has even heard a single witness." Therefore, if the proposal means that the use of special measures would be automatic and there would be no need to lodge a notice, that might be something that we would welcome.

We welcome very much the fact that there is a right to object. We think that that is an excellent provision. I anticipate that there will be some cases—although not many—in which the use of special measures will become a live issue in a trial, and the defence will raise an objection.

It appears that, increasingly, the Crown is prosecuting domestic abuse cases in the justice of the peace court. I am not convinced that that is necessarily the best forum for that. However, putting that aside, the fact is that some of our JP courts are not equipped to operate television links and other special measures. That might need to be considered.

Professor Miller: The Scottish Human Rights Commission broadly supports the bill and recognises that achieving a balance between the rights of witnesses and the rights of the accused is not easy. However, if you take a step back and consider the provisions in the bill from the point of view of the justice system as a whole, you can picture the system as a pyramid. The bottom two corners of the pyramid are the right of the accused to a fair trial, and the public interest in effective investigations and prosecutions and in the rights of victims and witnesses in that process being properly addressed. The apex of the pyramid is an independent and impartial judiciary, on whose ability we rely almost entirely to ensure that that balance is struck on a case-by-case basis.

My suggestion, therefore, is that you should ensure that you are satisfied that there is nothing in the bill that undermines the role of the court and its capacity to make decisions on cases in a way that will strike that balance. Ensuring that there is the capacity to object and for a hearing to take place when an application is made is a critical way in which the bill can ensure that that balance is maintained.

10:15

Alison McInnes: Murdo MacLeod and Peter Lockhart said that 95 or 98 per cent of applications were granted. Women's Aid argues that if that is the case, witnesses have certainty about how they will be handled as they go into the court process. It argues in favour of the automatic right to special measures. Victim Support Scotland has said that its "greatest concern" is the right to object; it is very worried about that. Do we want to consider that issue further?

The Convener: You have just taken up John Lamont's supplementary question. That does not matter—he has waived his right. He had to, as you have made the point. Who wants to deal with the concerns of the victims organisations?

Murdo MacLeod: The faculty is fully aware of victims' concerns, which were expressed very thoroughly in their responses. The faculty has gone further than other organisations in suggesting that consideration be given to further representation for victims in particular instances, such as when there is a request to look through their medical records. Currently, victims have no way of participating in that process. On the matter of section 275 of the 1995 act and applications to explore sexual history, the faculty suggested that

consideration be given to introducing the participation of victims.

On Alison McInnes's primary point about objections, the Government has perhaps got itself into a bit of a pickle. David Harvie from the Crown Office gave evidence about that. If the measures are mandatory, why should there be a right to object? My answer is that the measures should not be mandatory; that would be a solution to the conundrum. As Alan Miller said, the judge is best placed to adjudicate on the respective submissions and to come up with a subjective decision. There is a right of appeal contained in the objection. That seems to be perfectly sensible. In my respectful submission—although I have given evidence myself and it can be a terrifying ordeal—we should have faith in judges to make those decisions, rather than make the measures mandatory. We are talking about 18,000 witnesses who will be given the automatic right to those measures. In our submission that right should not be automatic, but left to the judge.

Alison McInnes: We can all think of people who would benefit from the special measures. Can you help us by giving any examples from real life in which objections have been made and upheld and people have had to give evidence in open court without any special measures?

Murdo MacLeod: I have no examples from my personal knowledge. However, as Peter Lockhart suggests, up to 98 per cent of the time the applications go through anyway. The point is one of principle, or rather, a little more than that. There might be a case in which the application is not well founded; it is up to the judge to determine that.

With child witnesses, it is self-evident that the child is a child. One is not looking at the class of case; that is just one of the factors that a judge should be entitled to look at. If we extend that objective test—that the child is a child—to classes of crime we will stray into a difficult area. There can be many classes of crime in which a victim, or an alleged victim, or a witness, is quite capable of giving evidence. Another way of looking at the issue is that in some cases applications are not made. That is presumably so for quite a few of the cases. We are wary therefore of giving a blanket right to the proposed measure.

The Convener: The matter of cases held in camera has not been raised. As I understand it, that can also protect the accused. Does that have any interaction or relevance here—can holding cases in camera assist the accused, if I may put it like that?

Peter Lockhart: As we mention in our submission, we need to be careful about going down the route of conducting trials in private. There are occasions when that needs to be done, but the judge should make the decision. The difficulty is that, particularly in domestic cases, there might be family members who are caught up in the case—not in the sense that they are witnesses, but because there is a domestic situation within the family—who will want to be able to hear and see the evidence, so I have concerns about that.

The other factor—again, we mention it in our submission—is that, with the use of videolinks, we wonder why it would be necessary to conduct the trial in private, because in effect the witness is not in court and does not know who is there. However, I am not sure that that necessarily answers your question.

I want to pick up a point that Murdo MacLeod made. From a defence point of view, I cannot give you a specific example of a case in which I or another practitioner in the court that I practise in has been successful in challenging the use of special measures. That is very rare. Although we welcome the right to object, I envisage that it will be difficult to satisfy a judge with a valid objection, particularly where the case falls into one of the mandatory categories. I am not sure what type of argument could be put forward to challenge the use of special measures.

The Convener: Presumably, you might say that the case is not a domestic abuse case. Would that not be an example? Domestic abuse cases are a mandatory category, so if you believed that the case was not a domestic abuse case, that could be an argument.

Peter Lockhart: Well, yes. That is an interesting point. That might be an argument. I do not know. Domestic abuse now covers quite a wide area.

The Convener: I just thought that I would throw that out.

Peter Lockhart: Yes. That is a possibility.

The Convener: It is obvious what a child is, but what a certain case is might not be obvious to one of the parties.

Roddy Campbell has a question about objections.

Roderick Campbell: It is just a technical point.

Murdo MacLeod: Convener, may I make a point on the issue of victims?

The Convener: Yes. I beg your pardon.

Murdo MacLeod: It is not really for the faculty to say, but I wonder whether the process that is envisaged in the bill might build up expectations on the part of vulnerable witnesses and complainers. They will hear that special measures will be mandatorily granted to them, but an

objection might come in later on and the thing will be ventilated again. Might it not be better to have an application and deal with it there and then? At least the victim will then know where they stand.

The Convener: Thank you for that.

Roderick Campbell: Murdo MacLeod touched on where I was going, which is the timing of the vulnerable witness notice and any objection. Will you clarify how late in the process a vulnerable witness notice could be served and how late in the process an objection could be made? A concern that we have heard from the victims organisations is that victims would want clarity as early as possible so that they do not have things hanging over them and do not suddenly find at the last minute that the position has changed. Will you comment on that?

Murdo MacLeod: Perhaps the obvious comment is that the matter should be dealt with as soon as possible for everyone's sake so that everyone knows where they stand. There are provisions on that, however. I do not have them to hand, but in the statute there is a seven-day period for the matter to be determined once the application is in. Lord Carloway, in the case of Dunn, suggested that the defence has the opportunity to write in to raise an objection, under the current process, once it becomes aware that it is unfolding, as it were. However, the sooner it is done, the better.

Peter Lockhart: I agree. In general terms, in summary cases, the Crown would usually have its vulnerable witness notice in by the intermediate diet, which is four weeks before the trial, so the matter is dealt with at a fairly early stage. In solemn cases, we would certainly expect the notice to be in before the first diet.

The difficulty that the Crown faces is that, under the current legislation, it will usually write to or have contact with the witnesses and ask whether they want any special measures. They do not always respond right away, and occasionally it happens that an application comes in fairly late in the process. For example, the victims, witnesses or complainers—whatever we want to call them—may have moved, or they may have lost contact with the fiscal's office. Obviously, if the measures were mandatory that would not apply because we would know at the outset that witness A, B or C had mandatory special measures and so it could be dealt with early doors.

Sandra White (Glasgow Kelvin) (SNP): Good morning, gentlemen. I want to follow on from Alison McInnes's first question, about the vulnerable witnesses provision. We have heard from previous panels that the vulnerable witnesses provision should perhaps be extended to civil cases and children's hearings. Do you have any thoughts on that issue?

Murdo MacLeod: I have no particular comment about that, but I suppose that the same principle applies in other adversarial cases. One would hope that that would be the case in fatal accident inquiries and in particular public inquiries, which are more inquisitorial than adversarial. Certainly in my experience of a lengthy public inquiry, strenuous efforts were made to ensure that the provision of evidence was made as easy as possible for witnesses. However, I am afraid that I am not an expert on civil procedure.

Peter Lockhart: I am the same; I am here from the Law Society of Scotland's criminal legal aid committee and I am a criminal defence practitioner. However, logically we would anticipate that a witness in a civil case may be equally fearful of and stressed by giving evidence, particularly in children's panels and referrals. Logically, there is a good argument for extending the provision but, as I said, I do not practise in that area.

Professor Miller: That is a very good question. The commission's experience in dealing with the frustration of the victims of historical child abuse—some of whom have had contact with the criminal system and some of whom have had contact with the civil system—is that they have found great problems in the system adapting to their situation in the way that it should. Very often their experience is that neither criminal nor civil processes are particularly fit for purpose for bringing in very vulnerable victims or witnesses to participate. It has to be recognised that, even if we take all the special measures, the process is still very fraught for someone to be exposed in the way that they will inevitably be, no matter what measures are brought into being.

Therefore, we need to look more broadly at other forms of access to justice for victims and not only in the criminal justice process or civil proceedings. That can include reparation, restitution, different forms of alternative dispute resolution or conciliation. We have to look at the system as a whole and make it fit with the circumstances of a particular individual, rather than try to shoehorn them into the system better than has been the case until now, because that is difficult. I do not think that there will ever be a perfect solution because of the different interests that are at play such as the rights of the accused and the role of the judge. We must look more broadly at access to justice for victims.

Sandra White: I appreciate your answers as a layperson who does not have as much knowledge about the law as you do. However, we are considering the bill and other panels have said that the provision should be extended.

I want to follow up what Alison McInnes said regarding the right to object. I come to the issue from the perspective of the public, as a punter, or whatever you want to call it. You say that the decision should be up to the judge but, when we speak to witnesses or victims—this is a terrible thing to say—many of them do not have much faith, not in certain judges or sheriffs but in the system as a whole.

I was interested in what was said when we talked about the vulnerable witnesses application, which Roderick Campbell teased out a bit. You said that that should be dealt with as soon as possible, that there is a seven-day notice period and that an objection could go in four weeks before the trial, although lawyers could also put an objection in whenever they feel the time is right, for example if evidence comes forward or their client wishes it. How would that work? Would it be possible for people to say that they are not going to object and then, two days before the trial, there is an objection? Could that happen?

10:30

Peter Lockhart: The short answer is yes. The bill allows for objection at any stage. Indeed, my reading of the bill is that it allows for objection even once the trial has commenced, although that would be an unusual situation. I cannot think off the top of my head of a practical example to give you. The important principle is that there should be a right to object. That is because there may be quite a gap, particularly in domestic situations, between the time of the alleged offence, police involvement and first appearance in court, and the trial. There might be a change in circumstances during that time that puts a different perspective on matters and renders the special measures unreasonable. I think that the principle is correct; we will have to wait and see how that will work in practice.

Let us assume for a moment that an objection is made and that a sheriff upholds that objection. Obviously, that might be subject to appeal by the Crown. Sandra White suggested that some sheriffs may grant the objection and some may be agin it. However, there is judicial training; presumably those questions about the judicial system could be raised then. There are other mechanisms in place and if there was a problem with the particular judge or sheriff, that could be dealt with.

Murdo MacLeod: Under section 271D, which is not going to be revoked, the judge can review the situation as it progresses. One has to have faith in judges and in the legal system. As Peter Lockhart says, there is now extensive judicial training for the fiscal service; that also applies to defence practitioners to an extent.

Professor Miller: Sometimes we can become very concerned with local or national ways of dealing with these problems. That is quite right; one of the functions of our Scottish Parliament is to oversee the criminal justice system in Scotland. However, there is broader international experience on the matter. I will read out to you the relevant United Nations declaration, which comes from the experience of a whole range of different systems. The declaration says that measures to help victims are very positive and are needed but should be facilitated by

"Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system".

In other words, that suggests that there has to be a balance. Victims' rights must be safeguarded at appropriate stages in the proceedings, but in relationship with the other interests that are at stake within a criminal justice system—the right to a fair trial, effective investigation and so on. Anything that undermines the role of the judge and the court in a specific case with all the facts in front of them is inconsistent with international best practice.

John Lamont: My question is to Mr MacLeod, on the use of a TV link to give evidence as one of the special measures. You suggested in your written evidence that research shows that evidence given by TV link is more difficult to assess and does not give the same impression in court compared with evidence from someone who is physically in the courtroom. Could you give us more information about that research, particularly in relation to the bill? The research is relevant also to the Government's proposals to close some of Scotland's courts; the proposal to use a TV link would have a wider impact than simply on the bill.

Murdo MacLeod: I am afraid that I cannot give you much more about that research. Essentially, that information is anecdotal. One of the members of the faculty recalled being told by instructors who were talking about the provision of a TV link that there were difficulties with the assessment of witnesses. I will certainly see whether we can firm that up a bit.

However, it is obvious from my submission that, all things being equal, it is better to see a witness giving evidence. For example, the issue might be whether the accused restrained a witness in a particular way, so it would clearly be better for the jury to be able to see the size of the witness, which they would be able to do only from having the witness in court. In my experience, there have also been problems with the audibility of witnesses giving evidence from the live-link centre. Another example might be the assessment of demeanour,

because a witness's look to the side in some remote room might look suspicious in some way, although it might in fact be quite innocent.

Of course, the live link can be very difficult for lawyers. If you ask any criminal lawyer, or any other lawyer involved in examining or cross-examining witnesses by means of a live link, they will tell you that it is extremely difficult to build a rapport with the witness. In my submission, it must be better in terms of the ability of the practitioner to question the witness and in terms of the jury's assessment of a witness's demeanour for the witness to be present in court. There is of course the counterbalance to that, which is the right of the witness to give TV-link evidence, which will be granted in the right circumstances. However, in my submission, the best evidence is evidence given in court.

Peter Lockhart: I agree with that view. Having done the job for more than 30 years, I know that the witness's body language, even when they come into the court, very much sets the tone. In many trials in which I have been involved, I have led a defence witness whose body language was not good and I have thought, "Oh, dear." For example, if I was not here today and you were looking at me through a television link, you would find it a different experience.

The other point that I would make is that—

The Convener: We are reading your body language very carefully—all of you.

Peter Lockhart: I am sure you are.

The other thing that I would venture to suggest is that, although we have the technology, in practical terms and on a day-to-day basis, there are quite often problems with it. For example, in the smaller courts—I practise in Ayr, where the technology is not being used every day—when a trial is using a videolink, there can be problems with the link and perhaps the technical person who operates the link is off ill and somebody else comes in to do it who does not have the same experience. I therefore think that we must improve not only the technology but the training of the people who operate the system in our courts, which I think is sometimes an issue.

The Convener: I found interesting Mr MacLeod's comment that a videolink is not always in the witness's interest, because a look might be misinterpreted.

Murdo MacLeod: There are other examples of that. For example, a witness might not like being filmed, particularly if the very nature of the crime involved filming, or the witness may prefer to see the person who is asking them questions rather than just hear their disembodied voice. Such factors would be taken into account, though, in the decision whether to grant permission for the link in the first place.

John Finnie (Highlands and Islands) (Ind): Good morning, panel. My question is for Professor Miller first and foremost. It is about oral representations by victims and families to the Parole Board for Scotland and the right of an accused to challenge them. How should that be facilitated?

Professor Miller: Thanks very much for the question, because that issue is one of the commission's concerns about the bill, which we otherwise broadly welcome. It goes back to the point that I tried to make at the beginning of the meeting, which is that it is very important that the independent and impartial sheriff, judge or Parole Board is not fettered by not being able to look at the facts of a case independently and decide for themselves what weight to give to different forms of representation that are made to them.

When a prisoner becomes eligible for temporary release or release, it is quite appropriate for information to be passed to victims and for them to make representations about their concerns or perspective. That should be part of the decision on conditions of release or on release at all. In order for the Parole Board or the appropriate body to determine how much weight to give to that information, and in order to give the other party—the prisoner in this case—the right to respond to the concerns that have been raised, which may or may not be well based, it is important that all the facts are made available to whoever is going to make the decision. If I were in your shoes, I would want some assurance from the bill and from the Parole Board—from which you will be hearing, I think—as to how to ensure a level playing field and equality of arms between the prisoner and the victim in the decision that must be made.

Murdo MacLeod: I agree in particular with Professor Miller's statement that there is scope for an accused to be unfairly prejudiced by information being passed over to the Parole Board or another organisation without their having the opportunity to respond to or perhaps challenge that information.

Graeme Pearson (South Scotland) (Lab): There are a couple of areas that I wanted to discuss with you that have not so far been covered. The bill contains a provision for certain information to be given to victims or witnesses as of right. There is a section that sets out what that information might include. Are the witnesses happy with the categories of information that would be given to victims and witnesses? Is there any information that you would wish to exclude from or add to that list? I am referring to section 3(6), on page 3 of the bill.

Murdo MacLeod: I had the opportunity to read David Harvie's evidence to the committee on the matter. As far as I understood what he said, all the information as specified in paragraphs (a) to (g) of section 3(6) is disclosed by the Crown, in any event, to the respective and relevant witnesses. The faculty has no great concern about that.

The broad difficulty in having too much interaction between the prosecution and its witnesses is that the independence of the prosecution is compromised. Although we are not saying that disclosure of the facts is particularly controversial, we are concerned about the possibility—as is envisaged in the European directive—that witnesses or complainers could essentially appeal a decision or seek for it to be reviewed, which puts pressure on the independent prosecutor.

Having said that, we have no inherent difficulty with the measures in the bill.

The Convener: I do not think that that measure is in the bill—it is something that has been proposed.

Murdo MacLeod: It is not in the bill, fortunately, no.

The Convener: I do not think that it is in the bill, but I may be wrong.

Murdo MacLeod: It is not.

The Convener: A witness suggested that people should have the right to seek a review.

Murdo MacLeod: Yes. I read the responses of some organisations. Ms McInnes and others are keen for such provisions to be in place. We hope that there is not a drift towards that in due course.

10:45

Professor Miller: From the commission's point of view, I have no issue at all with any of the paragraphs—(a) to (h)—of section 3(6). Before I became chair of the commission I ran a law practice for 15 years in Castlemilk, where I gave advice not only to those charged with crimes but to victims of crimes who had contact with the procurator fiscal system. I remember the frustration that many victims experienced because the information that will be provided under paragraphs (a) and (b) was not provided as a matter of course. People had experienced a bad situation and had co-operated with the police, but they were left hanging, without knowing what was happening. If no proceedings were taken, they felt that that was a reflection on their integrity or credibility, although there might have been good legal reasons why the evidence was insufficient.

I very much support and welcome paragraphs (a) and (b) of section 3(6)—the state has an obligation in that regard and should do better—and I have no issue with any of the other matters being part of the information flow. I understand what Murdo MacLeod said. There is a line that cannot be crossed, but what is envisaged can be done without crossing the line.

The Convener: But people should not have the right to seek a review.

Peter Lockhart: I do not think that the Law Society has any difficulty with paragraphs (a) to (h) of section 3(6). Like Professor Miller, I often find people coming into my office to seek information. That still happens, which clearly indicates that there is a need.

The devil will be in the detail, and my concern is about how the provisions will work in practice. As we said in our paper, we are moving to a single witness complaint situation, and we can envisage practical difficulties. If someone wanders into the procurator fiscal's office in Ayr and says, "I want to know what's happened to my case," will the desk clerk have to say, "Well, your case has been dropped, because we didn't believe you, frankly," or will it have to go back to a depute? Will the person have to go to the police station? The bill covers the courts too, so what happens when someone wanders into the sheriff clerk's office in Ayr and asks what has happened with their case?

There will be practical difficulties. However, a witness—and I use the word carefully—in the proceedings should be entitled to the information that is set out in section 3(6). They should be aware of what is going on. If they have made the effort to give information to the police that has resulted in criminal proceedings, they are entitled to that information, in my view. As we said, the one caveat might be that we need to define slightly better who can have that information and who cannot. For example, if the police are investigating a criminal offence in the high street and they take a statement from a person that is subsequently found to have no evidential value, and the person will not be giving evidence, is there any justification for that person to have the information? I throw that in for the committee to think about.

Graeme Pearson: There are two other areas that I want to cover. At our most recent meeting, there was a bit of a quandary about the notion of victims or witnesses participating in the investigation and proceedings. We were at something of a loss to understand what the inclusion of such a provision in the bill was meant to achieve. Do you have comments on that?

Murdo MacLeod: Mr Pearson, are you referring to concerns about the wording of section 1(3)(d)? The paragraph provides that

"a victim or witness should be able to participate effectively in the investigation and proceedings."

Graeme Pearson: Yes, that is it.

Murdo MacLeod: I am not sure why the word "effectively" is in there. If someone is to participate at all, one would hope that their participation would be effective. From my reading of the provision, I can only imagine that it means that people can effectively participate in terms of giving evidence, for example. Of course, that is best achieved if evidence can be given in an easier way. Beyond that, I have no idea what the provision means.

Graeme Pearson: Should we leave it in or would it be safer to take it out?

Murdo MacLeod: As I said, I do not know why it is in. There might be a reason, which is lost in all the paperwork.

Graeme Pearson: Should we search for the reason, then?

Murdo MacLeod: I think so, yes. Good luck to you.

Graeme Pearson: We might well do that.

The Convener: Does anyone else want to comment on that?

Professor Miller: I take the point. This might be a help or a red herring: in case law over the years the European Court of Human Rights has said that if someone is given a right, including a right to a fair trial in a criminal justice system, it should be a practical and effective right and not just something on paper that does not have much relevance. The provision might just be borrowing that language.

Graeme Pearson: Finally, I invite comment on the reference in the bill to restitution orders and a restitution fund—there is a new idea in that regard. The idea is that if a police officer is subjected to an assault, it will be within the power of the court to decide on a restitution order. I raised with the previous panel whether a conflict of interest would be involved in that, given that the police officer would presumably give evidence for the prosecution and that the police may benefit at the conclusion of the case. Am I being overly sensitive about the matter?

Murdo MacLeod: I think that you are. I have faith that police officers in particular would give evidence truthfully in accordance with the oath that they take. I have a wider point to make about restitution orders, if I may. The question is why they have been confined to police officers. The faculty states in its written submission that although

"many officers face danger on a regular basis, so do others employed in the emergency services".

For example, I have been involved in cases involving prison officers who have been traumatised by being badly assaulted in prison riots. In addition, hospital staff come in for a lot of abuse and assault, as do others. Although this is not in our written submission and police officers are not in a different category otherwise, it should be borne in mind that police officers are trained, as perhaps are prison officers, in how to respond to violence. It is part of their occupation, as it were, that they will face danger from time to time, but that is not the case for other occupations. Although this is not strictly within our remit, we thought that it might have been better or fairer to have rolled out restitution orders, if they are coming in, to other occupations.

The Convener: Would that not cause some issues with other emergency services, such as the ambulance and fire services? We already have special legislation to deal with assaults against hospital staff, for example. I do not know where you would end the list in that regard.

Murdo MacLeod: Why have a list at all? That would be my answer. Compensation orders work and are routinely granted. If it is going to be impossible to draw up a list, perhaps there is no need for a list at all.

Peter Lockhart: Graeme Pearson's point is a very interesting one, which I had not thought of.

Graeme Pearson: I am now sorry that I raised it.

Peter Lockhart: But it is a valid point. I know that sometimes in a criminal trial I may be aware that, for example, the victim has a current claim for criminal injuries compensation. I may well say to such a witness, "You have a financial interest in this man being convicted. Is that correct?" I am sure that professional police officers would be above all that, but your point is well made.

My general observations on the matter would be very much in tune with what Murdo MacLeod said about it. The police do a fantastic job, but there is a danger with restitution orders. We already have compensation orders and sheriffs impose them regularly. If there was evidence that compensation orders were not being used and that that was felt to be a problem, that could be a matter for the sentencing council and judicial training. However, that is not my experience.

The other difficulty, to be quite blunt, is "the punter", to use Sandra White's expression. The punter will not understand the difference between a compensation order, a restitution order and a victim surcharge. At the end of the day, if the punter is fined £500, as far as he is concerned he is paying £500. Whether that is made up of fines, restitution orders or whatever will be lost on him. Another difficulty will be a practical one from the

collection point of view. I think that there may be problems with that.

I very much believe in compensation orders and I think that they work. It is a good idea for someone to have to pay for their misdemeanours, particularly if that brings some restitution where there is criminal damage or personal injury. We therefore already have legislation in force and we have compensation orders. If they are not working, the question is why not.

Roderick Campbell: I want to move on to the victim surcharge. My question is particularly aimed at Professor Miller. Section 22 provides for a victim surcharge and inserts into the 1995 act a new section 253F(2), which says:

"Except in such circumstances as may be prescribed by regulations by the Scottish Ministers, the court, in addition to dealing with P in any other way, must order P to pay a victim surcharge of such amount as may be so prescribed."

Professor Miller, you are obviously concerned about the impact on the families of offenders of this provision, but the Government might be able to deal with that in the regulations. Perhaps you could comment on your concerns and how you think the victim surcharge fund should operate.

Professor Miller: Yes. The concern that we put in our submission was about getting blood out of a stone. If someone is convicted, they can be fined or ordered to pay restitution or a surcharge, but such individuals are often not of great financial means in the first place. Many of them come from families that do not have any great financial means either. You would want to ensure that the relevant court takes into account the impact on those families, particularly on the children, as I expect it would do. The particular circumstances of the offender and the offender's family background should be taken into account by the court when it is deciding what sort of financial penalty should be imposed and what the consequences of that might be on the offender and on those members of their family who had nothing whatever to do with the crime that was committed. I would hope that the relevant judge or sheriff would weigh up that sort of thing.

The Convener: Does that not happen already?

Professor Miller: Yes.

Murdo MacLeod: That happens already, convener, but the Faculty of Advocates has difficulty with the proposal, which, as we read it, says that the court "must" order the payment of a victim surcharge. The judge will have no discretion whereas they did previously.

Furthermore, the payment must be for a prescribed amount, whereas—this is mentioned in our written submission—by virtue of section 211(7) of the 1995 act, the judge or sentencer is statutorily obliged to take into account the means of the offender before imposing a fine. We are therefore concerned that the measure is regressive and potentially very unfair.

The Convener: So the line

"Except in such circumstances as may be prescribed by regulations"

is not helpful.

Murdo MacLeod: We do not know what those circumstances might be.

The Convener: No, but you have put a marker down. It would have to be tested.

That seems to be it. Do you wish to add anything that we might have missed? We are two minutes away from Professor Miller's deadline but, as he does not have anything to add, we will let him go to his next committee.

Professor Miller: Thank you.

Peter Lockhart: I have a general observation that we put into our written submission. The Law Society endorses much of what is in the bill but, as I said earlier, the devil will be in the detail and how it works in practice. I suspect that there will be funding issues and that those will have to be considered carefully. It would be unfortunate if victims and witnesses had expectations that could not be fulfilled due to current financial constraints. There is a danger of that.

The Convener: Can you be more specific about the funding issues? There is, of course, a financial memorandum to every bill.

Peter Lockhart: A lot of the burden will fall on the Procurator Fiscal Service and, to an extent, the police and the Scottish Court Service. All their budgets are currently under tight review. The bill does give an indication of the financial cost—I think that there was a figure of on-going costs of around £2 million, which is not an inconsiderable sum of money. One wonders where that will come from. Will it have to come out of other budgets? As I said, that is just a general point.

The Convener: We can raise that point with the cabinet secretary. Thank you both very much for your evidence; it is very useful. I will give everyone a five-minute break.

10:59

Meeting suspended.

11:05

On resuming—

The Convener: We are back in business and we move on to the second panel of witnesses: Colin McConnell, who is chief executive of the

Scottish Prison Service and a regular visitor; John Watt, who is chair of the Parole Board for Scotland; and Heather Baillie, who is vice chair of the Parole Board. I know that you were listening to the previous evidence. Thank you for your submissions.

The focus of this panel is on considering victims' rights in relation to the release of offenders, but we are not limited to just that aspect of the bill. The committee knows what your remits are and the questions will be within those remits.

John Finnie: I have a question for the Parole Board people. If you listened to the first panel, you will be aware of a question that I posed earlier. How do you envisage the representations that victims and families will make to you working in practice? Do you intend to share that information with the individual who is being referred to?

John Watt (Parole Board for Scotland): Yes. How we expect the process to work is that a member of the board will interview the victim, find out what they have to say, record that in writing and then check it with them. That information will thereafter form part of the dossier that goes to the prisoner. Of course, we will ensure that it has no personal information—addresses, phone numbers and the like. It will go to the prisoner, who will be able to comment on it at any parole hearing. Prisoners will have ample opportunity to know and understand what the victim is saying before the tribunal.

John Finnie: That is very reassuring.

Graeme Pearson: Good morning, panel. Thank you for coming along. My question is about the practicalities of maintaining information and passing it to victims or witnesses who have been involved in a trial. It is about the Prison Service's ability to maintain links with those who are designated to receive such information and to keep up to date with the current process with a prisoner.

Do you feel that you have effective systems that will allow you to pass on the type of information that the bill would demand? Would that information include circumstances in which prisoners are released on day release, the release of prisoners to go outwith the prison for further education or whatever and escapes?

Colin McConnell (Scottish Prison Service): I am content that the systems that we have are sophisticated enough and reliable enough to cope in the current circumstances and with the provisions that are set out in the bill.

As for the proposed changes, as I set out in our submission, we expect more victims to register with the victim notification scheme, so the demands on the SPS will undoubtedly increase. However, I am confident that we have the resources to ensure that that will work, given the projections. As a witness said earlier, we will have to wait for the test of time, but I am confident at this stage that we could cope with the demand that those changes could bring.

Graeme Pearson: Would that include day release and training for freedom and so on?

Colin McConnell: In so far as that is provided for in the bill, yes—I am confident that we can cope with that.

Roderick Campbell: In its submission, the Parole Board talks about the difficulties around raising

"false expectations on behalf of the victim that their representations will influence the ... decision on whether or not to release"

life sentence offenders when the test is

"protection of the public".

Do you have any practical advice that can be given to try to deal with that issue of raising false expectations?

John Watt: The problem lies in the basis for the Parole Board's decision, which involves an assessment of risk to the public. The input of victims of crime will tend to relate more to the original crime and the sentence. If they have something to say that bears on risk, that will be taken into account. However, victims might make their representations in the expectation that they will prevent someone from being released. We have to deal with that by ensuring that, when they are interviewed by a member of the board, they are given a full explanation of what can and cannot be taken into account. I doubt that we could do anything in advance of that point. The information would probably be irrelevant until the victim had an opportunity to speak to someone who knows the parole process and can answer their questions.

Sandra White: That comes to the nub of the issue. Obviously, as Roderick Campbell said, expectations might be too high, and you have explained that the Parole Board is there to assess the risk to the public. You said that, when the victim speaks to the Parole Board, a full explanation should be given to them. That would be done on an individual basis. Should a full explanation be written in guidelines in the bill, so people can find out what the position is, or are the issues so individual that we could not put guidelines in the bill?

John Watt: I suspect that the advice will depend very much on the circumstances of an individual case and the nature and quality of the information that a victim can give. It would be extremely difficult to write comprehensive

guidance. It would have to be so comprehensive that it would be incomprehensible—that is an oxymoron, but you know what I mean.

Sandra White: In that case, every victim who appears before the Parole Board will be given different advice. That could lead to one witness giving wrong advice to a witness in another case. How do you square that circle for members of the public who are witnesses?

John Watt: As I said, the advice will have to be case specific. I do not know how likely it is that a victim of a crime that was committed 10 or 12 years ago will talk to another victim of another crime that was committed around the same time. I suppose that there might be multiple victims in one case, who would all be seen individually and would have the circumstances in relation to that case explained to them individually. I see no other way of doing it. The advice is case specific.

Sandra White: I take that point.

I think that Graeme Pearson wants to ask a question. Sorry, convener—I am not trying to chair the meeting.

The Convener: You were, but it is forgivable.

Graeme Pearson: No doubt the Parole Board has a website. Even though many of the decisions are particular and are tailored to the circumstances of the case, I presume that you could put broad guidance on the website that would let people know what to expect. A victim who contacts the Parole Board and thinks that going through the gruesome detail of an event from—in the example that you gave—12 years previously will have some impact on the board's decision would be frustrated to learn belatedly that that information is not relevant to the decision.

John Watt: Any such information would have to be in the broadest of terms and would have to be couched in terms of future risk rather than past offending, but that could be done.

Graeme Pearson: The bill's underlying approach is to empower everyone who participates in the criminal justice system, and information is power. I hope that victims will never need to read your website but, if they do, there will be valuable information on it if you share the approach with them ahead of time. Would that not be a useful way forward?

John Watt: There is information on the website already, but I am sure that we could enlarge on that.

11:15

The Convener: When victims are being told that an offender is permanently to be released or released on licence, are they told where that offender will be released? There are dangers both ways: a victim might know that an offender has been released and might see them on the same street, or vigilantes might act if they know where an offender is. If I had been the victim of and the main witness to a really serious crime, such as assault to serious injury, what information would I be given when the offender was released from prison?

Heather Baillie (Parole Board for Scotland): If an issue was raised before the Parole Board, the board could impose a licence condition, the terms of which would be advised to the victim. For example, if there is a concern that a particular geographic area would raise the risk for the victim or in the other direction, the Parole Board can and does impose a licence condition that the offender should not enter that geographic area without the supervising officer's permission.

The Convener: It is useful to know that. The punter—let us say that I am the punter—would not necessarily know about that if they were just told that the offender was being released.

Heather Baillie: The issue is raised by victims under the existing scheme from time to time and the Parole Board addresses the situation by way of licence conditions.

John Watt: At the moment, victims have to raise the issue in their representations. There are times when it is pretty obvious that there will be a problem, and the board can take account of that.

That forms part of the victim notification scheme and the written representation that the victim submits to the tribunal for consideration. The situation can be controlled by licence conditions, breach of which raises the risk of the offender being recalled to custody.

The Convener: You say that the victim must raise the issue, but can the Parole Board address potential problems off its own bat?

John Watt: Yes, it can.

Sandra White: It is right that victims and witnesses are given opportunities to make representations. Does the panel believe that prisoners should be able to challenge statements that have been given to the Parole Board?

John Watt: Yes. If a prisoner thinks that the information provided is inaccurate in some way, it is only fair that they can bring information before the tribunal to challenge that. That is the essence of fairness.

Heather Baillie: It is important that the victim providing the statement is aware that the statement will be disclosed to the offender when the Parole Board considers the dossier that includes that statement.

The Convener: It is a difficult balance to strike. Victims know that, if their application is not successful and the Parole Board decides not to impose a licence condition, there might be retribution. I am not saying that that happens, but it is a judgment call for a victim, is it not?

John Watt: The answer is yes, it is, but the situation can be talked through with a member of the Parole Board. Obviously, there is a limit to how much advice a Parole Board member can give. However, they can at least highlight the difficulties and the issues and, if so advised, victims can then take their own advice.

We can reassure victims that we will impose whatever licence conditions are necessary to manage the risk and that those will be policed. The conditions might concern a curfew, geographical exclusion or having any form of contact with the victim. There are ways to manage the situation. Victims often say, "You can't guarantee anything," and we cannot—there is always a risk.

Alison McInnes: Victim Support Scotland has called for the bill to give all victims of crime the opportunity to give evidence directly to the Parole Board when it considers a release rather than just to a member of the board, which is seen as being an option that is once removed. What problems might that cause, if it were the case?

John Watt: The board tends to operate on consideration of dossiers. It hears evidence from witnesses only in exceptional circumstances. A tribunal hearing in relation to a life sentence will take place in a small room in a prison, with all that goes with that. If a victim were to attend, they would be in close proximity to the prisoner—again, with all that goes with that. They would be open to a form of cross-examination—we could call it questioning—by the solicitor who was acting for the prisoner or directly by the prisoner. Attending the tribunal to explain their position would expose them to all those things.

It is not the norm to have witnesses there at that point. The chair could permit witnesses to attend, but I believe that that would create a difficult position. I do not know whether the Scottish Prison Service has a view on the matter.

People are in close proximity to each other during the meetings, so I can see difficulties with the idea. Victims who knew that that would be the case might view that as a disincentive to their turning up. I think that it would be more difficult for them to get their account across in that setting. Giving evidence is always difficult. Those of us who have done it realise what a lonely place it is. It is not a nice place to be—Mr Pearson can tell you that.

The Convener: I hope that we are being kind to you and that you do not feel that you are in a lonely place at the moment, even though you are giving evidence.

John Watt: This is not a lonely place to be, but a witness box can be, when someone is under examination by a solicitor. With the best will in the world, someone's message can become distorted. My view is that the best way for someone to set out their position is in writing. I appreciate Victim Support Scotland's position, but I do not agree with it.

The Convener: Mr McConnell, do you want to comment from SPS's perspective?

Colin McConnell: From an operational perspective, if the proposal were included in legislation, SPS would accommodate it. In most circumstances, it is just about making things work and building in the best protections possible. My only observation is that the proposal would add a level of complexity, but not to an unmanageable extent.

Graeme Pearson: I presume that the increased complexity, as well as being challenging, would have a cost attached to it, because one would need to cite witnesses to come to the prison and would need to make arrangements to manage that process. I am not saying that that means that one would judge that the measure was not desirable; I am just saying that there would be a financial impact.

John Watt: A cost would be associated with the measure.

As I am talking, I am thinking about the disconnect with criminal proceedings, in which we would probably do our best to keep the victim, the accused and their associates separate. Getting to a point at which we actively put them together—

Graeme Pearson: In a very small room.

John Watt: Yes. That does not seem to be logical. An expense would be involved but, if the Government decided to act in that way, we would find a way to deal with it.

Heather Baillie: The hearing would be after a considerable time. If we are talking about people serving life sentences, the consideration of their case for release takes place after the punishment part, and an average punishment part is in excess of 10 years. That would be a factor as well.

The Convener: Do not go back to the punishment part and the other part, because that left us with scrambled eggs for brains.

Graeme Pearson: I have a practical question, which the Parole Board might be able to answer. When you receive a file concerning the parole of a prisoner who has spent a decade in jail, what

practical steps are taken to ensure that the right people are informed that parole is in the offing, so that they can be given the opportunity to give evidence? Are there papers in the file that list the people who, 10 years previously, said that they wanted to be included in the process, or does someone review the file and select people who, in their view, need to be informed? Is there any difficulty in finding those people a decade later?

Heather Baillie: Victims are registered as part of the existing scheme.

Graeme Pearson: So they apply.

Heather Baillie: Yes. If they register under part 1, they are advised by the Scottish Prison Service of the decision that has been reached. If they register under part 2, they are given more information. They are told in advance—

Graeme Pearson: I am sorry. When you say part 1, what do you mean?

Heather Baillie: I mean part 1 of the victim notification scheme.

Graeme Pearson: Does that apply at the time of conviction?

John Watt: It comes immediately post-conviction. Intimation goes from the fiscal service to the prison, and the prison manages it thereafter. There are two aspects, which relate to the stage of release. Under part 1, an individual can opt to be informed of certain stages of release, and part 2 is an extended version that goes up to parole. In our papers, there will be a victim notification scheme notice that says that the victim has been given an opportunity to make representations to the tribunal. If representations come in, we have up-to-date details from the victim as part of the dossier. That is how it works.

Graeme Pearson: Given the change in approach, although a victim might have decided that they had had enough and thought, “He’s gone into the blue yonder and I want to forget about it,” they might have a different view eight years later. What if they found out by accident that a parole hearing had occurred and they were not informed of it? I know that we cannot manage every outcome, but the question is whether people should be registered in any case so that they are informed as a matter of right, or whether only those who apply to be registered should be informed.

The Convener: I was just thinking that, if the scheme was mandatory, it could be counterproductive for someone who wanted to forget all about a case.

Graeme Pearson: Indeed. What are the witnesses’ views?

John Watt: I have not really applied my mind to the issue, but it is difficult to see why people should proactively be drawn back into things that they might want to forget. The rights should lie with the victim rather than the state. If somebody decides after eight, nine or 10 years that they want to become involved, I will not turn them away.

The Convener: We have run out of questions. It has been a short but extremely helpful session. Sessions do not need to be long to be helpful. Do you wish to add anything that we have not covered?

John Watt: Not from my point of view.

Heather Baillie: No.

Colin McConnell: No.

The Convener: Thank you for your evidence.

Subordinate Legislation

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2013 (SSI 2013/112)

11:28

The Convener: We have two instruments to consider under the negative procedure. The first increases the fees that are payable to shorthand writers in the sheriff court by 2.45 per cent. The Subordinate Legislation Committee was content with the instrument. As members have no comments, are we content to make no recommendation on the act of sederunt?

Members *indicated agreement.*

Police Service of Scotland (Amendment) Regulations 2013 (SSI 2013/122)

The Convener: The regulations insert a requirement about the immigration status of candidates for appointment to the Police Service. The Subordinate Legislation Committee had no concerns about the regulations. As members have no comments, are we content to make no recommendation on the regulations?

Members *indicated agreement.*

Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012

11:29

The Convener: Item 4 was included on the agenda in response to a request by Graeme Pearson. As I explained last week, it was a bit late to put it on last week's agenda, and today was the earliest opportunity. The request was in response to a number of issues that have arisen recently in relation to the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.

Members will be aware that the Scottish ministers must review the operation of the offences in the act for the period 1 August 2012 to 1 August 2014 and that the report of the review must be laid before Parliament by 1 August 2015.

Before I invite members to comment, I ask the committee not to make any reference to the recent decision of Dundee sheriff court in the Dion McLeish case. An application for appeal has now been lodged, and the legal advice to the committee is that legal proceedings are still active and that any reference to the case would therefore be sub judice. We can, however, make general reference to the operation of the act; it is really the specifics of the case that we must avoid.

Graeme Pearson: My letter to the convener was largely a result of the growing public debate about the controversies surrounding police enforcement of the legislation and the efficacy of the legislation. That has resulted in a substantial number of emails to me and, I gather, to other members of the committee.

Some committee members were, when we considered the bill, unhappy about the length of time before a full review would be conducted. The legislation states that a review does not need to be scheduled for Parliament until 2015. That seems to be an awfully long time away.

The relationship between the Police Service of Scotland and the general public is important enough that the legislation should be reviewed, and there are concerns about its operation, particularly in relation to the targets and policies that are set by Government.

The Convener: Do any other members wish to comment?

John Lamont: I share Graeme Pearson's concerns about the act, and I too have had a large volume of email correspondence about it. Given the sheriff's comments, there is an onus on the committee to look at the act and how it is

operating, and to consider whether the timescale for reviewing it that the act itself sets out should be accelerated.

John Finnie: I regularly attend football matches. I am a season-ticket holder, and where I attend I do not hear any mention of the legislation at all. That said, genuine concerns have been expressed to me. I have had about three dozen emails and have responded to them all, and I have been in touch with Chief Constable House. However, with regard to the circumstances that have given rise to the series of emails, just because someone says that the problem is the legislation, that does not necessarily mean that it is.

There are significant questions to be asked about policing practices. For instance, I have asked Mr House if any debriefing has taken place about the incident on the Gallowgate on Saturday 12 March, and I have encouraged a review of police tactics—not least in response to the suggestion that kettling was involved. If that was the case, it is disappointing because—as I understand it—there is the potential for people who are in no way connected with the incident that gave rise to it to get drawn into a situation. There most certainly are concerns; they have been shared with me, and they are almost exclusively from a quarter that supports one team, but that does not mean that we should not look at them.

Are we committed to that timeframe for the review, or is there any latitude for on-going review? Given the time that it takes to put in place prosecutions and an appeals process, it is fairly soon after the event for us to be able to see a broad picture of the effectiveness or otherwise of the act.

The Convener: I want to hear views on how we can progress the issue, but we have to discuss that in the context of our work programme. We cannot commit to action until we consider all the issues in the work programme, if we are to slot anything in.

Members might be content in the interim—although it is optional—to write to the minister to reflect the conversation here and to find out what the Government has to say. That does not mean that we are pre-empting anything: we can still discuss the issue in the context of the work programme, which is very heavy, as members will know from their papers. We can do that and do something in the interim; I am not saying that we should, but members can certainly consider it.

Alison McInnes: There was always concern, given that the bill was so rushed and, in my view, so ill-founded, that it carried the risk of doing more harm than good. I, too, have received a great number of representations from constituents.

Although the spotlight must be shone on the concerns about heavy-handed and biased enforcement, the implementation of the act needs to be proportionate. The Government seems to be resting on the idea that there have been a number of successful prosecutions, but for me, that in itself is not a sign of whether the act is successful, especially if there is a sense that many fans feel intimidated by the legislation. I wonder whether it is possible to have an interim review and for us at least to hear from the Lord Advocate about implementation.

Sandra White: I was not on the Justice Committee when it considered the bill, but I have read the act. As you said, convener, a report on the review of the act is to be submitted to Parliament in 2015. If that is the case, I would want to uphold that. However, that is a decision for the committee.

I echo what John Finnie said about the events in the Gallowgate, which is in my constituency of Glasgow Kelvin. I have had many emails about the matter and I know that others have, too. Those events—which I believe are also sub judice—had nothing to do with the act. A few of us have written to Strathclyde police authority and I have had a reply from Councillor Philip Braat, who is a Labour councillor and convener of Strathclyde police authority. I am sorry—I should have given a copy to the clerks. The letter says that an investigation into the events is not forthcoming and that there are internal inquiries into the matter. In the last paragraph, Councillor Braat says:

> "However, let me confirm that the force has already appointed a senior officer who has been asked to investigate any complaint received against any police officer and, should any misconduct be found, this will be dealt with in terms of the existing complaints structure."

Colin Keir (Edinburgh Western) (SNP): My comments were partially taken on by Sandra White.

In my days as a councillor here in Edinburgh, events such as happened at the Gallowgate are the sort of thing that would have fallen under my remit. It is almost irrelevant who was involved; it is purely a police operational issue and regardless of who is at the receiving end of it, it would most likely have been dealt with in the same way—at least, that is what I would expect.

Although I understand the concerns about whether there has been heavy-handedness, those are dealt with under the procedures for local authority and police complaints. I do not really think that we should consider the issue when we look at the act again.

Roderick Campbell: I want to reiterate some of the things that Sandra White said. I have been trying for a little while to get a briefing from what

was Strathclyde Police—now Police Scotland—on the events on 16 March. I have not yet obtained one, but I am still working on it. It is my understanding that whatever comments might have been made about police tactics on that day, it has nothing to do with the 2012 act per se. That act was not used and no one has been charged in relation to it. We should be careful to distinguish the events in the Gallowgate, which have caused a lot of public concern, from a general review of the act. That is my principal point.

Graeme Pearson: I record first and foremost that I made no connection between the events at Gallowgate and my invitation to consider the act.

If I can comment about the events of that day, I say that I think that it is appropriate that the Scottish Police Authority properly review the circumstances in policy terms to decide whether—as John Finnie indicated—a kettling strategy was involved. The authority is the appropriate body to oversee whether that was appropriate. It is certainly for Parliament to comment on whether its approach is effective and whether it is responsive to its legislative responsibilities.

I am very aware of the number of people from South Scotland who have contacted me about how the act is being utilised. There is an on-going public debate about the act and about the implications that have arisen as a result of its enforcement. It seems that among the reasons why a group gathered on that day at the Gallowgate was their view of whether the act is appropriate or otherwise, and whether police enforcement of the act is effective and healthy. If we fail to scrutinise in a timely manner how our legislation is being used, that is not good for those who are being charged under the act. I have the numbers here: as of June 2013, 34 people, according to the figures that have been supplied to me, have been dealt with under the act; 83 per cent of prosecutions have resulted in convictions.

Roderick Campbell: I think that you said June 2013. That cannot be right.

Graeme Pearson: I am sorry. I meant as of April 2013; there is a mistype in the brief.

We are talking about 34 people and about the amount of upset that is being created among otherwise decent members of our community—respectable people who are involved in this controversy. There is an onus on us to review the act at the earliest opportunity.

The Convener: The act was also supposed to be seen as a deterrent and we do not know whether that has been the case. That was the other view of it—it was hoped that there would not be prosecutions.

Graeme Pearson: You will be aware that many of us had our reservations even in the lead-up to the legislation.

The Convener: Indeed. I campaigned for it not to be emergency legislation at the beginning, if you recall. I thought that we should have a full hearing on it.

John Finnie: Graeme Pearson has covered a number of my points already—not least of which is the fact that, whatever the merits of the act, it is right that we recognise that the purpose of the people who congregated that day was to voice objections to the legislation. As a regular football attender I am blissfully unaware of any implications over it, but it has been made clear to me in personal contacts that certainly supporters of Glasgow Celtic feel that there is overzealous application of the act, which does not manifest itself only in arrests and prosecutions, but in operational policing. That has to be addressed, perhaps by way of a review of the act, to which, if it is competent, I am not averse.

There are clearly policing issues. I have said to individuals that if they have been the subject of overzealous policing, there is a complaints procedure that I encourage them to use, and that they should, if they feel that they have been wrongly convicted, seek legal advice as to the remedies for that. There are various strands to the issue, but it is important that the committee recognise that for the vast majority of football fans the act is not important, but that for one club in particular it has real resonance. It is seen as being—as Graeme Pearson suggested—divisive, which is precisely what gave rise to that demonstration, as I understand it.

The Convener: I do not want to close down the discussion, but I wonder whether it would be helpful, because of the range of issues here, to write to the SPA with regard to the operational matters and the policy on them; to the Lord Advocate with regard to the comments that have been made here; and to the Minister for Community Safety and Legal Affairs with regard to specific concerns in relation to operation of the act. We can then, in the light of their responses, decide whether to take the matter further.

Do members have anything further to add to the discussion?

11:45

Sandra White: I understand what you are saying, but I echo what John Finnie said. This is what I wanted to say at the beginning; the particular incident in the Gallowgate that kick-started the question that was asked and the discussion was an operational matter.

The Convener: I said that. I said that we would write to the SPA because it is an operational matter.

Sandra White: Yes. John Finnie said that he goes to football matches and has absolutely no problem at them. Basically, we are talking about one particular area. The issue was an operational matter for Strathclyde Police; it was not necessarily to do with the act.

The Convener: No. We have separated them out.

Sandra White: That is what I feel.

The Convener: That is why I think that I should add the chief constable to the list. The last thing that politicians want to do is get involved in operational matters.

Sandra White: Absolutely.

The Convener: That does not mean that operational matters do not count, but the first port of call with operational concerns should be the SPA and the chief constable. Do members have any other suggestions? With that evidence gathered, we could decide what to do further.

Colin Keir: I am wary about using the Gallowgate example simply because of the operational part of it. Any large group could be in the same situation.

The Convener: I have clarified that that is not to do with the act, but is an operational matter. However, there are concerns relating to it, and we want to know what the processes in relation to operations were.

Colin Keir: I find this difficult. If I were looking at the matter up the road, obviously the usual questions would have to be asked about whether it was or was not allowed. It is simply an operational matter. I understand what you are saying, but we cannot use it in any reference to the act.

The Convener: I am not suggesting that we ask the minister about an operational matter—there are routes for that—but there is an issue that is open to debate to do with examining whether there could be an earlier or interim review. I think that Alison McInnes suggested that. That is another matter to do with the act.

We have separated and teased out the two matters. Politicians cannot get involved in police operational matters that are unconnected with the act. Graeme Pearson and John Finnie will know that better than the rest of us. I have been advised that there were no prosecutions under the act for what happened at the Gallowgate. That is a separate issue, but there is an issue to do with the act itself.

Alison McInnes: I have a couple of points to make. To respond to Colin Keir, what happened at the Gallowgate was a manifestation of concern that arose from policing under the act, so it is legitimate for us to look at that. If you are writing to the Lord Advocate, could you ask whether he has updated his guidance on that?

The Convener: Certainly, I could. Members should say whether there is anything else that they want to add to the letters. I will run them past you all.

Colin Keir: I disagree to an extent with connecting the two matters, simply because it was just a gathering of people. The gathering is irrelevant; at issue is how it was handled.

The Convener: That is what we will write letters about.

Colin Keir: I know, but it was the way that—

The Convener: We will write about the operational matter.

Colin Keir: The word “manifestation” was used.

The Convener: What happened was within a culture. Let us put it like that.

Colin Keir: I simply see what happened as another instance of something that the police saw in a large group, and the matter is dealt with under the legislation that already exists.

The Convener: I do not expect all of us to agree on absolutely everything, but it is important to hear comments from the appropriate agencies, which will no doubt clarify whether the matter is within their remit.

John Finnie: I will deal with Colin Keir’s issue first. To say and acknowledge the reason why people gathered is not to express a view one way or another on the merits of legislation, and I certainly do not have any issue with that.

On the level of interference in operational policing, I have written to Chief Constable House to ask him whether there was any debrief on the incident and to encourage the non-use of kettling, if kettling was used there.

If legislation that we have been party to passing is having a disproportionate impact on one geographical area or a section of the community, we should legitimately ask why. To my mind, the act is not interfering in operational policing.

The Convener: I do not think that we could put anything in the letter about the use or non-use of kettling. I would rather get a response—

John Finnie: I will share my reply with you when I get it.

The Convener: I would rather get a response from the chief constable than cross that line between politics and policing.

Graeme Pearson: It is appropriate to ask the SPA for its view of the policy and how it was enforced on the day.

The Convener: Absolutely.

Sandra White: I do not know whether you will get an answer. We have been told that the case is sub judice, and until the video tapes have been looked at—

The Convener: Okay; in that case we will be told that.

Sandra White: That is what I have been told.

Graeme Pearson: Can I add just one sentence? We are not interested in the activities on the day; it is the policy that we are interested in.

The Convener: Yes—within a culture that surrounds the legislation.

Is the committee content that the first step will be to write to the chief constable and the SPA particularly with regard to the incident in the Gallowgate, which is an operational matter? There are connections—the demonstration was related to the act—but the issue was kettling in particular, which is an operational matter. We will ask about that and about the complaints procedure.

We will also write to the Lord Advocate. We know that the case is sub judice because advice is being sought, but we want to ask for any comments that the Lord Advocate has regarding implementation of the act. In addition, we will write to the cabinet secretary, asking whether he is considering, at this stage, an interim review of operation of the act.

Are members content with that?

Roderick Campbell: I am content with that in principle, but could we see the letters before they are dispatched?

The Convener: Yes. I usually find that my semicolons get interfered with, but I assure you that you can see them. You have heard the gist, but you will see the letters before they go out.

John Lamont: I agree with you, convener, but I wonder whether we have adequately dealt with the issue that the sheriff raised about the drafting of the act.

The Convener: We would then have to get into what was said and the finding at that time, which is—

John Lamont: It is more to do with whether the prosecutors and the sheriffs are having difficulty not in relation to the case, but more generally. Is there an issue about their ability to interpret the wording of the act?

The Convener: We can ask for the Lord Advocate's views on that, as a starting point. As you will know from being a solicitor, it will be difficult not to get into the case itself, which may be subject to appeal—which might or might not fail—so we must watch ourselves.

Sandra White: On a point of clarification, John Lamont mentioned the sheriff's comments on the act. Are we also going to look at the sheriff's comments regarding denominational schools?

The Convener: No. We are not going to look at the sheriff's comments specifically.

Sandra White: That was part of his comments.

The Convener: No. We are looking at the generality of whether there are difficulties in interpretation of the act. We cannot look at the case—end of story. It is sub judice.

Sandra White: That is fine, but we have to bear in mind what the sheriff said.

The Convener: You will all get to see the letters before they go out sometime this week.

11:53

Meeting continued in private until 12:44.

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