OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 4 December 2018

Session 3

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 4 December 2018

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JUSTICE COMMITTEE
32nd Meeting 2018, Session 3

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*John Finnie (Highlands and Islands) (Green)
*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Dorothy Bain QC (Faculty of Advocates)
Kenny Donnelly (Crown Office and Procurator Fiscal Service)
Detective Chief Inspector Graeme Lannigan (Police Scotland)
Euan McIlvride (Miscarriages of Justice Organisation Scotland)
Grazia Robertson (Law Society of Scotland)
Kate Rocks (Social Work Scotland)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 4 December 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's 32nd meeting in 2018. There are no apologies.

Agenda item 1 is to decide whether to take in private agenda item 4, which is consideration of a proposal to commission research. Do members agree to take that item in private?

Members *indicated agreement.*

The Convener: I will suspend the meeting briefly to allow our witnesses to take their positions. Not all the witnesses have arrived yet.

10:01

Meeting suspended.

10:01

On resuming—

Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill: Stage 1

The Convener: Agenda item 2 is our third evidence session on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper.

I welcome our first panel: Kenny Donnelly, procurator fiscal, High Court, Crown Office and Procurator Fiscal Service; Dorothy Bain QC, Faculty of Advocates; Grazia Robertson, criminal law committee, Law Society of Scotland; and Euan McIlvride, casework team, Miscarriages of Justice Organisation Scotland. As I do every week, I thank the witnesses for taking the time and trouble to give us written submissions in advance of the formal evidence session. Those submissions help us tremendously.

We will move straight to questions from members.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, panel. I want to open up a general discussion. What do you perceive to be the benefits of pre-recorded evidence with regard to, for example, the impact on vulnerable witnesses and the quality of the evidence that might be given? Do you see any downsides to that method of taking evidence?

Kenny Donnelly (Crown Office and Procurator Fiscal Service): The Crown Office and Procurator Fiscal Service welcomes the introduction of the bill. There will be a number of benefits. Our professional experience supports the view that greater use of pre-recorded evidence will have significant benefits for victims and witnesses. That has been noted in many of the written responses to the committee. It will reduce the risk of further traumatisation of victims and witnesses, help to ensure that evidence is taken as closely as possible to the point in time at which an allegation is made, and allow children and vulnerable adults to give their evidence outwith the presence of a jury—that environment can be challenging for anyone who appears in court. There are clear benefits on that basis, and we welcome the fact that the bill allows the opportunity to assist victims and witnesses to give their best evidence.

The pre-recording of the evidence of witnesses will most effectively be achieved by employing a combination of special measures that are contained in section 271M of the Criminal Procedure (Scotland) Act 1995—namely, giving evidence in chief in the form of a prior statement, and taking the evidence by commissioner. A high-

quality visual and audio recording of a police interview is required to enable the first part to be effective. The quality has to be there in both the recording and in the questions that are asked. Once that is achieved, that will allow us to use that evidence in the first instance to avoid the witness having to go through all their evidence in its entirety.

We cannot always do that at the moment, because the quality of the recording equipment is not consistent and the quality of the recording can make things difficult by being distracting or simply because it is not capable of being played in a courtroom. One of the challenges is to ensure that the recording can be heard in the quite big environments of many of our courts.

Rona Mackay: I am sorry for interjecting, but how often does that happen? Is it a fairly regular occurrence?

Kenny Donnelly: I am sad to say that it happens more often than I would like. I do not have anything other than anecdote—

Rona Mackay: I am just speaking in general.

Kenny Donnelly: Issues with the recording equipment certainly arise reasonably frequently. The recording is affected by the equipment and the environment in which it is deployed. Sometimes the equipment itself is not at fault; people might flick their papers at the wrong point in an interview, or there might be an issue with where the microphone has been positioned and therefore with the ability to capture the witness's voice. Evidence, particularly that from children, can sometimes be very softly spoken; of course, it can be softly spoken at the best of times, but when very sensitive matters are being discussed, it can be difficult to record the evidence unless the equipment has been correctly set up and is of sufficient quality for the recording to be effective.

The second part is the quality of the questioning itself. Police and social workers are trained in how to conduct joint investigative interviews of children, but, as a matter of law, we have to review these things and we have found at times that some of the questioning has not been of sufficient quality, either because something has been missed or evidence is inadmissible because of the nature of either the question or the answer.

The issue of quality has to be sorted out on two fronts, but once we get that part of it fixed—and I know that Government has been looking at investing in additional equipment and that the police and social work departments have embarked on a revision of the training, with a view to rolling it out to the officers who have been trained in this work—that should, I hope, provide the framework to allow the prior statement to be used as evidence and to take evidence by commissioner at an earlier stage. That should allow the victim to give their evidence in an environment that is friendlier than the more hostile environment of a courtroom and, in turn, allow that best evidence to be presented to the jury.

The Convener: Would anyone else like to comment?

Dorothy Bain QC (Faculty of Advocates): I agree with Mr Donnelly on the benefits of pre-recording evidence and support all his comments about the difficulties that we face with the quality of the recording and the available equipment as well as the quality of the questioning and the product that is available for the jury.

Therefore, instead of repeating what he has said, I will just point out that another real benefit, particularly in cases involving children, is that the recording can be made as near as possible to the time of the events in question. Particularly in the case of children, who change so quickly between the ages of 10 and 12 in their physical demeanour and their emotional and intellectual development, it can make all the difference to a case if you have captured their evidence at the time, when they are probably at their most vulnerable.

For that reason and all the reasons that Mr Donnelly has highlighted, with particular emphasis on the impact of the early recording of children's evidence, the Faculty of Advocates supports this bill and the reasons that underpin it.

Grazia Robertson (Law Society of Scotland): The Law Society very much emphasises the role of the defence in all this. With regard to the recording of evidence, we totally accept that, particularly where children are concerned, that can be the best way of presenting that evidence in a trial, and we are supportive of such a move.

However, the approach and the evidence require to be tested in an appropriate manner. You will notice in our submission a lot of emphasis on funding and the defence being properly resourced, but it is not a case of our simply looking for more cash. Instead, it is a recognition that this is a big undertaking requiring significant financial input. If that input is not in place and if this is not done properly, you will be almost in a worse position than you were before, because expectations will have been raised that the situation under the bill will be better. It might turn out not to be so, for all the reasons that have already been voiced.

We were influenced by the fact that there are technical issues at the moment with the recovery of digital evidence in criminal court cases and the presentation of that to the defence in a format that we can use. If those issues are not being properly addressed, what will happen when the new system is brought into play if everything is not on point with regard to the quality of the equipment?

All elements of it need to be properly resourced, down to the training of the people who are putting the questions to the children. There is a financial imperative that needs to be dealt with in relation to almost every aspect of the new system.

Rona Mackay: Can you expand on what you meant when you talked about needing to test the new system? Did you mean that it should be phased in more slowly?

Grazia Robertson: I was talking about the need for the defence to have the opportunity to challenge any evidence, as they have to do in a criminal court setting. There has to be an opportunity for certain questions to be put to witnesses. That is already being done, but if that is to become a more common practice, we want our solicitors to be assured that there is appropriate legal aid funding in place to enable that to be done at the correct time in the proceedings—not too soon and not too late—so that we do not encounter difficulties that would cause further delays in the process. One of the issues that was highlighted was that the new system should make the matter run a bit more smoothly and avoid longer delays in getting cases to a court conclusion.

We felt strongly about phasing in the new procedure slowly. We felt that rushing into the process could create great difficulties. That is why we were fully in favour of focusing first on younger children and serious offences and on testing and evaluating the system rather than simply starting with it and moving on. We want to evaluate how that element of the process works and find out whether there is something that can be changed or learned from before we move on to other elements.

Obviously, you will be under pressure from various agencies who are speaking on behalf of people who want the new system to apply to them as well and for that to happen sooner in relation to witnesses from certain groups. I understand that there is a pressure to move along more quickly than might be wise.

Rona Mackay: Do you have a particular timescale in mind that you think might be reasonable?

Grazia Robertson: Others might be in a better position to suggest something like that. Until we are assured that the new procedure is working well in respect of the gathering of evidence from children in relation to serious matters, we should not be considering rolling it out to any other categories of witness.

Euan McIlvride (Miscarriages of Justice Organisation Scotland): From the outset, we accept the rationale behind the taking of evidence from child witnesses in the way that is proposed. We can see how it would be beneficial and appropriate. However, my organisation comes at the issue from a slightly different perspective in that we represent people for whom the trial process has already gone wrong and we see quite a lot of devil in the detail.

I can boil it down to the two principal problems that we have identified. First, we see an imbalance in treating vulnerable witnesses and complainers as separate from vulnerable accused. I note from the policy memorandum that there is a recognition that, in the interests of fairness, it might be better to put in place similar measures for vulnerable accused. Therefore, it is surprising that there is a proposal to proceed with legislation that is unbalanced in that way. We think that it might be better to iron out the approach to vulnerable accused and then introduce all the provisions at the same time.

The other difficulty that we have concerns the concept of the deeming of witnesses to be vulnerable, particularly where there is no apparent objective standard of vulnerability. We take that to constitute a threat to the trial process in that a witness or a complainer who is deemed to be vulnerable will derive some advantage in terms of credibility in the eyes of a jury.

Rona Mackay: Do you have any misgivings about that with specific regard to children?

Euan McIlvride: I speak from personal experience. I am probably unique on this panel in that I have been cross-examined as an accused person in the High Court. I underwent six days of cross-examination and found the experience very unpleasant. I understand that it is a difficult and stressful experience for anyone who goes through it.

With regard to maintaining the quality of evidence from children, I have no problem whatsoever with the proposal.

10:15

Rona Mackay: On the principle of someone being innocent before they are proved guilty, might the giving of evidence at an early stage be detrimental to the child accused?

Euan McIlvride: It might be. A lot of work needs to be done on this. That is my point, in a sense; I do not think that the issue has been properly examined. There are issues, obviously, in that an accused person is in a different situation from everyone else and would normally give their evidence at a different stage. However, if we recognise that giving evidence in the high-pressure environment of the High Court or the sheriff court in solemn procedure has dangerous

and negative impacts on vulnerable witnesses, we really need to recognise that that cuts both ways.

The Convener: Liam Kerr will pursue the point about potential miscarriages of justice.

Liam Kerr (North East Scotland) (Con): In its submission, the Miscarriages of Justice Organisation Scotland quite rightly flagged up the need to be cautious before we do anything, in case there is a risk of miscarriages of justice. The organisation says that the proposed reforms present a risk of

"dilution of the right of an accused to a fair trial."

I understand your point about there being an imbalance. However, your evidence suggests, I think, that the reforms will increase the risk of miscarriages of justice. Can you explain how? What will be lost?

Euan McIlvride: There is a danger in witnesses being deemed, by virtue of the nature of the offence, to be vulnerable on a blanket basis. As we see it, such deeming of witnesses or complainers—we are particularly concerned about complainers—as vulnerable, and the provision of special measures for them, will give them a status in the eyes of jurors that would be advantageous to them, in adversarial situations. Some support would be offered to their credibility in such situations.

Liam Kerr: Do you have evidence of that?

Euan McIlvride: I have the testimony of a number of clients of our organisation, who were convicted on the evidence of false witnesses who were given protection of the existing sort in the course of the trials.

I do not for a moment suggest that every complainer is a false complainer, but there are some false complainers, so to enhance the credibility or the impact of their evidence, simply by virtue of the nature of the offence that is being charged, would be inherently dangerous.

Liam Kerr: I understand that. Let me reflect that back to you. You are saying that the taking of evidence in advance from a witness who has been defined as vulnerable could prejudice the jury against the accused person, because of the credibility issue.

Euan McIlvride: I think that juries would be liable to heightened sensitivity to the issue and, perhaps, to a heightened sense of sympathy for a witness, in such circumstances. A person who has been identified as being vulnerable will derive advantage from that.

Liam Kerr: I understand. The Law Society did not raise that issue. Does that mean that the society does not think that that is a realistic point?

Grazia Robertson: The issue of vulnerable witnesses is settled in legislation. When all that was an issue previously, we made representations saying that the category of deemed vulnerability was very wide. Also, at that time, there was provision whereby a person could consider themselves to be vulnerable just by virtue of their being a little nervous in court and, if that was the case, an application for special measures could be made. The category was very wide when the idea of vulnerable witnesses was introduced, but I think that the matter is settled and we can avoid the problem that has been described.

Liam Kerr: Does Euan McIlvride's point about credibility stand?

Grazia Robertson: Jurors are given instructions when special measures are used in court. They are told that special measures are happening to make the witness feel more comfortable, and that they should not read anything into it.

Special measures have become quite common. Without formal assessment it is difficult to know what impact they have on jurors. We can all form views on what jurors might think or perceive in certain situations, but the reality is that we do not know; we might imagine that jurors are forming a view when they are not doing so. The position is a little unclear.

I certainly have sympathy for the point about the status of the vulnerable accused. We use various special measures to ensure that accused persons are properly supported in the trial process but, again, that is all largely unevaluated, so we are not entirely clear how successful special measures for accused persons are.

I do not know that there has been a great deal of proper monitoring and evaluation of the success of the existing special measures. If we are considering bringing in something else, that would imply that the existing special measures have failed in some way. I do not know that that is necessarily true.

Liam Kerr: That is interesting.

I turn to Dorothy Bain. I note that the Faculty of Advocates suggests in its submission that there is a need for "sufficient safeguards" against miscarriages of justice. I take it that the faculty is conceding that miscarriage could happen as a result of the changes; indeed, perhaps Mr McIlvride is right in saying that there is an increased risk of such miscarriages. I would be interested to hear the faculty's view on that. What might the safeguards be, if they do not already exist?

Dorothy Bain: I think that you are referring to the Faculty of Advocates' general position, as stated in its response to the bill. That position is

recognition that the change that will permit early recording of evidence will substantially alter how trial procedures work, and that changes to the balanced procedure and processes that we have at the moment might have a knock-on effect for a particular party.

Necessary safeguards should be identified when such a change of process is made. The faculty envisages insurance in the form of full disclosure of evidence at an early stage, a proper opportunity for defence counsel to prepare for the case being presented against their client, and an appropriate opportunity for cross-examination of witnesses, arising from, say, a child's joint investigative interview to the police being led as evidence in chief. Our position is just a general recognition that change might upset a balanced procedure, so it must be ensured that individuals in that procedure are protected against miscarriages of justice. Change brings with it the need to take care.

The submission from the Faculty of Advocates also contains the powerful recognition that the vulnerability of witnesses requires the court process to be moulded around the witness's needs, rather than maintaining the old rigid structures with which we are so familiar. The benefit of gathering evidence as near in time as possible to the events in question is that accurate evidence can be gathered and recorded for the jury, instead of the jury being dependent on evidence from a child perhaps two or three years after the event itself.

Liam Kerr: I want to press you on this issue, so that I am absolutely clear about it. The faculty's submission says that it is

"vital that sufficient safeguards are in place to enable the rule to operate fairly".

I presume that those "sufficient safeguards" would have to be in place prior to any such change.

Dorothy Bain: Yes.

Liam Kerr: Has the faculty made it clear what the safeguards would be? I think that you have already listed some, but how confident are you that they will be

"in place to enable the rule to operate fairly"?

Dorothy Bain: Confidence about the safeguards being put in place will come when we understand that the concerns that we have raised in our submission have been properly addressed. The main concern relates to disclosure of evidence and ensuring that those who present an accused person's interests in proceedings are properly informed of the evidence and are in a position properly to prepare and present their client's case. One of the safeguards would be to ensure that the Crown meets its disclosure obligations. There is a real question mark over that at the moment, which the faculty raised in its submission.

We also raised concern about the quality of recording and about the manner in which vulnerable witnesses are questioned by the police—perhaps through the joint investigative interview process. Quite often, the manner of questioning is a very difficult issue in a trial. Members of the faculty have experience of evidence from a joint investigative interview not being admissible, because the manner of questioning of the child was inadequate.

Another safeguard would be to ensure that those who represent the interests of an accused have a full opportunity to consider material and to prepare whatever is necessary in response to such interviews.

Within the preparation phase for any trial, a number of issues require to be addressed. I have mentioned some of them, but we could easily provide a list of the issues in a written response, if that would satisfy the committee.

Liam Kerr: That would be of benefit, if you would not mind doing so, so that we understand what the safeguards are and ensure that they are put in place.

Dorothy Bain: The Faculty of Advocates made a general statement in the introduction of our response to the call for evidence. In it, specific questions were asked that required us to address specific points, which perhaps excluded the opportunity for giving extra information.

The Convener: It would be helpful if you could put that information in writing.

Before I bring in Daniel Johnson with his supplementary and main line of questioning, I want to ask about the definition of "vulnerable witness". I note that MOJO's submission says that the term appears to be defined in the policy memorandum in terms of

"the nature of the offence".

Therefore, it would provide a blanket cover as opposed to there being an objective or evidence-based test. Is it your position that children should automatically be in the "vulnerable" category, but that there should certainly be an objective test for other people, whether they are the accused or a witness?

Euan McIlvride: Yes, that should be the case. I would have no problem with children invariably and automatically being deemed to qualify for whatever the special measures are. My concern is about adults who are deemed to be vulnerable witnesses. I say for the record that I have no

difficulty whatsoever with protection being offered to witnesses who are vulnerable.

The Convener: Absolutely—but do you think that there should be a test to establish vulnerability?

Euan McIlvride: There should be a test.

If you do not mind, I will raise an issue about the proposed safeguards. I would be more confident about the safeguards if inquiries were to be made into the nature of miscarriages of justice that have already happened. I would not be confident about our ability to design effective safeguards in an environment in which, when we encounter miscarriages of justice, we make literally no inquiries into them. There is currently no inquiry into the nature or cause of a miscarriage of justice when it is uncovered.

In statistical terms, I accept that the number of miscarriages of justice as a percentage of the number of trials is not high, but it is still a serious problem. Last month, through a freedom-of-information request, I obtained from the Scottish Courts and Tribunals Service the statistics for the past five years in relation simply to solemn appeals. Such appeals arise from jury trials, so they involve more serious types of crime that carry more serious sentences. Over the five years to 2017, in conviction appeals alone the appeal court recognised 110 miscarriages of justice—two a month. That is a significant number.

The Convener: There is obviously more information on safeguards that Dorothy Bain and Euan McIlvride suggest could be provided. The committee would be very pleased to receive additional information on that specific and important point, if they want to provide it.

Euan McIlvride: I am very happy to do that.

10:30

Daniel Johnson (Edinburgh Southern) (Lab): I want to follow up on one of the contentions that Mr McIlvride made. The contention that, somehow, evidence that is taken by commissioner would have enhanced status is quite serious if we are seeking to promote something that is ultimately about obtaining justice. I am interested in your reaction to a number of points.

First, the concern has been expressed to us that evidence being pre-recorded might diminish rather than enhance its impact, although that has been allayed somewhat by actual use of the approach in practice. Secondly, special measures are currently in use, so I wonder whether your insight is borne out by that use. Finally, the converse is that, for some people—particularly children—their ability to provide good evidence might be diminished by doing it in court.

How do you address those points?

Euan McIlvride: My position is informed by the experience of the people whom I meet daily, a number of whom have been convicted and subsequently exonerated, with their conviction having been founded on the evidence of witnesses who had been permitted special measures. I have made the point previously that I accept that it is not the case that any witness who presents as vulnerable is necessarily not a vulnerable witness. I simply make the point that there is a danger, of which we have direct experience, of too much weight being given to the evidence of witnesses who have been afforded the particular status of vulnerable witnesses.

Daniel Johnson: Will you explain that? I do not really understand why evidence has been given greater weight just because it was pre-recorded.

Euan McIlvride: I will give an example, although it is perhaps not directly relevant because it has criminal and civil elements.

I have a client who was convicted of historical sexual abuse and went to prison and served a substantial period of time in prison. He was subsequently cleared at appeal, went to retrial and was acquitted. The evidence that was relied on to convict him was the evidence of a witness who was given special measures. The criminal position is that he has been acquitted and exonerated. However, to this day, he is denied the right to practise his profession because his professional body decided that the vulnerable witness was to be believed by dint of their being vulnerable, so it has refused to permit him to return to his profession.

As I said, that is perhaps not a directly relevant example, but it is an example of how excessive reliance on a perceived vulnerability can have real consequences in people's lives.

Daniel Johnson: That example, however, is about perception and consequences rather than about the method of taking the evidence. If the measures are subject to ground rules hearings and the witnesses are to be subjected to cross-examination, I struggle to understand why the special measures in themselves enhance the view of the evidence.

Euan McIlvride: Perception is, ultimately, what cases are decided on. The jury will decide and reach its verdict on the basis of its perception not only of the evidence but of the witness who gives it.

Daniel Johnson: You have not explained to me why viewing that evidence as a recording rather than its being given in person alters the perception of the evidence.

Euan McIlvride: As I said, I merely refer you to examples of which I am aware in which that has been the outcome. I would be interested to see any study of whether special measures enhance or detract from the credibility of witnesses. I can come at the issue only from the perspective of the job that I do and the people with whom I work.

Daniel Johnson: Okay. I think that you have acknowledged that your view is speculative.

Does the Law Society or the Faculty of Advocates share the concerns about the altered status of pre-recorded evidence?

Grazia Robertson: People have expressed views as to how they imagine jurors might perceive certain types of evidence. Certainly, with remote links—where the witness is not in court but jurors view the evidence on a screen—there has been concern that because the witness is at some distance, the jurors might not get the same feel for the evidence as they would if the witness was in court. Again, there are different views on that; the matter is not really settled.

I know that some academics who responded gave the view that some studies have shown that jurors do not assess witnesses differently depending on whether they appear on a screen or in front of them, and that they do not have a difficulty with that. Other people might have a different view. We are working on the basis of imagining what jurors might perceive in certain situations when they view evidence. In my experience, however, jurors certainly try their best to view the evidence as carefully as possible in order to reach a verdict—as far as any of us can know that, because their deliberations are, understandably, secret.

Dorothy Bain: On the suggestion that there is an enhanced status in the credibility of the witness who has pre-recorded their evidence, the Faculty of Advocates does not hold the view that has been expressed by the Law Society.

Daniel Johnson: That is useful. I know that I have taken a bit of time, but I would like to ask briefly about the possibility of extension to other forms of hearing, particularly in the sheriff court, where the bulk of child witnesses will be appearing. That is obviously not provided for in the bill but, given that there is provision for extension by regulation, do the panel members have any thoughts or concerns about the possibility of putting provisions in place to enable that extension, albeit not immediately and perhaps with the caveat of further consultation or other work being done? If you have concerns about that, are they largely practical or are there concerns in principle about making provision for extension to different types of hearing?

Grazia Robertson: At the risk of sounding as if I am being a grubby lawyer, my concern would be about funding, financing and resourcing. There are huge resource implications in extending the provisions both to sheriff and jury cases and to sheriff summary cases. I reiterate my previous point that, if it is not done properly and if it is implemented badly, it could be quite disastrous and people could have a worse experience than they might have had using the existing special measures.

Kenny Donnelly: The Crown Office supports the phased approach that has been recommended by the Government. It is proposed that deliberate decisions should be taken sequentially over a period of time to extend the presumption for additional categories of witnesses, but we can do that only in a phased way, learning as we go, so there must be a process of evaluation, review and learning as we move through each stage. The Law Society is absolutely correct to highlight the fact that there is a resource requirement at each stage. All of that is additional. Each of those hearings is an extra hearing for the process; it is not absorbed anywhere else in the process, so there is a resource requirement.

I can understand the frustration of those who represent other groups and are looking for the rule to be implemented more widely immediately, but to implement too quickly would overwhelm the criminal justice system and cause both systemic and individual case risk.

I can give an example of an increase over the course of the past year, since Lady Dorrian's practice note was introduced in May 2017. I can see from checking my statistics that, in the period from May 2017 to March 2018—and this is only in the High Court—there was an average of five evidence-by-commissioner applications per month. That increased to an average of 14 per month over the period from April to August 2018, and the strain that it put on the system was enormous in terms of advocate depute time and judicial time. I am not so well sighted on the defence position, but I assume that it would have been equally taxing for counsel and solicitors instructed in those cases. It caused a massive upsurge in work and there was some anecdotal suggestion that, in the absence of resource, it was causing delay rather than expedition. I do not have any data to support that, but that is the experience of finding the capacity to conduct hearings with a relatively modest increase.

The Government benchmark is 100 commission hearings a year for children in the High Court and, based on the Government's figures for what is proposed in the bill, we anticipate that that number will go up by somewhere in the region of another 350 or so. Therefore, we are talking about going

up to more than 40 a month in the High Court for children. That is without extending the provision to vulnerable adults or to the sheriff court.

Taking it one step at a time allows the resourcing to be put in place and for the facilities to be checked to ensure that they are adequate and sustainable. From that, we can learn lessons for the roll-out to the wider classes of cases.

It is appropriate to start with children, because they are the most vulnerable in our society, and with the High Court, because High Court cases are the most serious and thus witnesses are likely to be speaking about the most sensitive areas. A phased approach is the right way to allow the system to cope and absorb the provisions. In their written evidence, the senators of the College of Justice used a phrase that I will reiterate, which is that the result of bringing in these provisions on a wider basis would be an

"unsupportable surge in demand on the justice system's limited resources".

Daniel Johnson: My key question is not so much challenging the phasing—I accept the need for that. It is whether the bill could make provision for additional future phases, once the measures are proven. At the moment, we would need to come back to primary legislation to extend the provisions to the sheriff court.

Kenny Donnelly: Sorry, I had not picked that up. I may have misunderstood the question. The bill allows for the provisions to be extended to the sheriff and jury court but not to the summary court.

It is a matter for Government, but such an extension would have a massive resource implication. We would need to do the calculations for what that would mean for children and deemed vulnerable adults. In summary cases, we endeavour not to use a child's evidence unless it is absolutely necessary to the proof of the case. Relying on a child's evidence tends to happen in the more serious cases, but there is still a significant number of witnesses in the summary courts who are children or who would be deemed vulnerable adults within one of the categories.

Daniel Johnson: I have taken up a bit of time so, unless any of the other members of the panel particularly want to answer that question, I will stop.

The Convener: Did Euan McIlvride want to add something?

Euan McIlvride: Subject to the comments that I have made about fairness and balance, I have no problem with what has been said.

Liam McArthur (Orkney Islands) (LD): Kenny Donnelly may have answered this. I do not think that anyone disputes the additional workload that the provisions will create. It is not about streamlining the system but about improving the quality of the evidence and the justice system as a result. During the committee's inquiry into the Crown Office and Procurator Fiscal Service, however, we heard repeatedly about the problems that are created by churn in cases. Will going down this route be likely to reduce or bear down on those problems and free up resource at some point in the system or improve the way in which it works?

Kenny Donnelly: Of itself, not necessarily, but the provisions are certainly a step in the right direction. The one huge advantage is that they reduce the impact of churn on the victim or the witness whose evidence has been given. Any future delay in proceedings will not give victims concern about when and where they will give their evidence. The early capture of their evidence is beneficial in that the victim or witness will be able, to some extent, to put that aspect of the proceedings behind them. Although they will still have an interest in the outcome of the proceedings, they will not have the trauma of giving evidence still to face.

Liam McArthur: Is there no evidence from what you have seen since March last year that the additional front loading of that quantity of work bears dividends by reducing problems and delay in the later stages of a trial?

Kenny Donnelly: I was going to come on to that. The bill is one measure and does not do that in itself. The Crown Office has embarked on a separate piece of work to reduce the overall journey times of our cases. The idea was borne of the report in, I think, November 2017 by the Inspectorate of Prosecution in Scotland. One of its observations that was accepted was that cases took too long to get from the point of charge and report to the Crown to conclusion. We have embarked on work to tackle that. The Government made additional funding available in, I think, September and we will apply that with a view to reducing the journey times. The work has already started, but the additional resource that that funding will provide will allow us to make strides in reducing the journey time and in bringing these cases to court much earlier. Although the report related to sexual offences cases, we are applying it across our case load in the High Court with a view to bringing all the cases back to earlier indictment and prioritising those cases that involve the most vulnerable, particularly young children and children in general.

10:45

On deemed vulnerable adults, most of our cases involve someone who is vulnerable, so the prioritisation there is simply about trying to get the

cases into the court at an earlier stage. We have already made some progress on that. The committee might recall that the Justice Committee inquiry and the Inspectorate of Prosecution in Scotland's report contained a reference to a backlog of work involving pre-petition investigations. Those are cases that the police have reported to the Crown but in which a decision has not yet been made on whether to place the accused before the court, so there is no petition. When we started tackling that problem in October 2016, there were 700 of those cases; that is now down to fewer than 100. Progress has been made on the age and profile of the cases before they get to court.

At the same time as we have been trying to do that, we have faced a massive increase in the number of sexual offences cases being placed before the courts. In the past financial year, we projected a 50 per cent increase but, ultimately, there was approximately a 40 per cent increase in the number of new petitions for sexual offences cases.

Notwithstanding that, we have managed to increase the number of cases that we are getting into court, and the age profile that we analyse as part of our management information about cases is showing that that is coming on. It is a long process; we are not going to get there overnight, but we are starting to see the signs of progress with the cases that are getting to court being at an earlier stage than was perhaps the case when we started on the process.

Liam McArthur: We are moving away from the terms of the bill.

Kenny Donnelly: I am sorry. I was just explaining that, in terms of the wider piece of work, getting cases indicted earlier will allow us to get the evidence captured earlier and have an earlier trial. I hope that the two things will run in parallel.

The Convener: We have moved on to timescales, so I will bring in Jenny Gilruth. If the witnesses could be a bit more succinct, that would be good. We have limited time and if all the responses are as lengthy as some of the ones we have had, we will not get through all our questioning.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): I would like to ask some questions about the timing of commissions. Last week, the committee heard from Children 1st and Barnardo's on the time that is taken giving evidence at the police end. One case was cited in which a child witness had to give statements to the police 27 different times.

Kenny Donnelly, in your written submission, which is about the court end of things, you say:

> "If the accused is not, in fact, indicted, evidence would have been taken unnecessarily. If the accused is indicted, but on charges which differ from those which had been anticipated at an earlier stage, it might be necessary to hold a further commission hearing; multiple hearings would be liable to increase, rather than to reduce, trauma."

The issues are about the quality of evidence and the potential retraumatising of the witness because of the length of time taken. What opportunities are there to expedite the process for child witnesses?

Kenny Donnelly: What is in our written submission about the timing of the commission hearing arises from the provision in the bill that removes the barrier to holding a commission prior to service of the indictment. We welcome that provision, but the Crown's position remains that the majority of commission hearings will take place after service of indictment.

I refer you to my previous answer. The Crown's idea is not to have the commission before the indictment but to expedite service of the indictment to allow the commission to take place at an earlier stage. However, in some cases, when we see that that will not be feasible, the provision allows for us to hold the commission earlier, prior to the indictment.

The reasons for that are many and varied. I am sure that the Faculty of Advocates will disagree with me, but the Crown Office's experience is that, once a case is reported to the Crown, the investigation that it conducts, which is known as the precognition process, evolves. We ingather the evidence. We do not get all the evidence when we get a police report: we have to ingather the statements; we have to ingather forensic material and get it analysed; we have to analyse digital devices, which goes back to a point that Grazia Robertson raised earlier; and we often have to ingather medical and social work records.

To an extent, the investigation is organic. We identify and ingather the material that we think we need. We do not get all the material at the same time and, when it is received, we must assess it to determine whether it is material and relevant, and anything that is material and relevant must then be disclosed to the defence. The process often results in further material coming to light and that material must be obtained, either to support the Crown case or because it is relevant to the defence. Therefore, the volume of material grows as the investigation goes on. As a result of our examination of the material, including witness statements, the charges that were drafted at the petition stage may not be replicated in the indictment. There are often significant changes to the information that appeared in the petition in the indictment. It is important that the parties know exactly what the evidence is and what the charges are for the purposes of a commission hearing, to

allow the questions to be properly framed and to ensure that all the areas in which the accused is likely to stand trial are covered.

If the commission takes place too early, there are three principal risks. First, material could be missed, which would require a further commission to take place—that is absolutely correct in order to be fair to the accused. Secondly, we may have carried out an unnecessary commission hearing because, after investigation, we decide not to proceed with the charge—there is an attrition rate for such matters. Thirdly, if the accused chooses to plead guilty, the commission hearing could be viewed as having been unnecessary.

In most cases, the accused's opportunity to plead guilty is after service of the indictment. Therefore, in the majority of cases, the commission will take place post-indictment, but the opportunity to do it before the indictment in appropriate cases, where the timeframe cannot be matched, is helpful and appropriate.

Jenny Gilruth: Thank you. Do other members of the panel have a view?

Dorothy Bain: The Faculty of Advocates has fully explained its response to the question of the timing of commissions. For the reasons that are set out in our written submission, I disagree with Mr Donnelly that a commission requires, for the most part, to take place after service of the indictment.

Grazia Robertson: In our response, we agree more with the Crown's position. Rather than risking multiple engagements with the child witness, it would be better to choose the best, most appropriate time. We should look at the provisions of the bill with a view to eliciting the best evidence from a witness and not traumatising the witness, instead of seeing them as a mechanism to speed up the whole process. There are far too many other variables involved.

Euan McIlvride: On the basis of our written submissions, we would prefer commissions to take place post indictment, rather than at the petition stage. On that point, I agree with Kenny Donnelly.

The Convener: It is a balance. We know that a delay of a week, a fortnight, a month, let alone two years, can have a disproportionate effect on the child. Equally, we want to ensure that all the evidence, including late disclosure evidence, is heard. It is a tricky balance but one that has to be negotiated.

Dorothy Bain: The point is that, once an accused person appears on petition, the disclosure obligations of the Crown are focused by statute. Precognition, as described by Mr Donnelly, does not now happen to the same extent and, when an accused appears on petition, great care is taken to craft the charges that appear on the petition. Just as Mr Donnelly has a great wealth of experience from the COPFS, the faculty's response is based on a great depth of experience of prosecution in the High Court. The faculty's view is informed by the good and strong personal experience of its members.

The Convener: Based on your submission, I think that you are saying that late disclosures should be the exception, rather than the rule. However, current practice has not worked out that way, which is something that needs to be looked at. If I understand you correctly, all the facts are substantively known before the indictment stage, and that would be the counterargument.

Dorothy Bain: Yes, very much so.

The Convener: That is helpful.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Are there any other ways that we could better use pre-recorded evidence? I would like you to reference the children's hearings system in your responses. Last week, Malcolm Schaffer, head of practice and policy at the Scottish Children's Reporter Administration said that he would like to see a marrying-up of its use in the criminal courts and the children's hearings system.

Grazia Robertson: The children's hearings system should be a very different environment from a criminal trial setting. The whole purpose of bringing in the children's hearings system was that it was not to be a criminal trial process. I would not think that there would—

Fulton MacGregor: To clarify, it was the Scottish Children's Reporter Administration that brought the issue to the committee last week.

Grazia Robertson: As a practitioner, I do not have much experience of the children's hearings system, but I understand that there is a more holistic approach in that environment than there is in a criminal court setting, so I would have thought that there would be other mechanisms whereby evidence could be elicited without that being too traumatic for a child.

Kenny Donnelly: I am not aware of the SCRA's evidence, but I am aware that it is keen to look at what we have been doing in the criminal courts, to see what lessons can be learned. We have been sharing with the SCRA our experience of implementing the practice note and improving how we approach evidence by commissioner hearings under the existing legislation. I am aware that it is keen to use pre-recorded evidence, and I see no barrier to using the same pre-recorded evidence in both children's hearings and criminal trials. At the moment, the statements that are given to the police are already used in both environments, so it

seems perfectly sensible to use a video-recorded piece of evidence in that way. However, I am not an expert in the children's hearings system.

Dorothy Bain: The benefits of pre-recording in the criminal justice process can be translated to the children's hearings system. If that could be done, it would make sense.

Fulton MacGregor: Does Euan McIlvride want to add anything?

Euan McIlvride: I have nothing to add.

Fulton MacGregor: We have touched on special measures for vulnerable accused. I want to ask about child accused. The Criminal Age of Responsibility (Scotland) Bill is going through the Parliament at the same time as this bill. Should provision have been made for child accused?

Kenny Donnelly: The Crown covered that at paragraphs 17 and 18 of its written submission. It is important to take into account the age and vulnerability of accused persons as well as that of victims and witnesses. However, pre-recording evidence may not be the appropriate special measure for accused persons, as there is a conflict with the right to silence, with the determination whether evidence should be given made after hearing the Crown's evidence. Two of the key benefits of pre-recording evidence are that it removes the need for a witness to attend the trial and it removes the need for them to give evidence in the presence of the accused person. Neither of those benefits apply to a child accused in the same way that they would apply to a child witness, because the accused needs to be at the trial and has that opportunity to decide whether to give evidence. However, there is no barrier to the use of other special measures for an accused person, where a decision is taken to lead evidence. Beyond that, I am not sure that I can add much from the Crown's perspective.

Dorothy Bain: The Faculty of Advocates made extensive reference to the accused as a vulnerable witness in response to the consultation exercise and in response to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill itself. We submitted a lengthy paragraph on that, particularly in our response to the consultation. In a trial, very different issues arise for complainers and witnesses, as opposed to the accused. For the reasons given, it makes sense that the provision does not apply to vulnerable accused. I understand that the Scottish Government is undertaking an exercise that looks at the issue, and that is to be welcomed.

Grazia Robertson: As the committee can see from its submission, the Law Society agrees with the Faculty of Advocates on that. In the interests of our client accused, we did not think that it was an appropriate matter to proceed with at this stage.

11:00

The Convener: The right to silence has been brought up. The issue is that evidence is pre-recorded before the accused sees how the trial is unfolding.

What are your views on the ground rules hearings provisions in the bill? Mr McIlvride, your organisation's submission refers to the total lack of a definition of "ground rules" in the policy memorandum.

Euan McIlvride: Indeed. It is a general observation. I understand that my perspective on the issue is rather less technical than that of the other members of the panel. It struck us as being a little incongruous that reliance was being placed on a hearing when it appeared that there was no definition of what that was to constitute and what fell within the scope of such a hearing. I do not claim any knowledge of or expertise in the specifics of the issue.

The Convener: That is a fair point. The submission also said that it would be helpful to have a definition of "permissible lines of questioning".

Euan McIlvride: Yes. I think that it would be.

The Convener: I know that the other panellists have views on the matter.

Grazia Robertson: Dorothy Bain probably has more experience than I do of ground rules hearings as they currently exist. I am not aware of any particular issues with them at present, and I do not think that there would be any issues.

Kenny Donnelly: I think that what is envisaged on ground rules hearings is captured in Lady Dorrian's "High Court of Justiciary Practice Note No 1 of 2017" as matters that the court needs to determine in advance of the commission hearing taking place. That practice note, of which I am sure that the committee will have had sight, sets out a number of factors that parties and the court must agree in advance of a commission hearing taking place. A ground rules hearing is simply a mechanism to allow the court to regulate the commission hearing in a way that best suits the needs of the witness as well as preserving the rights of the accused to a fair trial. I think that what the bill does on ground rules hearings is a wholly appropriate step to take that replicates what the practice note already requires of the parties.

Dorothy Bain: The current preliminary hearing system is what is used to permit a ground rules hearing to be undertaken in relation to any particular case. I understand that that is working

relatively smoothly, but one of the issues that the faculty raised in its submission was the benefit of a ground rules hearing in the absence of intermediaries. We focused on whether the absence of intermediaries would be a problem for how the bill is eventually implemented and whether it is practical to expect that it will be successful in the absence of intermediaries.

The Convener: I think that we are about to move on to look at that issue in more detail.

Liam McArthur: Dorothy Bain has teed me up nicely. Last week, we heard that there was strong support for the role that intermediaries could play in assessing the communication capabilities of individual children and vulnerable witnesses. I take it from your submission that you strongly support inclusion in the bill of reference to intermediaries. Could you expand on those thoughts?

Dorothy Bain: Yes. The faculty very much supports that. Our reason for doing so is underpinned by our experience of taking the evidence of children and our realisation that, despite our best endeavours and a great deal of preparation and attention to detail, as lawyers, we are not in the position of an expert witness who understands the psychological, educational and intellectual needs of a vulnerable child—that is just not the job that lawyers are trained for. If a lawyer has a trained expert to assist them in understanding the needs of the witness, we will be able to do what we hope to achieve through all the work in this area, which is to mould the procedure around the witness's needs. In the absence of that expert input, one could legitimately question whether we will get to where we want to be. The faculty was strong on that in its submission.

Liam McArthur: That is echoed in Police Scotland's evidence. Even when there is joint intervention involving police and social work input, Police Scotland still felt that the provision of such expertise by intermediaries would be hugely beneficial.

Dorothy Bain: Intermediaries have expertise that will allow a vulnerable child witness to be given their voice, which is what we want from the process. In the absence of that expert input, no lawyer would say that they have the expertise—that is not their training. They take on board expert input and they frame and mould their questioning around it.

Liam McArthur: Does Ms Robertson agree with that view?

Grazia Robertson: I have no issue with the suggestion that intermediaries can assist with communication needs. However, I have a caveat. With regard to vulnerable accused, someone who is called an "appropriate adult" is purportedly there to do a similar job. That scheme has had significant issues and difficulties with the provision of an appropriate degree of expertise and meaningful support in the existing environment and on a personal level. In many cases, we criminal practitioners do not find the appropriate adult a particularly helpful presence. It would be unfortunate if intermediaries were brought into the system and the same difficulties were encountered. My caveat is that you have to be careful that meaningful benefits are brought by the right people who are of a proper standard to carry out the work.

Liam McArthur: Is that caveat sufficient to make you discourage any suggestion that intermediaries should be in the bill?

Grazia Robertson: Are we supportive of the idea? I have no problem with the idea of intermediaries. My caveat is that you would need to make sure that it is done properly, for want of a better word. History shows us that it may not have worked as well as we had hoped in similar areas.

Liam McArthur: Does the Crown Office have a view on the issue?

Kenny Donnelly: The potential use of intermediaries was raised by Lady Dorrian in the evidence and procedure review paper. Intermediaries are not covered by the bill, and some more work needs to be done to scope the potential benefits of their use. I may be wrong, but I think that the Government has started on that work, separate from the bill. We should look at and carefully consider the issue, but I do not think that we would want to delay the bill's implementation while such scoping work goes on.

Liam McArthur: Would there be any difficulty in retrofitting that provision in due course? Would a regulating power be needed in the bill for when such a scoping exercise was completed?

Kenny Donnelly: One option would be an enabling provision to allow that to be done by regulation. The alternative is to capture the work in a separate piece of legislation. That is a matter for Government, but until such scoping is done, an enabling provision could be premature. However, I do not profess any great knowledge or experience in that regard.

I recently visited Liverpool Crown Court, which hosts one of the pre-recorded evidence pilots. The judges spoke about the use of intermediaries and the general feedback was very positive about the inputs that they have provided, which have included not just advice to the parties but assistance with proposed questions, framing them in ways that best meet a witness's needs. The approach is clearly worth exploration, and I would welcome that. How it would be taken forward is a matter for Government.

Liam McArthur: Mr McIlvride, do you have a view?

Euan McIlvride: I do not have a position on the matter.

John Finnie (Highlands and Islands) (Green): Ms Robertson said that existing special measures may have failed, which is why we are here. Do criminal justice professionals have attitudes that could lead to a reluctance to use special measures?

Grazia Robertson: I did not mean to give the impression that special measures may have failed. The implication of considering the pre-recording of witness evidence is that all the special measures that we have brought in may not have done what was expected of them. That was my only observation with regard to the existing special measures. Also, I am not entirely sure that those measures have been fully monitored and evaluated to establish how successful they have been to date. It may be that they have been found to be successful. My experience is that they generally tend to work reasonably well and are fairly straightforward, but it is not my needs that they are catering to, of course.

From the point of view of presenting the defence and so on, we have not encountered particular difficulties with existing special measures. However, with regard to whether they enhance the evidence that is given, it would be interesting to know whether they have been of benefit.

John Finnie: Mr Donnelly, we have heard that, sometimes, witnesses have not been consulted and it was just presumed that they would get screens—I think that that is how it was put to us. Is there a reluctance to apply special measures?

Kenny Donnelly: I do not think that there is a general reluctance to apply them, but there can be difficulties in identifying what the right special measure is. We should not routinely apply measures without consulting the victim or the witness. However, when we make applications, it can occasionally be difficult to make contact with the victim, and there are time limits for lodging the applications. Under the guidance, there are certain default applications that we consider for certain categories.

The bill is to be welcomed in so far as it changes the emphasis and pushes parties into applying for particular special measures in relation to the categories of cases and witnesses that we are talking about. The evidence and procedure review recognised that that is what is best for victims and witnesses.

At the moment, we have to persuade the court that a measure is appropriate. However, the bill puts us in a position in which we have to justify not using the measure. The bill is a device that will enable us to make much better use of what is available, to the best advantage of victims and witnesses.

John Finnie: My next question is for Dorothy Bain. I noted that you said that you would take on board expert input if intermediaries were involved. However, earlier, you talked about the questioning of a child as sometimes being inadequate. What training needs do you think professionals in the field have?

Dorothy Bain: The import of my statement about the questioning of witnesses being inadequate is that pre-recorded evidence cannot be used at the trial if elements of the evidence are inadmissible. It is, therefore, imperative that those who are questioning children in pre-recorded sessions know the rules of evidence and the manner in which evidence in chief can be elicited—that they know the parameters within which they are working. They need to understand that a deficiency in that process will upset all the work that is being done to ensure that the victim's evidence is captured as near as possible to the time of the events.

Lawyers are good at taking on board change—it might not feel like that, but they are. An intermediary who is skilled in understanding children's needs and assessing their intellectual capacity and their ability to communicate will be able to give expert input to a lawyer and tell them that the way in which they are framing their questions is inadequate and that they are not going to get to the truth and elicit the child's evidence effectively. Combining the skills that a lawyer has, which concern the rules of evidence and eliciting evidence in chief, with that expert input will ultimately achieve the goal that you want to achieve, which is to get a child witness to say what happened to them in a way that can be relied upon and which they are comfortable with. That approach translates to vulnerable adults with learning disabilities and the like. The combination of training and ensuring that those involved know the rules of evidence alongside the input from the expert in the field will let you achieve what you want to achieve. That is what I meant by what I said earlier.

John Finnie: Mr Donnelly, what is the Crown's view?

Kenny Donnelly: In fairness to the police and social workers, taking evidence in the way that we are talking about is extremely difficult. It is not an easy task, notwithstanding training, and they do not have the benefit of having the party representing the accused to object to whatever they are saying or a judge to overrule that. The training has to be right. I mentioned that we sometimes run into difficulties with using the pre-

recorded statement or the video-recorded interview as the evidence in chief. That does not preclude us from using evidence by commissioner. We can proceed and have both the examination in chief and the cross-examination recorded at the commission hearing, but the optimal approach involves using the video-recorded evidence that is given at the time.

As I mentioned, the police and social work are reviewing the training. The Crown Office has an input and will assist with the delivery of that training. If we continue to strive to improve the quality of the questioning and we see that degree of specialism and expertise evolving further, the concerns that have been raised by the Faculty of Advocates will diminish.

11:15

John Finnie: What about a role for judicial training?

Kenny Donnelly: There is always a role for that. Gosh—I am telling the judges that they need to learn, but every day is a school day for all of us, is it not? Judges would probably benefit from some training in making greater use of the approach whether in the High Court or, as we expand down, the sheriff courts.

As I mentioned, we are already dealing with increased use of special measures in the High Court, and that has highlighted issues to do with the logistics. I go back to what I said about resourcing and having the right facilities. Not all courtrooms have all the right information technology or video equipment required to play certain pieces of evidence. There have been teething issues, and the parties need to have a full and open mind about what they need to have prepared in advance of the hearing. I think that judicial training would be welcomed by the judges themselves, too.

Shona Robison (Dundee City East) (SNP): We have heard your views about the principles of the special measures, but I want to confirm more about the process. In the bill, there is a proposal for an administrative application process that would reduce bureaucracy and simplify and standardise the process. From your written evidence, I think that you are, by and large, quite satisfied with that proposal.

Kenny Donnelly: Yes. The simplified provision is designed to remove bureaucracy, and it is hoped that it will result in savings for us in the administrative task of drafting documentation for consideration by the court. The provision relates only to standard special measures to which a victim or a witness is entitled, so there is no real need for judicial consideration; it is simply a matter of notifying parties of what is required.

Generally speaking, the answer to your question is yes. The report by the Inspectorate of Prosecution in Scotland, which I referred to earlier, as one of its key findings rather than as a recommendation highlighted that the provision could be used to streamline the process.

Although the bill seeks to make evidence by commissioner a standard special measure, the requirement of the ground rules hearings distinguishes it. Obviously, further consideration will have to be given not to granting the measure but to the regulation of the commission hearing.

Shona Robison: I do not necessarily require a response if people are satisfied with the proposal.

I will stick with the process and procedures. Does the panel believe that any further action might be required to ensure that the right measures are identified for vulnerable witnesses? Are there any other measures beyond ground rules hearings, which we have heard about, that you want to highlight?

Kenny Donnelly: Every case rests on its own circumstances. I am sorry—that is a typical lawyer's answer, but it is an accurate one. For instance, we might have to apply for a combination of special measures for a child or an otherwise vulnerable witness. We could seek to have the evidence by commissioner application as a special measure, the use of the prior statement as a special measure and the use of closed-circuit television, whereby the witness gives their evidence from a separate site, as a special measure. In every case, we look at all the measures that are available, discuss them with the victim or witness subject to their concerns—as I mentioned earlier, that can sometimes be difficult—and come up with the balance of measures that will, it is hoped, support them best through their evidence and preserve the integrity of the proceedings.

Shona Robison: Do you believe that the process and procedures for reaching those decisions are okay?

Kenny Donnelly: Yes. We welcome the streamlining of the initial part of the process, but there are mechanisms for review. As we get nearer to the date of the hearing, there might be a change in circumstances or in how a witness wants to go about giving evidence. There are mechanisms whereby the court may review its approach, on the application of parties, right up until the hearing at which the evidence is given, so I think that there is sufficient flexibility in the process to meet the interests of justice.

Shona Robison: Okay. I will move on. We touched on resources, and a number of comments were made. It would be helpful to get your views on whether the resource implications are

adequately reflected in the financial memorandum. Your written evidence covers some of the issues in that regard, but will you talk about the resource implications in the context of the proposed phased approach? Clearly, the resources will need to match that phased approach—if you get what I mean. I am thinking about the speed of change, what can be achieved and whether the resources that have been identified will enable us to take a cautious approach. There will be further resource implications beyond that, but I am talking about the resources that are required to achieve what the bill seeks to achieve rather than the potential future changes. It would be helpful to get your views on the record.

Dorothy Bain: The financial memorandum is more detailed than financial memoranda that I have seen for some other bills, and the costs of the proposals are fully reflected. There is not much that the faculty can do to challenge the figures; they look thoroughly researched. For that reason, I have nothing to say about them.

In our written submission, we say that the assumption that underpins the financial memorandum is very much that

"the current preliminary hearing system will continue to act as the GRH"—

that is, the ground rules hearing. We say that "very limited extra costs" are therefore apportioned for the Scottish Courts and Tribunals Service and the Scottish Legal Aid Board. However, if a procedure is to be brought into effect to ensure that evidence is captured as near to the time as possible, as the faculty says, that process should not take place after the service of the indictment. If that is right, there will not be the opportunity for the preliminary hearings system to act as the ground rules hearing, so there will be an extra hearing, which might have financial consequences.

On a separate point, the stepped process that the bill envisages for the introduction of the measures that we are talking about is to be commended. Stepped change is necessary for this particular legislative change, and financial analysis of the change will be required after the procedure for which the bill provides beds down—

Shona Robison: We need on-going evaluation of the approach and its impact on other parts of the system.

Dorothy Bain: Yes, very much so. I agree entirely with what you suggest. If there is a reduction in churn, there might be savings elsewhere. After the evaluation exercise, it might be possible to say that the new procedure has created savings elsewhere that we cannot currently envisage.

Shona Robison: That is helpful. Does anyone else want to comment?

Grazia Robertson: I do not think that the Law Society has a great deal to say about the finances other than to comment on the general principle of resourcing and our keenness for a phased approach. As Kenny Donnelly said, there has to be new funding. Taking funding from elsewhere in the criminal justice system would lead to imbalances that would create a different set of problems for us all.

Regarding the defence, the Scottish Legal Aid Board and others will have to be alert to a change in procedure that will require us to do certain things at an earlier stage in the proceedings, so that they can consider whether funding is properly in place to enable that. I am happy to leave it at that.

Kenny Donnelly: I am in broad agreement with what the other witnesses have said. As with any financial memorandum, there is a degree of projection and estimation of time and cost. As I said, and as Shona Robison said, an important element of the phased review will be on-going evaluation to ascertain whether what was projected is adequately and effectively meeting the requirements of the roll-out of the next phases.

Shona Robison: Thank you, that is helpful.

Rona Mackay: I am conscious of the time, so I ask the witnesses to answer this question very briefly. Are you in favour of the barnahus or child's house system, which is a more holistic way for children to give evidence that is used in Scandinavian countries?

Kenny Donnelly: It is difficult to answer that question quickly.

Rona Mackay: I appreciate that.

Kenny Donnelly: In general, we certainly should look at that as a potential future model. However, because it is such a departure from the way in which we currently conduct investigations and subsequent court proceedings, it is a long-term vision rather than something that we could do now.

Dorothy Bain: I am supportive of the concept, which highlights that we are all still learning how to handle very difficult cases. Every opportunity for change should be considered, if it will help.

Grazia Robertson: The Law Society would never close its mind to any suggestion, but quite a lot of packages of changes have already been implemented and we are now considering another one. All that we want is to take our time and assess things. Once we have all the information about what exists and what is new on the horizon, we can move on to other elements.

Euan McIlvride: We have not considered that approach, but I cannot think of any reason why we would have a problem with it.

The Convener: I have one final question, which is in two parts. Previous witnesses have mentioned communication as being absolutely crucial throughout the process. Could we have your views on that? More specifically, do you know of cases in which vulnerable witnesses have been encouraged to give evidence and have done so only to find that the trial that they expected to happen has not taken place because the accused has pled guilty to a lesser charge, which the witnesses were totally unaware of until they arrived at the court doors? There is obviously a communication issue there.

More generally, when we have encouraged vulnerable witnesses to come forward in very serious cases and there has been a conviction, there may have been repercussions, as there frequently can be with people who are in a position of power. Should the bill extend measures beyond support for vulnerable witnesses in giving evidence and pre-recording to ensure that support is available after conviction?

Kenny Donnelly: On communication, as the committee will be aware, there are examples of things not having been as well communicated as they ought to have been. We are constantly striving to improve, and we recognise that communication is key. The inspectorate report that I mentioned focused on that, and one of its recommendations was about increasing the frequency of contact with victims and witnesses. We are implementing that recommendation and are trying to improve our approach.

I could be here all day, talking about plea negotiation, so I do not want to go down that line too much unless you want more detail on it. However, it is something that parties look at with a view to resolving proceedings in the best interests of—

The Convener: My question was about the communication of the decisions, which I understand can happen very late.

Kenny Donnelly: Part of the problem is that it can sometimes happen at the 11th hour and sometimes even at the 12th or 13th hour. It is imperative that we communicate decisions appropriately, in the right manner and at the right time to victims and witnesses, subject to the circumstances. I would welcome the opportunity to look at and learn from examples of that not having happened. It should not be that way.

The Convener: I also asked about support.

Kenny Donnelly: To an extent, that is outwith the remit of the Crown Office and Procurator Fiscal Service. We are the prosecution service and, although we offer support to victims and witnesses through the court process, it is for other agencies to offer that support when the case is concluded and in the post-trial period.

Dorothy Bain: Communication with the victim of crime and the provision of necessary support for them are key to the success of the criminal justice process in such cases. Communication is the Crown Office's responsibility from the stage at which a case is reported to it, but I am not able to comment on what the Crown Office does or does not do in that regard.

One can readily see support after conviction or acquittal as another issue that should be looked at. I am sure that, if such support is provided, it will be welcomed both by victims who feel that they have gone through the process successfully and by those who have been let down by it.

I think that, in all of this, what is key to a successful outcome, including a successful trial outcome, is communication with and support for the victim before, during and after their evidence in court.

Grazia Robertson: I do not think that I can add much more from the Law Society's perspective, because I do not know that we necessarily give a great deal of thought or attention to the issue in our submission.

I can see where communication between the Crown and witnesses will be very important, but we have to make clear what type of communication we are talking about. It will be about ensuring that witnesses understand the process, explaining to them what is happening and why but not going into the ins and outs of their evidence. That is sometimes what witnesses feel the Crown should be doing, when, in fact, that would be quite improper. The Crown is alert to that and the fact that witnesses sometimes expect to receive certain types of information that they cannot receive. With regard to their being kept abreast of proceedings and the reasons for any delays, I understand why that would be stressful and why it should be avoided at all costs.

Euan McIlvride: As we do not really have any involvement with the issue of communication with victims and witnesses as it is being discussed here, I do not think there is anything that I can usefully add.

The Convener: Thank you very much for what has been a very worthwhile evidence session. I suspend the meeting for a five-minute comfort break.

11:31

Meeting suspended.

11:36

On resuming—

The Convener: I welcome our second panel. Detective Chief Inspector Graeme Lannigan is from the public protection specialist crime division of Police Scotland, and Kate Rocks, who is the head of public protection and children's services at East Renfrewshire health and social care partnership, is representing Social Work Scotland.

I thank the witnesses for their written submissions—it is so helpful to have them in advance of our hearing from you in person.

Fulton MacGregor: Good morning. I have a general question. Is there a problem with vulnerable witnesses, particularly children, having to explain events to police and social work? Perhaps you could reflect on the joint investigative interviews, which might take place on several occasions and over a long period.

Kate Rocks (Social Work Scotland): I do not want there to be any misconceptions about joint investigative interviews. They usually happen when an incident arises for a child—they are incident specific—and the police and social work plan the investigation together.

The social work starting point is to assess where the risks lie for the child and to make sure that a safety plan is in place. We try to minimise the number of interviews. Graeme Lannigan will probably say—I do not want to speak for Police Scotland—that the purpose of the joint investigation is for the police to establish whether a crime has been committed against the child. We have different approaches at the very beginning to establish the facts and what has happened to the child.

I suppose that some of the learning over the years about JIIs is that we need to do them better and that they need to be much more trauma informed. Lesley Boal and I are the co-leads of the new JII training programme. We are developing that so that we will be more likely to recognise children's trauma from the outset. There is an opportunity to improve the system.

In the main, JIIs are used for children for whom child protection issues have been identified, and children who are not victims in child protection cases but might be associated with them as witnesses. For example, a child protection issue might relate to one child in a family, so we have to interview the siblings to establish whether they, too, are at risk, or whether, from the police's perspective, any other crime has been committed against them. The starting point for social work is quite different.

I know that other witnesses' submissions have included lots of references to JIIs, so I felt that it was really important for the committee to be clear about their purpose.

Detective Chief Inspector Graeme Lannigan (Police Scotland): From a policing perspective, the JII process stems from interagency referral discussions in which we have identified children for whom it would be beneficial to have a joint interview with police and social work. The number and length of the interviews vary, and the interviews should be based on the child. The planning and preparation that go into the interviews—and our consideration of the new training product—should be trauma informed and child focused. Rather than suiting the needs of the police, the judiciary or social work, JIIs should be focused on the child.

Fulton MacGregor: I am keen not to step on my colleagues' toes in areas of questioning that they will deal with later, but I have listened to the responses from Kate Rocks and Graeme Lannigan and I note that JIIs are specific and planned on an individual basis. Can you go into more detail about what happens in cases in which there might be communication difficulties and the child might require the use of a communication aid, and about how pre-recording of evidence could work on such occasions?

Detective Chief Inspector Lannigan: We use communication specialists on occasion. The traditional JII training to date has been a five-day course; you will understand that that can in no way train people in a communication specialism. We have colleagues in speech and language who can help us, and we use specialists from within the United Kingdom, including from the National Crime Agency. We can link in with specialist interview advisers to give us, as interviewers, pointers at the planning stage so that we can get the best information from the child in a way that suits them. The current course in no way makes police officers and social workers communication specialists. We have to work together with partners to plan the interview and make it bespoke for the individual child.

Kate Rocks: I agree with Graeme Lannigan.

Fulton MacGregor: To avoid the risk of covering other members' areas, I am happy to leave it at that, convener. However, it has dawned on me that I should, at the start of the first evidence session, have declared an interest as a social worker who is registered with the Scottish Social Services Council.

The Convener: You have done so now; it is duly recorded.

Daniel Johnson: I would like to follow on from the previous question. One of the key principles that we are looking at is that there should be provision of a good environment for children who are giving evidence, but this is also about trying to reduce the length of time over which evidence is taken. We have heard that the JIIs can be useful in doing that, because they can be admitted as evidence in chief and therefore avoid the need for duplication through children giving evidence again as the case proceeds. What insights can you provide into how the JII has been improved so that the quality of evidence is good enough to avoid that duplication?

Detective Chief Inspector Lannigan: I should make the committee aware that I am involved in the new JII training product, so I am working with key individuals in the police and social work to develop it. First and foremost, our training takes a trauma-informed approach, and we are also looking to learn some skills from specialisms in speech and language. The training is set to increase from the current five days up to about a year's worth of training, which shows the committee the difference that we are trying to make.

In respect of age, development and communication abilities, we tie the training down to essential elements of crime, and consider all the topics that we would wish to cover in order to test evidence. When we have identified which areas we want to cover, we must look at how best to introduce them to the child—what phrases we should use and what types of questions should be asked. We appreciate that we have to get all the information that is required for us to test and probe that evidence, in order to get the high evidential standard that we are looking for, and to do so in a child-centred way that is legally sound and compliant, but is also understood by the child. Those are some of the core values that we are trying to instil in the new training product.

11:45

Daniel Johnson: Can you provide examples of questions, or of how they will be altered, to ensure that high evidential standard?

Detective Chief Inspector Lannigan: Most people have heard of leading questions, double negatives and so on. The new training product also looks at the Eunice Kennedy Shriver National Institute of Child Health and Human Development's model, which is internationally acclaimed and has research backing. Once we have identified the topics, we can work through a phased process or framework in order to use the best open questions and the best questions that suit the child's needs and communication skills. We would then allow the child to interpret and to give their information as best they can. In questioning, when less is said by the interviewer and more is spoken by the child, that is always beneficial, through not using closed questions, for example. We should try to encourage the child to provide their evidence as best they can.

Daniel Johnson: That is very helpful. How will that work be measured and evaluated to ensure that it is doing what it is intended to do—that is, to provide higher-quality evidence and to reduce the need for additional questioning or interviews later in the process?

Detective Chief Inspector Lannigan: There will be several processes. One will be self-evaluation by interviewers when they have finished the interview. Feedback will also be required from the court process, if a particular line of questioning has been objected to. Peer review will also be important. The model that we will use will be subject to rigorous scrutiny by the individuals who conduct the interview, by peers, by supervisors, managers and interview advisers and by the courts. All that scrutiny will be fed back through 360 degrees in order to increase the quality of the interviews. Using highly trained officers more frequently will also lead to a better product.

Daniel Johnson: So, the courts provide formal feedback to the police.

Detective Chief Inspector Lannigan: We wish to build on that. We have worked with the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunals Service during development of the training. We want to build in feedback, because there can sometimes be a disconnection between what happens in court and information coming back to interviewers. Such feedback would inform practice.

Daniel Johnson: What is the view from a social work perspective?

Kate Rocks: The evaluation process, including self-evaluation, is really important to ensure the standard. The current situation in my local authority is that every single children and families social worker is trained in JIIs. The chances are that those social workers might well conduct three or four JIIs in a year, so we know that we need small cadres of social workers and police officers to become highly skilled in that work. The area is very complex for social workers and police, so we need to get the work right to ensure that the child gets justice.

The standard of a video-recorded interview or a joint investigative interview is dependent on how it is done. Their being of a high standard is at the nub of getting justice and ensuring that the child is not traumatised through the legal process. We see the importance of JIIs and what they can achieve

in the longer term. No doubt the committee will want to know Social Work Scotland's views on that.

Interestingly enough, the process has to be evaluated and it needs to be done rigorously. Social Work Scotland and I, as a chief social work officer, have come to the conclusion that not every social worker who works with children and families has the skill set to do JIIs, so we need to ensure that we use the right social workers and the right police officers. It is not necessarily just about social work; it is about particular skills in communicating with children. People might well be good at providing support for families, but being able to communicate effectively with a child to get underneath what has happened to them is a skill in itself.

We recognise that the system needs to improve, and that that will take time. We welcomed Lady Dorrian's report. Police and social work got together very quickly after the report and said that there was an opportunity for us to do something different in terms of the evidence and procedure review. We feel that the evaluation process and the high-threshold test are important to ensure that the process is effective.

John Finnie: My question is for DCI Lannigan. I understand that you have highly trained people, and it is gratifying to hear about the level of co-operation and detail that has gone into ensuring that. Kate Rocks touched on the fact that all social workers will have JII training. I am thinking of a situation in which a child discloses to someone who must then respond to that disclosure. It is extremely unlikely that the officer or officers involved will have been trained to that level. Will there be input into every officer's training so that nothing will be done that might inadvertently further prejudice the position of the child?

Detective Chief Inspector Lannigan: That is absolutely right. The in-depth research that we have done on the new JII programme and the trauma-informed approach has indicated that some training will have to be rolled out to everyone. The move towards having a smaller cadre of officers who do much more planning prior to the JII introduces a gap in the system; we need the initial attending officers or social workers to ask certain questions in order that they can decide what to do. However, they cannot be leading questions, and they must be asked in a way that will get the maximum amount of information without traumatising the child. My answer is that I do think that there is a need for further training. A lot of the research that we have done on the project is viable and could be used in that respect.

Daniel Johnson: I was interested by Kate Rocks's comment about the need to create small cadres of specialist social workers and, by implication, small cadres of specialist police officers. Can I tease that out a bit? What is your conclusion? Are you suggesting that that takes place within local authorities or are you talking about specialist teams that go beyond local authority areas because of requirements for their specialism? I would put the same question to the police: is a specialist function required that goes beyond existing boundary area divisions?

Kate Rocks: I do not want to contradict myself, but we want social workers that are trained to a high level. The danger is that if you create specialist social workers, you create a single point of failure for a system. You have to ensure that you have succession planning on how to deliver JIIs, because a busy social work team never knows what is going to come in on any one day.

We have had this discussion with regard to larger local authorities, where the critical mass makes it more likely that there will be expertise in a big city such as Glasgow than there will be in East Renfrewshire, for example. Social workers in big cities will be much more exposed to JIIs and more experienced in undertaking them. It would be up to local authorities to decide how they would organise training, working on the principle that training for JIIs is quite different. It does not last for five days; it can take up to a year, as Graeme Lannigan has outlined.

We have a bit of work to do on how we structure that provision across the 32 local authorities. I can talk only about my own area, which is very small and does not have the volume that cities and more urban areas have. It is more likely that I would have to go into a shared arrangement with my neighbouring local authorities to ensure that we have the necessary number of highly trained social workers to undertake JIIs. We would probably have to take more of a shared-services approach to ensure that. Bigger local authorities such as Glasgow City Council are more likely to have that experience, because of the critical mass that they deal with on a daily basis. I hope that that answers your question.

Daniel Johnson: That is very helpful. From the police perspective, what degree of specialism is required? Is there a central resource to do JIIs or is there something embedded at local division level?

Detective Chief Inspector Lannigan: Things are simpler for police officers, because we can take a specialism and react across boundary areas. The challenge here is that we are talking about a joint interview, which we have to undertake with our social work colleagues. From a police perspective, it is easy to put the right resources in the right place with a specialist skill set, but, as I have said, they have to be matched with social work.

I do not want to highlight one particular area, but it is easy to say, "Use smaller cadres more often." Where there are geographical issues—for example, in the Highlands and Islands—we need to work closely together. After all, you might have to fly or get a ferry to an island; indeed, there might not even be flights to—or even police officers on—some islands, so we have to make close links and put in place a model that services not only city centres but everyone throughout Scotland to the same standard.

The Convener: Fulton MacGregor has a small supplementary.

Fulton MacGregor: Picking up on Graeme Lannigan's last response, I know that, in Lanarkshire, there is a family protection unit that provides the officers for the joint investigative interviews. Is that model mainly replicated across the country, or are things different in different places?

Detective Chief Inspector Lannigan: As I have said, that would be the model in more built-up and more populated areas, whereas in certain areas in the north or the south of the country where such a cadre of specialist detective investigators does not exist, you have to consider what is beneficial for the child. Is it beneficial to wait two, three or four hours or even a day for one of those officers to appear, or would it be more beneficial to use a locally trained officer who might have that skill set? In the latter case, you would have to balance that with a consideration of how often those skills are used. There is no easy answer to your question, but I think that it is a matter of getting the right people with the right skills in the right place in the best interests of the child.

Rona Mackay: What is your view on the proposal at this stage to restrict the application of the bill's provisions to the most serious cases that go to the High Court?

Detective Chief Inspector Lannigan: It is absolutely the way to go. There comes a point when people realise that we need to do better, and there is an expectation about wanting to do that now. However, I note that, when the bill team gave evidence, they said that they looked at how things were working down south, and the information that came back was not to go fast too soon. You should roll things out in an area, learn any lessons about capability and capacity and then take things from there. As far as Police Scotland is concerned, a phased approach is exactly the way to go.

Rona Mackay: What do you think, Kate?

Kate Rocks: Social Work Scotland supports that position.

Rona Mackay: Should the bill state, albeit with a caveat, that that will happen? Should it contain provision to allow us to extend the approach without having to introduce more primary legislation if, after a period, it was decided that it should be extended?

Kate Rocks: It is really helpful to have flexibility in legislation, but we need to look at the learning as we move forward. The bill represents a significant cultural and system change, and that will take time. For it to be effective, we need to look at the learning and ensure that we, too, are evaluating the impacts on children.

I was interested in the comments from the Faculty of Advocates and the Law Society. As it is, we do not know enough about the impact and effectiveness of special measures, because we have never asked those questions. My plea to the committee, therefore, is for those questions to be asked.

Detective Chief Inspector Lannigan: As Kate Rocks has said, flexibility is key. The goal and vision are for all vulnerable witnesses to be able to give their evidence in this manner. We are fully supportive of that, but, as far as resources and finances are concerned, we are cognisant of the need to learn lessons as we go. Again, I commend the phased approach that is being taken and the need to learn lessons as we go along.

12:00

Jenny Gilruth: I want to revisit some of the evidence that we heard at last week's committee meeting from the children's charities with regard to children's experience of the system. One of the charities told us about a child witness who had to give 27 statements to the police. That obviously impacts on the quality of the evidence and potentially retraumatises the witness. Mr Lannigan, can you give me your views on that from a police perspective? Should there be, for example, a cap on the number of times that the police are able to speak to a child witness?

Detective Chief Inspector Lannigan: I heard that evidence being given, but I do not know that case, so I cannot speak about it. I was somewhat surprised by what I heard and I would say that that does not represent normal circumstances—I have never heard of that happening before. However, that might have been a protracted child sexual exploitation case. Further, when someone talks about a statement, they might actually be talking about a contact.

In answer to your direct question, I do not think there should be a cap per se. I think that we should plan the interviews that focus on a child. If, for example, a child has a medical difficulty that means that they can spend only five minutes at a

time answering questions, I can envisage a greater number of interviews being required. However, that would happen only in extreme circumstances. I do not think that the case that you mention is a normal case.

Jenny Gilruth: I want to look in a bit more detail at the training that police and Social Work Scotland are revising at the moment. I was quite heartened to hear some of the terminology that you used in your response to Fulton MacGregor at the start of the session, when you spoke about being trauma informed and child focused. All that is great to hear, but there seems to be a bit of a disconnect between that end of the system, on the police and social work side, and the court system itself. Were the courts or the Crown Office involved in revising the training?

Detective Chief Inspector Lannigan: A policy officer from the Crown Office and Procurator Fiscal Service is embedded in the training system. We are well represented across the sectors. We went out of our way to ensure that that was the case at the start. The team that was developing the training was supported by the national health service, and we have a reference group and governance groups. There is a wide representation from the third sector—including organisations such as Children 1st—to ensure that there is a cohesive response. I would have to say that the training is well supported throughout Scotland.

Kate Rocks: The Scottish Children's Reporter Administration is also included in those discussions. That is important because of the issue of the civil threshold. We hope that, regardless of the way in which evidence in chief is taken—whether it is done by commissioner or another way—it can be used for the civil proceedings in terms of proof. We feel that we have had a high level of buy-in and good representation. For example, NHS Education for Scotland has been involved in helping us to develop the first module, because that needs to be consistent with the national trauma framework. That approach means that what we are doing will become part and parcel of the culture of Scotland and will not be something that sits out at the margins because it is seen as being only a children's issue.

Liam McArthur: We have heard strong support for the way in which things are working in a couple of areas, but there have been questions about whether the bill should be going further.

First, there was some concern that the detail about what should be involved in ground rules hearings was not as explicit as it might be. Do either of you have a strong view about whether there is a common understanding in that regard and things are working well or whether the situation might benefit from additional detail being placed in the bill?

Detective Chief Inspector Lannigan: I am fully supportive of ground rules hearings. It is not something that the police are involved in. However, from the early stages of meeting a victim or a witness, we begin to build up a picture of them. I therefore suggest that information that is gleaned right from the start could be advantageous to a judge or sheriff in a ground rules hearing.

Kate Rocks: We are not involved in ground rules hearings. A lot of these children are known to us, so we feel that there is probably an opportunity for us to help the ground rules hearing to establish how best to support the child to give evidence. We are generally supportive of the ground rules hearings.

Liam McArthur: You both indicated that you are not directly involved in the process at the moment. Is your input being sought routinely? Would the bill benefit from greater clarification about when it is appropriate to factor in and seek out that sort of input, either from a police perspective or a social work perspective?

Detective Chief Inspector Lannigan: As we put in our written submission, since 2014, Police Scotland has been involved in witness strategies for the High Court for victims of rape. The learning from that process could be transferred into ground rules hearings.

I reiterate that when we have information and a relationship is built up through planning and preparation, all that information about how someone communicates and what their needs are should be passed across for the JII. Do we do that as well as we could just now? I do not think so, but, in the future, we will have to.

Liam McArthur: Would it be the same from a social work perspective?

Kate Rocks: As we heard earlier, communication has been an issue. Social work might not know that a child is approaching going to trial. We are not notified by the Crown Office. There is an assumption that we know that a child will be giving evidence, but that is not always the case, because there is no automatic notification to local authorities about the child.

Liam McArthur: Previous witnesses touched on Lady Dorrian's report and some of the fleshing out that she provided about how this process should work. However, from what you are saying, the input from police and social work has not necessarily altered as a result of that.

Kate Rocks: No, because we need to be notified. We are reliant on parents or some other party telling us. As I say, the information lies with

the Crown Office and there is no automatic notification to social work.

Liam McArthur: That is helpful.

In its written submission, Police Scotland was very supportive of the benefit that the expertise of intermediaries can have in facilitating communications and making that expert assessment. We heard that point from the Faculty of Advocates in the previous evidence session. I would not say that the other witnesses were sceptical, but they raised possible concerns about the quality of that intermediary involvement.

Is there a feeling, particularly from a Police Scotland perspective, that having the intermediary role set out in the legislation might be beneficial?

Detective Chief Inspector Lannigan: It would be hugely beneficial. I have been fortunate to work for a UK policing agency, where I came into contact with intermediaries and the department that deploys them and facilitates their use. As an on-call resource for supplying intermediaries, I found them to be hugely beneficial to the whole process as independent communications specialists, from the pre-planning of the interview right through to the court process.

I know that the demand for registered intermediaries is growing and it would seem that their particular specialisms are used and sought after in England and Wales. I think that using them would be a huge advantage in Scotland.

Liam McArthur: From recollection, the Law Society was comparing the use of intermediaries with some of the issues that it believes have arisen in relation to appropriate adult involvement for adult vulnerable witnesses and suggesting that the consistency of the input has not necessarily been as high as had been hoped for. However, I take it that, in your experience of working alongside intermediaries in England and Wales, you have not seen a similar issue arising there.

Detective Chief Inspector Lannigan: Where you have particular difficulties, it might be because you have a minimal number of people with that specialist skill set. That is why we have to get the best people to help.

Some children have really bespoke communication issues and that is why we need the specialists. Even with the best intentions, with a year's training, you are still not going to get that level of specialism that you may require on occasion. That is why I think that using intermediaries—those independent communication specialists—can be worth it in those situations.

Liam McArthur: Who would be the arbiter of when an intermediary is required? Who makes that judgment?

Detective Chief Inspector Lannigan: As a senior investigating officer, if I had a case with a child with significant communication challenges at the interview stage, I would request an intermediary to get involved right from the start, for example at a JII, before it gets to the court process. The information would pass right through COPFS to the court process. The earlier a communication specialist is on board, the more beneficial it is to the whole judicial process.

Liam McArthur: Would you see that running through any hearings thereafter, with the same individuals ideally remaining involved?

Detective Chief Inspector Lannigan: That is my experience of how it works.

Liam McArthur: What is the social work perspective?

Kate Rocks: We cannot comment because we do not understand enough about the intermediary system. Reading the written submissions, it seems to be an effective way to go. The issues would be who commissions the intermediary, and what the purpose is. Even when we looked again at the training for the JII, we knew that there was a need for more speech and language and communication input. Nationally, we do not have huge expertise in forensic speech and language therapists. They are more commonly found down south, less so in Scotland. There are some, but not a lot. I am keen to understand who the intermediary would be and the kind of qualifications they would hold.

Intermediaries seem to be different from appropriate adults. I imagine that, as the appropriate adults scheme operates across the board, a person does not necessarily have to be a highly trained professional to be an appropriate adult. They need an understanding of how to ensure that communication in an interview is in keeping with the individual's understanding, and how to sense check. From what I have read in the submissions, appropriate adults and intermediaries are not the same thing—they are quite different.

Liam McArthur: The criteria that we need to apply would self-evidently be the level of expertise, but also whether there is the capacity to deliver, in terms of the number of people with the expertise.

Kate Rocks: That is correct.

Liam Kerr: In response to various questions, you have spoken about improved communication and training throughout the process of dealing with vulnerable witnesses. Is there any area where support for vulnerable witnesses through the process can be improved? Is there anything that you want the committee to take on board?

Kate Rocks: There are children who have been involved in the care system yet have given evidence without social work or education services being aware of that. Under the getting it right for every child approach, if a child gives evidence, the team around the child should know that and help to support them. There should not be a reliance on the Crown Office to put in arrangements for that.

The other issue is the length of time that it can take for children to give evidence, particularly in solemn proceedings, and the child's memory and recall. These children are usually traumatised by what has happened. They may be a victim or a witness, generally of a significant domestic abuse case, and that may impact on them as they may suffer trauma themselves. We have to consider those things, because children need help as quickly as possible. Sometimes the court system is a counter to the early provision of help. The system needs to be speedier for children.

12:15

Liam Kerr: We can assume that those lengthy periods will continue for the foreseeable future, at least in some cases. You say that more help is needed, but what does that look like specifically?

You talked about education services or local authorities not being made aware of cases. That surprises me, because it seems fairly obvious that all the relevant agencies should be aware. Is there a barrier to that happening? For example, is there a data protection issue?

Kate Rocks: It is just something that happens. Assumptions are made that local authorities know. Social work services rely on information coming from the Crown Office, and it may not know that social work is involved. We might have been involved at the outset—there might have been a JII—but the child might not be known to us any more because there are no care and protection issues as the risk has been removed. However, there will always be a named person or someone in education or other universal services who knows the child. The approach is inconsistent. Such notification may happen, but I checked out the issue before the meeting and I found that even the ASSIST—advocacy, support, safety, information and services together—project is not always notified in relation to children who it supports, as it is reliant on the parents or third parties to advise it of that.

Liam Kerr: So you are not aware of any particular barrier to that happening.

Kate Rocks: I am not aware of any barrier.

Liam Kerr: Mr Lannigan, before I ask another question, do you want to say anything on that?

Detective Chief Inspector Lannigan: No. I cannot add to what Kate Rocks said.

Liam Kerr: Earlier, we talked about post-process support. We have talked a lot about the support for vulnerable witnesses going through the process, but what happens to them after the process, and what should happen or what would you like to happen?

Kate Rocks: I believe that, nationally, children should have an automatic entitlement to recovery services. The picture is inconsistent, and it depends on the professionals who are involved with the child. To go back to my first point, that works on the assumption that professionals are involved and they know what has happened to the child. Children's experience is that the whole court process is something that happens in secret. They cannot or are not allowed to talk about it, and professionals are anxious about talking about it with them because it might be sub judice and so on. It is clouded in secrecy. We know that children's recovery needs to happen quickly and that they need to be given the opportunity to speak as soon as possible.

Liam Kerr: You say that, after a process, a vulnerable witness may have some support but a lot depends on where they are and which professionals are involved. There is no standardisation. Is that what I am hearing?

Kate Rocks: Yes, that is right.

The Convener: Mr Lannigan, are you aware of cases where, after a vulnerable witness has given evidence and there has been a conviction, the police have been called out because there have been repercussions that date back to the fact that the vulnerable witness had the courage to come forward? Obviously, we would like to know about that if we are encouraging witnesses to come forward.

Detective Chief Inspector Lannigan: I cannot give you specific examples, but I can say that, if someone goes through a court process and it does not work for them and is unhelpful, I am sure that that is an inhibitor to their coming forward again and that they will tell people how unfortunate the process was for them. Therefore, any advancement that we can make and anything that we can do to make the process better and assist recovery will be hugely beneficial from a policing perspective, because there will be fewer inhibitors to people giving evidence, which we absolutely rely on.

The Convener: We are talking about encouraging people to come forward in very serious cases. Even when there is a conviction, the people who are convicted can still be in a position of power and influence. Should there be provisions in the bill to deal with possible

revictimisation as a direct consequence of people having the courage to come forward and give evidence?

Detective Chief Inspector Lannigan: I would not be against that at all. People who come forward and report what has happened to them are brave. It is a real challenge for them to go through the court process. It is a challenge for anyone, never mind a vulnerable individual, so I support anything that we can do to enhance the experience.

Kate Rocks: We agree, and we ask the committee to consider where that sits with the Domestic Abuse (Scotland) Act 2018. Children can be the victims of coercive control as well as their mother or father—I do not want to be gender specific. The element of coercive control, where it sits and whether there has been a successful conviction will be an issue for the child.

The Convener: And possibly the wider family.

Kate Rocks: Yes.

Daniel Johnson: I have a supplementary question to follow on from what Liam McArthur and Liam Kerr asked about the ground rules hearings and the support extended to witnesses. Last week, we heard the view that there needs to be almost a single point of contact guiding the child through the process. We have just heard from Kate Rocks about the lack of notification and, by dint of that, the support that could be provided by social work.

The ground rules hearings provisions in the bill provide the commissioner with the ability to consider appropriate support and a supporter, and to consider whether

"there are steps that could reasonably be taken to enable the vulnerable witness to participate more effectively in the proceedings".

Should those provisions be much more proactive and ask the commissioner to ensure that information is provided and support is put in place? Rather than it being a negative, should there be a more positive duty on the ground rules? That might lead the commissioner to consider contacting social services or other parties or organisations that might be involved in the child's life and might be able to help with that process. Might it be worth considering putting that into the ground rules hearings, rather than what is in the bill?

Kate Rocks: I agree that it needs to be done in a much more assertive way, as opposed to being something where people can say, "Perhaps—or maybe not." Not all the children who go through the process will have been known to social work, but we should work on the basis that they are entitled to have a supporter.

John Finnie: Chief Inspector Lannigan, you talked about a witness strategy. Is that extended to the people who we are talking about who will be covered by the legislation?

Detective Chief Inspector Lannigan: No. It is not extended specifically to children. It is specific to those high-tariff sexual offences that go to the High Court. That is not a perfect situation, but I mention it because all information that comes forward is hugely beneficial, and it takes us right from the initial police involvement to ground rules hearings, which we have just talked about. If we had greater knowledge about the individual, it would allow the strategy to be put in place. Thereafter, specific plans and actions for that individual would make the judicial process more suitable for them. I mentioned it because there is work to be done with early information gathering to make sure that the information flows straight through the process.

John Finnie: I have two or three questions around that. Would it be possible for you to share information about the strategy with the committee, either by letter or in some other way?

Detective Chief Inspector Lannigan: Absolutely.

John Finnie: It sounds as if there is potential to extend it to the group of people that we are talking about. Given the nature of some of the people who are accused and their propensity for extreme levels of violence and intimidation, does a risk assessment form part of the strategy?

Detective Chief Inspector Lannigan: I cannot tell you all the details of the strategy. Are you talking about potential for the future?

John Finnie: Yes. I was going to go on to pick up a point that the convener made. A risk does not stop with conviction; in fact, it can be compounded by conviction. I assisted someone in a case in a community where there were extreme levels of violence that continued afterwards. The police continued to be involved and were very helpful.

Detective Chief Inspector Lannigan: In such circumstances, we have to be involved. If the person has not gone to prison or has been released, we have to be aware of the situation post-trial and be alive to the repercussions for witnesses or victims who have stood up and given evidence. We have to protect them, and being seen to do that will encourage other people to come forward. I fully support looking at risk and supporting all victims and witnesses who have been brave enough to report what has happened to them.

John Finnie: I have a question for both panellists. Are you aware of any reluctance to put in place special measures? We have heard

previously that witnesses have sometimes not been consulted and that there was just a presumption to put up a screen. Would that form part of the witness strategy?

Detective Chief Inspector Lannigan: We are not involved at the stage of considering special measures for the courtroom. However, I heard the earlier evidence that there is no reluctance. I am not aware of any reluctance, but I would fully support bespoke special measures that are planned in response to an individual's needs.

Kate Rocks: Our situation is similar to that of Police Scotland. We would not be involved in special measures. As I have outlined, we sometimes become aware of them if a parent or other party advises us. If we know that they are required—if the child is on a statutory order to us—we will make contact with the Crown Office. However, I cannot comment on the question, as I would not know.

John Finnie: If social work services are not supporting a vulnerable witness in those circumstances, who will be doing it?

Kate Rocks: That is a good question. It may well be the third sector or the family or extended family. Not all vulnerable adults are supported by professionals. There is almost a presumption that vulnerable witnesses or victims have support. It is more likely for children, but there may not be support for adults, unless they are involved with services.

John Finnie: For the avoidance of doubt, I add that I was not being critical of social work services. You can assist only if you know—

Kate Rocks: —and if there is a reason for involvement. A child being a witness to a crime is not always a reason for social work to become involved, and the situation is the same for adults. Our business is to promote the welfare and ensure the safety of individuals, and we do that in a very holistic way.

Shona Robison: I will go back to resources. The financial memorandum is quite detailed. I want to give our witnesses an opportunity to put more on the record, beyond what is in their written submissions. Police Scotland's submission seems to say that, as long as the approach is phased, the organisation is not overly concerned about resources, but if the approach went further than is in the bill, it would have concerns. Is that your position? Do you feel that the memorandum adequately resources what is in the bill, albeit that this is a first phase?

Detective Chief Inspector Lannigan: The bill is very specific in that prior evidence can be a written statement, which does not imply the requirement for more video-recorded interviews. However, if further video-recorded interviews were to be required, that would have huge and significant financial implications for the police with regard to facilities, training, IT infrastructure and so on. Those are not mentioned in the bill because of the option to provide prior evidence in a written statement. Police Scotland wishes to put on record that, should that initial narrow scope be extended to an implication that there should be far more video-recorded interviews, that would have a huge impact across Police Scotland.

Shona Robison: In our discussion with the previous panel, a call was made for continuing evaluation so that a proper assessment could be made of the costs of implementing the bill and, more widely, of whether savings could be made elsewhere in the system because of the bill. It was felt that that might help us to identify what resources would be required in the future. Do you agree?

12:30

Detective Chief Inspector Lannigan: It has been mentioned that COPFS would benefit from a ground rules hearing if the prior statement was video recorded. However, no such requirement is included in the bill. As far as the financial memorandum is concerned, Police Scotland has not identified any further additional costs in that area. Consideration needs to be given to whether, if we were to video-record the prior statement, there would be savings in the length of commissions and how they would run. If further investment was required, that would need to be met. However, that could be balanced against savings in the court processes.

Shona Robison: According to Social Work Scotland's submission, the resource issue seems to centre around the additional training needs of the legal profession, local authorities and social workers. I think that Kate Rocks mentioned earlier that much more training would be required than is currently the case.

Have I summarised where your concerns about resources lie, or do you have other concerns that you would like to put on the record? Do you recognise that the phased approach will help us to make sure that we go at a pace that enables matching resources to be provided?

Kate Rocks: Yes, but what Graeme Lannigan has said should be borne in mind. If there is greater reliance on VRIs, there will be greater reliance on social work to provide those VRIs. That will be an issue for social work as well as Police Scotland. As we move forward, there are interrelated asks in relation to how we deliver effective interviewing of children, whether in the context of the Age of Criminal Responsibility

(Scotland) Bill or the bill that we are considering today. There will be big asks from local authorities, and the financial memorandum does not address the impact on local authorities.

Rona Mackay: What are your views on the barnahus system? Should we be moving towards it?

Detective Chief Inspector Lannigan: Several issues arise in that respect, one of which is to do with the facility, how it appears and the funding for it. I have not been to such a facility, but I have seen images and photographs of one, which is far in advance of the facilities that we have in Scotland at the moment. It would be hugely beneficial to have such facilities.

From the point of view of how the interview is conducted and how that links in with the legal system, if we matched the product that we will have at the end of our work on JIIs with a bespoke facility or facilities throughout Scotland, that would be hugely beneficial, regardless of whether it is badged as barnahus. However, investment in facilities will unquestionably be required.

Kate Rocks: I had the opportunity to visit a barnahus in Iceland and I was struck by the fact that the approach is focused on the child and setting the right conditions to get the best evidence from the child. Lesley Boal is the head of public protection for Police Scotland. She and I felt that some aspects of the barnahus model and some of the thought processes involved ought to be applied to the new JII training.

What we have in Scotland at the moment is an inquisitorial, adversarial system. I was struck by the fact that, under the barnahus model, the children get justice really quickly. The interviewers have a high level of skill, which is directed by the judge who presides over the case in the barnahus—the judge goes to the barnahus. That should be our aspiration. We know that the conditions are not such that we can do that, but we will strive to make sure that JII can, as far as possible, achieve some of the very good practice that we have seen in Iceland.

I was very cynical when I went to Iceland, but I was very surprised by what I saw. The environment was fabulous for children. It was just a wee house. Everything was thought of. The children—and their parents—were welcomed at the door, and they got juice. Everything about the house was warm.

The conditions before a child has a joint investigative interview are even more important than the interview itself. Children need to feel relaxed; they need to feel safe. Everything about the barnahus felt safe—it felt safe to me as an adult, never mind how it must feel for a child.

Rona Mackay: That is helpful.

The Convener: We are looking forward to seeing the barnahus model ourselves this weekend.

Kate Rocks, you said that there would definitely be cost implications for social work. I am aware that the proposal impacts criminal justice social work and mainstream social work. Have you had discussions with the bill team? Is it clear from which budget any resources would come?

Kate Rocks: No, we have not had any discussions. We need to be clear about the phased approach and what the implications of that would be. If, for example, there is a greater requirement for VRI, there would be greater demand on social work and police to do that together. It is really hard to estimate what the cost of that might be. Evaluation is probably the right way to do it, in order to understand the impact.

The Convener: The financial memorandum says:

> "It is not anticipated that there will be any new costs ... to local authorities as a result".

We need to tease out whether costs will fall on local authorities or on the justice budget. However, on the issue of whether more resources will definitely be put in, the answer seems to be no.

Kate Rocks: That is correct.

The Convener: Okay; that is helpful.

That concludes our questions. We will suspend for a minute, to allow the witnesses to leave.

12:37

Meeting suspended.

12:38

On resuming—

European Union (Withdrawal) Act 2018

Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) Regulations 2018

Civil Jurisdiction and Judgments (Amendment etc) (EU Exit) Regulations 2018

European Institutions and Consular Protection (Amendment etc) (EU Exit) Regulations 2018

The Convener: The next agenda item is consideration of a proposal by the Scottish Government to consent to the UK Government legislating using the powers under the European Union (Withdrawal) Act 2018 in relation to three UK statutory instruments. I refer members to paper 3, which is a note by the clerk.

Before I invite members' comments, I note that our clerks have looked at the instruments and have a couple of observations that it would be useful to highlight. Stephen Imrie will explain the two main areas that we should be aware of.

Stephen Imrie (Clerk): Thank you, convener. I want to provide an update to the paper that members have in front of them, which, at the point of writing, said that officials did not have any comments. Subsequent to that, we have been looking at things in a bit more detail.

First, the timescale that is available for scrutiny of the instruments is shorter than the normal 28 days. The Scottish Government said that that is due to "drafting issues", which emerged late. In the case of the European Institutions and Consular Protection (Amendment etc) (EU Exit) Regulations 2018, the clerks understand that that has meant that Westminster's sifting committee, the European Statutory Instruments Committee, received the proposed instrument before we were notified, which is not normal procedure—normally, the Scottish Parliament begins its scrutiny before Westminster does. We thought that we would bring that to your attention.

Secondly, the two instruments on civil law—the Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) Regulations 2018 and the Civil Jurisdiction and Judgments (Amendment etc) (EU Exit) Regulations 2018—raise a number of important issues to do with child maintenance and civil law regimes for cross-border and commercial courts. This is, of course, entirely a matter for the committee, but you might want to ask Scottish Government officials to confirm that there are no substantive differences between what is being proposed and what was proposed in the Scottish Government's consultation earlier this year on the effect of Brexit on family law.

The Convener: On the timing issue, there might be extenuating circumstances on this occasion, but we want to send a very strong marker that this cannot be the norm, especially as we have no idea how many of these statutory instrument proposals we will get in the not-too-distant future. I also think that it would be good to get some more thoughts on the effect of the civil law instruments. I would welcome comments from members.

John Finnie: On the Civil Jurisdiction and Judgments (Amendment etc) (EU Exit) Regulations 2018, it says in our paper—I think that it is a public paper—at paragraph 21:

> "in the absence of an agreement between the EU and the UK, the retained EU law will cease to operate reciprocally between the EU Member States and the UK."

We all understand that. It goes on to say:

> "The UK alone is not able to legislate to restore that reciprocity and in addition the retained law will contain numerous EU exit related deficiencies meaning that it will cease to operate effectively."

I want to put on record my anger at a situation that means that the quality of the law that we have for our citizens is reduced because of this ridiculous situation that the UK Government is in.

I also note what the clerk says about immunities, at paragraph 35. Members know my aversion to anyone being immune from criminal or civil law in Scotland. The removal of immunities from anyone is to be welcomed. This is a modest start, but we have a long way to go.

Liam McArthur: I echo what John Finnie said about the deficiencies that have been highlighted. A number of these instrument proposals have come forward. I am not proposing that we vote against or abstain in that regard, but I think that each proposal illustrates, in its own way, the ridiculous position—as I think John Finnie put it—in which we find ourselves. It is a position that is highly, highly regrettable.

The Convener: If there are no more comments, are members content that we make the point about the timing, which I think is crucial, given that we are going to be dealing with a lot of statutory instrument proposals, and that we seek confirmation that the Scottish Government is happy that there is no substantive difference between the proposed SIs and what emerged from its consultation and impact assessment? I do not think that making those points prevents us from giving our approval in the 10-day time limit; I just seek assurance that the Scottish Government is

quite happy, and I think that Stephen Imrie has said that that could be done in a phone call. Subject to all that, are we happy to approve the approach that is proposed in our papers?

Members *indicated agreement.*

The Convener: Thank you. That concludes the public part of the meeting. Our next meeting will be on 18 December, when we will continue our consideration of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill and take further evidence on the Management of Offenders (Scotland) Bill.

12:43

Meeting continued in private until 12:44.

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