OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 15 November 2016

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 15 November 2016

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JUSTICE COMMITTEE
9th Meeting 2016, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Mairi Evans (Angus North and Mearns) (SNP)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Oliver Mundell (Dumfriesshire) (Con)
*Douglas Ross (Highlands and Islands) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Susan Bulloch (Scottish Government)
Chief Superintendent Gordon Crossan (Association of Scottish Police Superintendents)
Fiona Eadie (Procurators Fiscal Society and FDA)
Annabelle Ewing (Minister for Community Safety and Legal Affairs)
Quentin Fisher (Scottish Government)
Craig McGuffie (Scottish Government)
Michael Meehan (Faculty of Advocates)
Stephen Murray (PCS Scotland)
Derek Ogg (Faculty of Advocates)
Calum Steele (Scottish Police Federation)
Rachael Weir (Procurators Fiscal Society and FDA)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 15 November 2016

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning and welcome to the ninth meeting of the Justice Committee in session 5. Agenda item 1 is a decision on whether to take an item of business in private. Do members agree to take item 6, which is consideration of our work programme, in private?

Members *indicated agreement.*

Subordinate Legislation

Home Detention Curfew Licence (Amendment) (Scotland) Order 2016 [Draft]

10:00

The Convener: Agenda item 2 is subordinate legislation. I welcome Annabelle Ewing, the Minister for Community Safety and Legal Affairs—a frequent visitor to the committee—to speak to the draft order, which is an affirmative Scottish statutory instrument.

Accompanying the minister are Quentin Fisher and Susan Bulloch, both from the community justice division, and Craig McGuffie, from the directorate for legal services. You are all welcome. I remind the minister that officials are permitted to give evidence under this item but not to participate in the formal debate on the instrument under item 3.

I invite the minister to make an opening statement.

The Minister for Community Safety and Legal Affairs (Annabelle Ewing): Good morning, convener. I am pleased to have the opportunity to speak briefly to this draft SSI.

The draft Home Detention Curfew Licence (Amendment) (Scotland) Order 2016 amends section 3AA(5) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 by repealing paragraphs (f) and (g) of subsection (5), which in turn refer to sections 16 and 17 of the act. Section 3AA(5) of the 1993 act provides a list of circumstances to which the Scottish ministers' power to release a prisoner from prison under section 3AA(1)—known as home detention curfew or HDC—does not apply. HDC is a form of release from prison for up to six months prior to the halfway stage of the prisoner's sentence. During that period, the prisoner is tagged and is subject to a curfew condition, which is remotely monitored.

Section 3AA(5)(f) of the 1993 act, which the SSI seeks to remove, permanently prevents the granting of HDC to a prisoner where the prisoner has previously been released on licence but has then been recalled to prison either for non-compliance with their licence conditions or because they have received a further sentence of imprisonment before the expiry of their sentence.

Section 3AA(5)(g) permanently prevents the granting of HDC to a prisoner where the prisoner has previously been released from prison during the term of their sentence but has then been returned to custody during that time for committing a further offence.

The repeal of those two paragraphs will mean that such prisoners may be able to obtain HDC. However, their release will still be at the discretion of Scottish ministers, exercised via the Scottish Prison Service. The granting of HDC is not guaranteed. In deciding whether to grant HDC, the Scottish ministers, via the Scottish Prison Service, are obliged to carry out a stringent risk assessment and to take account of the need to protect the public.

The repeal of the paragraphs implements one of the recommendations that was made in October this year by the electronic monitoring in Scotland working group, which consisted of experts from the Prison Service and the police as well as independent researchers, social work practitioners and a representative of Scottish Women's Aid. In making the recommendation, the working group pointed to the fact that permanently excluding low-risk prisoners from applying for HDC does not recognise an individual's progress in terms of rehabilitation and improvements in compliance and motivation to desist from offending. Indeed, the working group considered that the fact that someone was recalled at 18 years of age for breaching their HDC licence should not preclude them from applying for HDC at a later stage of their life.

Finally, it should be noted that a number of exclusions from HDC will remain. Those include life prisoners, sexual and violent offenders who are serving an extended sentence imposed under section 210A of the Criminal Procedure (Scotland) Act 1995, and sex offenders who are subject to the notification requirements in part 2 of the Sexual Offences Act 2003.

I am happy to take questions.

Douglas Ross (Highlands and Islands) (Con): If the powers were to be granted, does the minister expect to use them extensively or sparingly?

Annabelle Ewing: Scottish Government ministers would make such decisions via the Scottish Prison Service. For example, if a long-term prisoner were involved, the legislation would apply only if the Parole Board for Scotland had made a recommendation for release at the halfway stage. Therefore, the decisions would be made by the practitioners on the ground, and it would be a matter of looking at each individual case to determine what should happen in the circumstances.

Douglas Ross: May I press you on the matter? You are asking the committee to recommend to the Parliament that Scottish ministers should be given more powers. Do you anticipate using the powers a lot, a little, or not much?

Annabelle Ewing: I am saying to the member that although the exercise of the powers would be, statutorily, at the discretion of Scottish ministers, in practice, that would be done by the Scottish Prison Service. At the moment, it appears from the figures that we have that only 300 prisoners could possibly fall within the categories that I have mentioned.

Douglas Ross: Where in the report that makes the recommendation are the statistics that back it up? Page 50 of the report says:

"The Group therefore recommend that Section 16 and 17 Statutory Exclusions are removed and will include statistics as evidence in the final report."

That comment is from the Scottish Government's final report, but I am unsure where the statistics ended up.

Annabelle Ewing: Are you referring to the final report of the electronic monitoring in Scotland working group?

Douglas Ross: Yes.

Annabelle Ewing: The report was, of course, drawn up by those who sat on the working group, which, as I said, comprised a number of organisations, including the police, the Prison Service, social workers, the violence reduction unit, Scottish Women's Aid and G4S monitoring. Those were the people who produced the report.

Douglas Ross: The report states on page 50 that the statistics behind the recommendation will be included "in the final report", but they have not been included. Where are they?

Annabelle Ewing: I will ask the officials to clarify the position. I do not know whether a further annex is required to go along with the report.

Quentin Fisher (Scottish Government): There is no further annex as far as I am aware. We can follow up on that and let you know if you wish.

Douglas Ross: Is it not quite an omission for a minister and Government officials to come to the committee and, in asking us to support an instrument, refer to a report that says that the statistics are in the report, when the statistics are not in the report?

Annabelle Ewing: I apologise if there is a reference to something that has not been added to the report. However, the report was drawn up by an expert working group that comprised all the members that I cited. I do not imagine that the member is trying to suggest that they are basing their recommendations on evidence that—

Douglas Ross: What I am trying to suggest—

Annabelle Ewing: —they do not regard as robust and satisfactory.

Douglas Ross: If I can continue, minister, I am trying to suggest that the experts felt that the issue was important enough to write in the report that they would

"include statistics ... in the final report."

That is said in the Scottish Government's final report, but the report makes no mention of the statistics that apparently back up your proposal to the committee and to Parliament.

Annabelle Ewing: The proposal in the SSI follows on directly from recommendation 7 of the expert working group, whose membership I have referred to—

Douglas Ross: Several times, but—

Annabelle Ewing: —and I think that all members would accept that the group's membership was independent and comprehensive.

The Convener: Perhaps I could intervene here, minister. That evidence is important in relation to the SSI. It is reasonable to expect that you and your officials looked at it and that you would come to the committee prepared with the information.

Annabelle Ewing: With respect, I have come prepared, having read in detail the electronic monitoring in Scotland working group report. If there was an addendum with any stats that were looked at, we would be happy to provide that to the committee, whether that is referred to on page 50 or any other page.

I am saying that the proposal in the SSI that we are putting before the committee today takes up directly recommendation 7, which is one element of the expert working group's proposals. The group has, I think, been considering its work since 2014, which is a period of some 16 months, and a national conference for 150 experts working in the criminal justice sphere and 12 national events were held.

All that work culminated in experts and representatives from a comprehensive section of the criminal justice fraternity in Scotland producing recommendations, one of which we propose to take up in the SSI that is before the committee.

The Convener: Nonetheless, minister, I would have expected you to bring to the committee meeting at which we are considering the draft order the statistics to which the working group refers .

Douglas Ross: May we have more information on the 300 people who are potentially subject to the removal of the exclusions? What sentences are they serving? What offences have they been convicted of?

Annabelle Ewing: There will be a mixture of sentences, but as I said—[*Interruption*.] Please allow me to answer the question. It is important to restate, for the benefit of committee members and others who are listening, that a number of key exclusions from the HDC system will remain if the committee today sees fit to recommend approval of the SSI. They include life prisoners, sexual and violent offenders who are serving an extended sentence, and sex offenders who are subject to a notification requirement. Those exclusions from the HDC system will remain ab initio.

As for other prisoners to whom the provisions will potentially refer, there will be a whole cross-section, and applications will be looked at on a case-by-case basis. I hope that that answer was helpful.

Douglas Ross: Well, no, because you said earlier which prisoners will not be included, which I fully understand. What I want to get on the record is that there are people who have been convicted of a range of offences that affect communities and individuals and who will be released into the community if the SSI is approved, and that over the past decade such people would not have been released into the community on home detention curfew.

Annabelle Ewing: The people whom the SSI is designed to deal with are those who committed a breach of licence conditions and those who committed another offence while on a community sentence. Those are the categories of prisoner who would be eligible for consideration, but HDC is by no means automatically granted. It is dealt with on a case-by-case basis and is subject to a stringent risk assessment, which includes, above all, consideration of public safety interests. Those conditions pertain today, as they will do tomorrow, and the key exclusions will remain in place.

Douglas Ross: You are saying that, based on your figures, up to 300 people could be released, and that the reason for the SSI is to give such people hope of getting out on HDC, when they have not been able to hope for that. However, such an approach could have a negative impact on communities, who will feel that there is no deterrent to committing crimes for offenders who are on community sentences, because the exemption will have been taken away and it will be acceptable for such offenders to be put forward for home detention curfew. I worry about the negative message that that sends to our communities, who are already suspicious about the efficiency and effectiveness of community sentencing.

Annabelle Ewing: You raise wider considerations about the HDC approach, which is one strand in community justice. From memory, I think that HDC has been in operation since about 2006 and has applied to certain categories of

prisoner. The SSI that we are discussing will seek to make possible, but not automatic, the granting of HDC to people who committed a breach while on licence and those who committed a crime while serving a community sentence.

Practitioners in the field have made this point. If a man who breached a condition while on licence as an 18-year-old then finds themselves before the criminal justice system again some years down the line, should he be excluded from the possibility of HDC? HDC is seen as a useful tool in furthering rehabilitation and reintegration into the community, thereby reducing reoffending, which I think is what we all want. As I said, there is always a stringent risk assessment, with consideration on a case-by-case basis and public safety at the heart of the process.

Mary Fee (West Scotland) (Lab): Can you give us an indication of the level of oversight that ministers will have in practice when making a decision? Will they simply act on recommendations that are made to them, or will ministers themselves look in detail at the individual case and make the recommendation?

Annabelle Ewing: Although in statute the decision is the Scottish ministers' decision, decision making is in fact exercised through the Scottish Prison Service. Perhaps a community justice official would like to give an example of how the process works.

10:15

Susan Bulloch (Scottish Government): Once an individual prisoner has reached the quarter stage of their sentence, the SPS would ask criminal justice social work for a home assessment. The report would include the circumstances at the home address that the prisoner was going back to, such as who lives there and whether they would be happy if the prisoner was released back to that address. The report would go back to the SPS, which would consider it along with the risk that might be posed to public safety. If the SPS was happy that the person could be released, they would be released on a tag to serve the last quarter of their prison sentence in the community.

Annabelle Ewing: The tag can be used for a 12-hour curfew, for example. The service operator's compliance monitoring is rigorous—it is 24/7—and any breach can be seen immediately. Scottish Women's Aid sat on the expert working group and it sees the opportunities created by electronic tagging of whatever kind as a means of better controlling where a perpetrator might be, through such things as exclusion zones. That further work is in scope at the moment and has been seen as having benefits.

Mary Fee: Although I am grateful for the explanation, it does not quite answer the question that I posed. If someone is out on licence and a breach occurs, and at a later stage there is an opportunity to recommend that they are released again on home detention curfew, do ministers make the decision or do they endorse a decision that is made somewhere else?

Annabelle Ewing: The SPS, which is an agency of the Scottish ministers, makes the decision.

Mary Fee: What guidance and criteria will be applied? Specifically in relation to the 300 prisoners, are there instances when you may overturn a decision?

Annabelle Ewing: I ask the legal department to answer that.

Craig McGuffie (Scottish Government): A decision taken by the Scottish Prison Service would be a decision by the Scottish ministers; the SPS is an executive agency of the Scottish ministers, so its decision stands as the decision of the Scottish ministers. It would not be the case that the Scottish ministers would overturn it, although that might happen at an administrative level before a decision was taken. If the SPS intimates a decision to the justice directorate at St Andrew's house, there may be some involvement. For example, the cabinet secretary might say that they do not a want a certain high-profile prisoner who is going to apply for HDC to be let out, but the decision is ultimately taken at SPS headquarters.

Mary Fee: So although it says in our paper that

"Ministers will have discretion to release those prisoners from prison on HDC",

it is not actually ministers but the SPS—

Craig McGuffie: It is ministers, but the decision is taken by the SPS, through delegated authority.

Mary Fee: Minister, you gave the example of someone who had committed a crime when they were 18 years old and then committed another crime later in life. He is currently excluded, but if the SSI is approved, he will no longer be excluded. Will offenders have the opportunity to apply only once to ministers to exercise their discretion to release them on HDC, or will they be able to apply five years later if they are in prison again? How many opportunities will they have?

Annabelle Ewing: It works the other way round. I return to Susan Bulloch's point about how the assessment of who is eligible is made. HDC is for those who are considered short-term prisoners; or, if they are long-term prisoners who qualify for automatic early release, it becomes a decision for the Parole Board that a prisoner can be released halfway through their sentence. This kicks in six

months prior to that. I am not sure that the prisoner would apply; rather, the criminal justice service may start the process where it finds it to be appropriate.

Mary Fee: Could an application be made more than once, if an individual offended regularly?

Craig McGuffie: Yes. HDC comes in during the six months up to the halfway stage of the sentence, so there is only a very short window in which the prisoner can apply for it. In general, if someone is refused HDC once, it is unlikely that HDC will be considered again for that sentence, but they could apply again if they were subject to further sentences in the future. I do not know how the application process works, but I know that the prisoner or the residential manager in the prison kick-starts it. HDC can be granted once for that sentence.

The amendments will mean that someone who has been recalled from licence under a previous sentence can apply in future sentences. If they were to be sentenced three, four or five times in the future, they could apply each time. The information that can be considered by ministers would include the previous release on licence and the recall. That could count against that prisoner in the Scottish ministers' consideration of the decision.

John Finnie (Highlands and Islands) (Green): Statistics are of course important, but it is the individual prisoner that matters. I am very supportive of this direction of travel. You have said that certain categories of prisoner will be excluded. It seems that we are in danger of cutting off our nose to spite our face if we exclude the group under discussion.

Can you confirm that there will be an on-going risk assessment that includes the community impact, in addition to the comprehensive risk assessment that is carried out at the time that the recommendation is made for the individual?

Annabelle Ewing: Do you mean after a decision to grant has been made?

John Finnie: Yes.

Annabelle Ewing: There is compliance by the service operator on a 24/7 basis. A long-term prisoner will also be supervised by criminal justice social work. There is on-going monitoring and the licence can be revoked immediately if there is a breach of compliance. There is a very robust system. Statistics have different elements to them, but I understand that in the first six months of the year, some 90 per cent of the HDCs that have been granted have been successful, in that there has not been a breach. That is a high figure.

John Finnie: There is also the question of support. The resource that would have supported an individual in prison is not automatically transferred to the community. Are you content that there is sufficient resource in the community?

Annabelle Ewing: Yes. The working group's report raised the issue of wider support as we look forward to the opportunities that further electronic tagging and monitoring present. Mr Finnie raises an important point about support and we will have to consider that very carefully because we have to make those developments work. It is also important that we make them work for victims. We have been working on those issues with victims organisations and will continue to do so.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I have a wee question about monitoring technology and its development. I put this general question in the context that we know from extensive research that sentences served outside prison are much more successful in reducing reoffending than sentences where people spend a lot of time in prison, albeit the categories of prisoners may be slightly different.

Is the technology that is used to monitor HDCs continuing to improve and, as such, is it a more effective way of keeping track of people serving sentences outwith prison?

Annabelle Ewing: I am not an expert on the technology. I am sure that its improvement is exponential, as with all technology. One of my officials can give further information on that.

Quentin Fisher: We currently use radio frequency—RF—technology. One of the working group's recommendations was that steps should be taken to introduce new technologies, with the global positioning system being the obvious one. However, we would have to change primary legislation in order to introduce GPS technology. That work is on-going.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Thank you for attending today, minister. Do you think that the report and the subsequent decision and recommendation that we have in front of us reflect the ever-growing body of evidence that Stewart Stevenson referred to, which shows that, apart from in the most serious cases, custody does not lead to a reduction in reoffending? Will the decision bring us into line with other, perhaps more progressive, European nations?

Annabelle Ewing: The report refers to some international comparison studies that have been made, and I think that work is going on at the University of Stirling in particular into the situation in Council of Europe countries.

What the member suggests is right: robust alternative options, in terms of community sentencing, that are properly monitored and

resourced and which, of course, exclude the most violent and heinous criminals, provide a way to ensure that we make some progress in tackling community justice issues and reoffending. If we can make progress in those ways, we will reduce reoffending; presumably, that is the goal that we all want to achieve, including the individuals who are caught in this cycle and, certainly, the communities that are blighted by offending. That is the direction of travel that we would hope to proceed in.

The Convener: Could you clarify the issue of ministers' discretion? That sounds quite straightforward, but your evidence seems to suggest that it is the SPS that would have the discretion, and that ministers would not overrule that. Is that the case?

Annabelle Ewing: The Scottish ministers' discretion, which is set forth in statute, is exercised via the executive agency of the SPS. That has been the case since HDC was brought to book in 2006. The situation has not changed. It is exactly the same today as it would be tomorrow.

The Convener: Did I perhaps misunderstand Mr McGuffie when he said that there might be a case in which there was a known criminal and the minister might intervene?

Craig McGuffie: Ultimately, the SPS is an executive agency of the Scottish ministers, so the Scottish ministers still have some element of control, although I do not know whether the exercise of that control would be welcomed by Mr McConnell. Certainly, if, for example, there was a situation in which a high-profile prisoner wanted to be put on HDC and the cabinet secretary did not think that that was a good idea, the cabinet secretary could exert some influence over the SPS. However, ultimately, the decision would be for the SPS, taken under delegated authority, and that decision would be the decision of the Scottish ministers, because the SPS is an executive agency of the Scottish ministers.

The Convener: I am a bit nervous about getting into the situation that we get into all too frequently with police matters, in which we are told that any problems are an operational matter for Police Scotland. What you are saying sounds kind of similar to me.

Minister, I am going to ask you not to move the motion at this time. I would very much like to see the statistics. It is quite reasonable to say that the committee should have had them today. The statistics were referred to by the working group and I think that, to enable us to give the matter full consideration, the committee should have the opportunity to see them before the motion is moved.

Annabelle Ewing: I would still like to move the motion. The report is quite detailed. I do not know whether every member has a chance to read the report, but it is the culmination of 16 months' work. If members had wanted to proceed with individual research beyond the report itself, they could have proceeded to do that. The report is comprehensive. The composition of the expert group was comprehensive across the criminal justice system, and included experts in their fields with independence of mind. I am not quite sure why we are putting the report into question, convener.

The Convener: We are not putting the report into question. You and your officials have come to the committee today unprepared, without statistics that are referred to in the report. I find that unacceptable. For that reason, I am asking you not to move the motion.

Annabelle Ewing: I hear what you say, and I do not want to disrespect the office of the convener of this committee. I feel that, in the circumstances that I explained a moment ago, it would have been for members to pursue in their own time individual research beyond the report itself. However, the officials tell me that it would not be a critical issue if the motion was not moved today so, on that basis, I am prepared not to move it. If the convener could clarify what the committee seeks, that would be very helpful indeed.

10:30

The Convener: I am happy to do that. It is the statistics that were referred to during the discussion. I am grateful to the minister for confirmation that she does not intend to move the motion today. I thank her and her officials for attending.

Community Justice Outcomes Improvement Plan and Performance Report (Scotland) Regulations 2016 (SSI 2016/309)

Act of Sederunt (Fees of Solicitors and Shorthand Writers in the Court of Session, Sheriff Appeal Court and Sheriff Court Amendment) 2016 (SSI 2016/316)

The Convener: Item 4 is consideration of two negative SSIs. I refer members to paper 2 and, in particular, to the Scottish Parliament information centre briefing on the act of sederunt, particularly page 2. I will take the liberty of reading exactly what that says, because it refers to a strong recommendation from the previous Justice Committee on the Courts Reform (Scotland) Bill:

"The Committee seeks assurances that there will not be a substantial rise in the level of court fees to pay for the

reforms in the Bill and will monitor closely the outcome of the next consultation on fees in 2015 and consequent statutory orders."

I remind members that the act of sederunt proposes a 24 per cent increase in court fees. It was very much the opinion of the previous Justice Committee that there should not be

"a substantial rise in the level of court fees to pay for the reforms in the Bill".

John Finnie: As a member of the previous committee, I am more concerned with the actual figures than with the percentages. We are talking about £18. I am reassured that people who are on low incomes are exempted. The SPICe briefing says:

"The current exemption regime covers those on income-based social security benefits such as income support. Those in receipt of Civil Legal Aid are also exempted from paying court fees. This is notionally available to those with disposable incomes of up to £26,000".

However, there is a caveat with that.

I am relaxed about the proposal.

Douglas Ross: I do not know how this works, but is it possible to get more information on some of the comments that were previously made? We are told that, two years ago, the Scottish Government said that it would take some time to get to full cost recovery but it is now saying that it has achieved it.

The briefing also states:

"The Scottish Government has indicated that it intends to look again at fees in 2018. At this stage, it is hoped to have better data".

If we consider the negative side of that statement, does it mean that the Government is proposing the change with poor data?

The Convener: That is a fair point.

Stewart Stevenson: The act of sederunt is part of a 10-year programme to recover the full costs, which started in 2006. It is appropriate that we proceed with it at this stage.

Mary Fee: I agree with the comments made by John Finnie and Stewart Stevenson. The briefing clearly says:

"court fees are a small part of the cost of taking court action."

I am inclined to look at the figures rather than percentages. That is the sensible way to proceed and I would not want to hold up the act of sederunt in any way.

Liam McArthur (Orkney Islands) (LD): I am not familiar with the background to that. John Finnie is right to pick out some of the safeguards that are in the system.

It would be helpful to understand what the trajectory is if, as Stewart Stevenson says, the process has been on-going since 2006. I am not clear why any undertaking would have been given to a previous committee that the direction of travel would not have continued along the path that this appears to be part of.

The point that has been made about the overall level of fees and the safeguards that are in place offers some reassurance, but I am at a disadvantage in not knowing the earlier undertakings that ministers appear to have given to the committee.

The Convener: The principle was access to justice and that that should remain when looking at court fees; there should not be a substantial increase.

I take on board John Finnie's point that the increase is relatively small in monetary terms. An important principle has been laid down today. If it is the will of the committee—it certainly seems to be—to approve the SSI, I am minded to move that we do that.

If there are no further comments, does the committee agree that it does not want to make any recommendation in relation to either of the SSIs?

Members *indicated agreement*.

The Convener: I suspend the meeting briefly to allow witnesses to take their seats.

10:36

Meeting suspended.

10:37

On resuming—

Crown Office and Procurator Fiscal Service

The Convener: It is my pleasure to welcome the first of today's panels of witnesses in the committee's third week of evidence taking on our Crown Office and Procurator Fiscal Service inquiry. I welcome chief superintendent Gordon Crossan, president of the Association of Scottish Police Superintendents; Rachael Weir, vice president, and Fiona Eadie, secretary, of the Procurators Fiscal Society section of the FDA; Stephen Murray, branch executive committee member of the Public and Commercial Services Union Scotland; and Calum Steele, general secretary of the Scottish Police Federation.

I refer members to paper 2, which is a note by the clerk, and paper 4, which is a private paper. All witnesses have provided written evidence and we are grateful to them for that.

I invite questions from members.

Chief Superintendent Gordon Crossan (Association of Scottish Police Superintendents): Is it possible to declare an interest before we start, convener?

The Convener: Yes.

Chief Superintendent Crossan: My partner works for the information and advice service within the Crown Office and Procurator Fiscal Service. In the interests of transparency, I want to declare that; I have previously done so. The written evidence that I have submitted and any evidence that I provide today is solely the information given by my members.

The Convener: Thank you for that declaration.

Stewart Stevenson: One of the threads that has run through the evidence that the committee has taken so far—and which is repeated in today's written evidence—relates to the operation of the centralised marking system that is now used by the Crown Office and Procurator Fiscal Service. I have not yet got a sense of the overall effect of that on efficiency. It may well be that it has made the marking process a more efficient and less resource-intensive activity, but the effects on other parts of the service may more than overbalance that and increase the overall effort.

I am not saying that because I have been told it directly; I just want to get a sense from the panel of whether they would agree with that suggestion. Perhaps they can lead me to the path of salvation and tell me that the savings in the centralised system are not offset by costs in effort and time elsewhere in the system. That would be a good place to start today.

I would be happy to hear from everyone, unless anyone wishes to demit.

Rachael Weir (Procurators Fiscal Society and FDA): I will start. There are always advantages and disadvantages in any system. The principal advantage in centralising is undoubtedly the bringing together of a core of specialist experience, with routine marking. There is some anecdotal evidence from within our organisation that when someone repeats the same task over a period, they build up a degree of expertise, which, in turn, builds in a degree of efficiency to the processes. It is early days for the team, as the system was introduced only recently. Some work is being done on it at the moment, and committee members have already heard from the department concerned.

My position is that there are advantages and disadvantages in the system. In many ways, the advantages outweigh the disadvantages, but it is important that we keep the system under review and that we keep evaluating what is working and what is not working within the organisation. That is one of the things that we do very closely in the trade union's discussions with the department.

Stewart Stevenson: Before we move on to the other witnesses, you said, Ms Weir, that the system is a balance of advantage and disadvantage, but you only referred to the advantages. Could you give me a sense of the disadvantages—the other activities that might be affected?

Rachael Weir: I would look less to my own and our organisational view and more at the written evidence that the committee has had from a number of organisations, which has pointed to concerns about the loss of local relationships. I do not necessarily agree with that, as I think that the local relationships still exist and that there are ways for local information and input on the impact of certain crimes on communities to be relayed to a national unit. After all, Scotland is a people of only 6 million—it is not the largest country in the world—so it should not be beyond our gift to share information. The challenge is in reassuring local communities that we are able to do so. That is one of the things on which our members are very much focused. It becomes somewhat harder, however, when there is a national unit in two specific locations, because people cannot be everywhere at once.

Calum Steele (Scottish Police Federation): To some extent the advantages have yet to be realised. Conceptually, it is easy enough to understand why the advantages would exist, but the biggest challenge from the perspective of the

members I represent is around their ability to get access to local fiscals and to get information from them on cases that are marked elsewhere. Invariably, that causes difficulty, delay and problems. Anything that adds additional time into the criminal justice system is problematic.

As with much that is discussed in the criminal justice arena, looking at any element in isolation tends not to give a realistic picture of the wider issues. To my mind, one of the biggest challenges that undoubtedly faces the Crown Office and Procurator Fiscal Service is that of resource. If there was a sufficiency of resource for centralised marking and to support local fiscals, the benefits of the centralised marking units would possibly be realised in a much more immediate and apparent way than is currently the case.

Chief Superintendent Crossan: I would echo many of the points that Calum Steele has raised. The Crown Office and Procurator Fiscal Service is part of a set of cogs of justice, as we all understand. We all have tightening budgets at present, and sharing resource within offices and so on will save money—we get that; in fact, we do the same within policing.

Calum Steele has alluded to the disadvantage, which is that trying to get hold of a fiscal can be really problematic. Fiscals can be so busy in the morning marking case papers that when we need to get warrants quickly, we do not have the ability to do so, so getting justice delivered quickly and efficiently becomes a problem for us.

The biggest issue is the one of local relationships that Rachael Weir alluded to. Previously, we could have a meaningful conversation with a procurator fiscal prior to case papers being marked, and it could sometimes assist with the movement of justice when we could have conversations within that trusting relationship.

10:45

John Finnie: I am not conscious that the issue of warrants has featured before. Can you clarify what that is, please?

Chief Superintendent Crossan: Certainly. Calum Steele's members and ours regularly speak about their frustrations when they try to get warrants quickly. Those frustrations sometimes arise because of inconsistent practice, but they are more often about access to a procurator fiscal who has the time or ability to make the decision there and then. Often, when our members come into work in the morning, a series of crimes will have been committed over the past 24 hours that may lead to their requiring a warrant quickly. However, they are often frustrated because the fiscals are too busy marking papers and there is no resilience that would allow the fiscals to be taken away from that work to sign warrants.

John Finnie: For the record, can you clarify why speed is of the essence in those circumstances?

Chief Superintendent Crossan: Absolutely. If, for example, information has been received overnight about drugs in a particular place, we need to get a warrant quickly before the people move on. In addition, housebreakings often take place at night and we may get information about the property overnight. It is fundamental that officers get warrants to move on that quickly, so they approach the procurator fiscal to get an access warrant from a sheriff.

John Finnie: Thank you.

I have a question for Calum Steele. In your written evidence, you talk about centralisation being problematic in marking and processing. You state:

> "Simple tasks like the re-citing of witnesses at adjournments could be easily resolved at court if Fiscal's offices had the ability to produce new citations."

We have heard a lot about the perennial problem of the number of multiple citations and very few people being called. Do you think that could be resolved? I do not mean the global issue—I mean the issue if there was the ability to recite locally.

Calum Steele: That ability used to exist and, by virtue of its former existence, we know that it worked. The removal, in effect, of the ability to cite locally has, in its own right, created additional bureaucracy and delay. I suspect that the answer to the question of whether the issue remains insurmountable is no. Even in the organisation that I work for—the police service of Scotland—we see that things that are set up get tailored and tweaked as they settle in. Ideas about what might be better achieved in one central place develop into the realisation that the way it was in the first place was maybe not so bad.

John Finnie: You also talk about the additional administration costs for the Crown Office and Procurator Fiscal Service and the police service of processing and serving citations. Are police officers involved in the serving of citations?

Calum Steele: Yes.

John Finnie: That was the position, but it changed. Has it now been reinstated?

Calum Steele: Yes. Police officers have always, to some extent, been involved in the serving of citations; it is simply a question of degree. At the moment, although their involvement is not enormous, it does exist.

John Finnie: Thank you very much.

Rachael Weir: I wonder whether I can add to the evidence that has been given in relation to warrants and national initial case processing. The national initial case processing unit, which marks the cases that are received from the police, is not engaged in considering applications for search warrants that are submitted by the police, which is what I think Mr Crossan was referring to. Therefore, the indication that was given that there is a delay in the processing of search warrants on account of marking does not match up with my operational experience or that of our members. What might be at play is what we refer to in our written evidence—I am sure that we will discuss this during the meeting as well—as the impact of budgetary constraints and resource constraints for our members across the service.

The Convener: Thank you for that clarification. That is helpful.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I have a question for Fiona Eadie and Stephen Murray in relation to financial constraints affecting staffing levels. Are trainees taking on a lot more casework? Is work that would have been done formerly by legal staff being taken on by non-legal staff? We have been hearing about the issue of short-term contracts, so can you elaborate on what effect that aspect is having on the service?

Fiona Eadie (Procurators Fiscal Society and FDA): It is true to say that trainees are doing a lot of the operational work. However, in many ways, that has always been the case, particularly when they are in their second year. They have a two-year training contract and in the second year of that they spend a lot of time in court. That is the first opportunity that they have to appear in court.

Our concern, which is probably also the trainees' concern, is that it is a training contract and they need to have adequate opportunities to be properly trained. As an organisation, we have a duty to properly train the solicitors of tomorrow, but the difficulty is that they are being relied on very heavily—and in a way that, somewhat unfairly, is referred to as "court fodder". We are struggling with our staff resource to cover all our court commitments. In those circumstances, it is not uncommon to see trainees frequently doing back-to-back courts. That is not appropriate, because the trainees need to have adequate time for proper training.

The other part of Rona Mackay's question was about admin involvement. I will let Stephen Murray answer.

Stephen Murray (PCS Scotland): I am happy to do that. PCS has grave concerns about the number of fixed-term contracts in the service, and there are good reasons for those concerns. We have an almost constant training programme because fixed-term staff do not stay for any longer than two years. However, experience tells us that many of them move on before then because they do not have full-time, permanent posts. They apply for jobs in other areas, so staff turnover is very high, which creates a problem for training.

There is also an issue around a lowering in the quality of applicants. In the past, the civil service, and the COPFS in particular, has been seen as a good employer and an attractive proposition. However, we tend to find that no one will give up a full-time, permanent post in order to come into the service as a fixed termer who will be kept on for a maximum of, say, two years.

Another issue for the union is that we do not think that we are doing the young people who do the fixed-term work any favours, because they have no security—they know that they will be there for only a limited amount of time. In terms of getting on in life, it is getting harder for people to get mortgages, and many lenders will not give someone a mortgage unless they have full-time, permanent employment.

For those reasons, PCS has concerns about the number of and reliance on fixed-term staff in the service.

Rona Mackay: How long has that been happening? Has it been happening over a number of years?

Stephen Murray: The process has been gradual, but it is now happening more and more, and certainly since I have been involved in the level of union work that I am currently involved in. Over the past two, there has been an increase in the use of fixed-term staff in the admin grades. The only permanent jobs available at the moment in the admin grades are the modern apprenticeships that are taken on each year.

Rona Mackay: Just to clarify, do you believe that the situation is down to financial constraints?

Stephen Murray: Absolutely. I have had discussions with senior people in the service about the issue, and I sympathise with them: it is difficult for them, as they can juggle only so many balls in the air with a stagnating or decreasing budget. However, they have to do what is best, and they also have to get the work done, which is why they have turned to fixed-term staff to such a degree.

Fiona Eadie: I want to clarify one point. Our written evidence refers to staffing in the organisation. Since 2009, there has been a drop of almost 8 per cent in the number of legal staff we employ. We would like to see that reversed.

The Convener: You have not yet put on record the cut in monetary terms. It is in your written submission, but it would be helpful to have it on record.

Fiona Eadie: Absolutely. In this financial year, the overall COPFS budget is £113.45 million. In 2009-10, it was £118.3 million. We calculated that, if our budget had kept pace with inflation, it would now amount to £144.5 million. That means that, in real terms, our budget has been cut by more than 21.5 per cent, or nearly a quarter.

The Convener: It is good to have that on record.

Mary Fee: My first question follows on from Rona Mackay's questions on staffing and is directed specifically at Stephen Murray. The PCS submission refers to "specialised units". Are there fixed-term staff in the specialised units, or are the staff permanent?

Stephen Murray: When someone comes in on a fixed-term contract, it is up to the senior managers to decide where they go, which could be to one of the specialised units. I have no definite information for you on the number of staff or the ratio. A person who comes in on a fixed-term contract would be expected to do the same work as a permanent member of staff; there is no reason why they would not go into one of the specialist units. As I said, I have no definite information to hand on the numbers. With regard to where new staff go when they start, it is simply decided which section has the greatest need. If one of the specialised units was understaffed for any particular reason, there would be no reason to suggest that someone on a fixed-term contract should not be placed there.

Mary Fee: Do you agree that a specialist unit depends and relies on the staff building up expertise in the area? If you put a member of fixed-term staff in that unit and they were there for only two years, it would be difficult for them to build up real expertise and understanding. If they then moved on, that would have an impact on the unit.

Stephen Murray: Yes—as I mentioned, the problem lies with training. There is a constant training process when there is such a high turnover of staff.

I would place no more importance on the work that the specialised units do than on the work that is done in the other units. The units simply manage their staff as best they can. As long as there is a core of experienced staff, the units should be able to take on fixed-term staff and have them up and running in the normal manner, as with any other employee.

Mary Fee: Your submission states:

"PCS believe that we have a high percentage of reworked cases".

Do you have any idea what the exact figure is?

Stephen Murray: No—that is based on anecdotal evidence rather than exact figures. I can give an example from my own experience. I work in the sheriff and jury unit and we see a lot of cases being adjourned. There is a number of reasons for that. To be frank, there are too many cases going to court and there is too little court time. The legal people have a very difficult job when they come to take the cases. First, they take those that are time barred, which makes sense, and they look at the severity of each case and prioritise the ones that should go through.

As I said, there are so many cases and so little court time in which to get them heard. Cases can be adjourned and get knocked on for a number of reasons. Very often, that is outwith our hands: it is the defence agents who come up with reasons for getting cases moved on, and we do not have any say in that.

Mary Fee: I want to ask another question, if that is all right, convener.

The Convener: Yes.

11:00

Mary Fee: Another piece of evidence that we have heard—and this is a thread running through the inquiry—is the lack of information about the processes in court. We have heard—mostly in oral evidence—that people were unsure about what would happen when they got to court, what the court process was, why there had been delays and what would happen after they had been in court. We also heard that—not always, but sometimes—there was a lack of joined-up communication between different services. I am interested in the panellists' views on that and how that side of the service works. Do all the services work together well?

Calum Steele: I suppose that, to some extent, that is probably a slightly unfair question to ask of police officers, because we are more than familiar with the vagaries of the court process, and our understanding and appreciation of the process may not necessarily tally with that of others. However—again, this is only anecdotal—bewilderment is often the conveyed experience of the witnesses that our members see in court and, indeed, the experience of the victims and complainers they deal with when they meet in court corridors and in the street.

That said, the victim information and advice service has tried to address some of that, at least in so far as it tries to provide information in advance for a small number of people. I do not believe by some stretch that it does so adequately for everybody, but it certainly does that for those who are going to court in particularly difficult circumstances. In any event, we are not saying

that anybody relishes being in court. My sense is that the VIA is providing more information than was ever provided in the past.

The Justice Committee scrutinised the Victim and Witnesses (Scotland) Bill, when the VIA service was born. The unfairness arises because the public does not really have an appreciation of what the VIA service is and how it is meant to work. The public tend to look to the agencies that they know for the provision of information about court processes—and invariably they turn to the police service. People express much of their frustration with the courts to the police, as though we are capable of doing something about the situation.

Mary Fee: That is interesting.

Fiona Eadie: There is perhaps a difference between the experience of those who are involved in a serious case and the experience of those who are involved in the summary courts. I was very pleased to read in some of the written evidence about the experience of many of our criminal justice partners. They said that the work of COPFS staff who were dealing with homicide and sexual offence cases and the liaison and communication with those staff were—I think that these were some of the descriptions—first class and second to none. However, there is a difference when it comes to dealing with the summary courts.

There has been an understandable focus on serious crime. However, what blights local communities—our members are part of those communities, too—and what will fill your postbag is the lower-level offences, such as antisocial behaviour. I can confidently say that, time and again, our members go to court without having had adequate time to prepare their cases. If they had more time to prepare, they would be better able to liaise with the victims and witnesses attending court.

Mary Fee: Is the lack of time to prepare down to the timetabling of court cases or the number of cases?

Fiona Eadie: It is to do with the lack of staff resource. We have so many cases. If there are 10 courts running in a given court on a given day and maybe nine staff in a unit to cover those courts, we need to borrow someone from somewhere else in the organisation and get them to fill in at the additional court.

We also know that over the past four years there has been an increase of more than 8 per cent in the number of cases that run to trial, and we know that the length of trials is increasing and that the trial courts are finishing much later in afternoon. It used to cause disbelief—people thought that those in the criminal justice system were working a half day and were finished at four o'clock, but that was not the case. They were coming back to the office and preparing for the next day's court. What is happening now is that the courts are running on much longer, so people no longer have the time that they once had to prepare for the next day's court, bearing in mind that we do not have the staffing resilience to allow someone else to sit in the office preparing for tomorrow's court. They either have to stay late in the office or take work home. We are meeting our obligations, but at a human cost to the health and welfare of our members.

Mary Fee: What time could a court sit until?

Fiona Eadie: Rachael Weir could probably help you better with some information on that.

Rachael Weir: It varies—it depends on which jurisdiction you are talking about. I can speak from personal experience in Glasgow, where it is not uncommon for courts to run past 4 pm and sometimes past 5 pm. The worst example that I have experienced in the past two years was a trials court that sat until after 6 pm. That obviously has a knock-on effect on the health and welfare of our members, as Fiona Eadie said, and on their ability to prepare, because they have to prepare for the next day and for 10, and sometimes up to 14 or more, trials. If they are to give those trials the attention that they deserve, more preparation time is required.

Mary Fee: What you have said is very helpful. Do any other panel members want to comment on the original question, which was around lack of information about the process?

Stephen Murray: I can back up what Fiona Eadie and Rachael Weir have said. As an admin manager within the section, I see at first hand every day deputes being given cases the morning the trial starts, and they have to read that material and prepare themselves before they go into court. That is not because of bad preparation on anybody's part; it may be because somebody is off sick or has not come to work for whatever reason. There is such a lack of resilience among the staff—and, I should add, among the legal ranks as well, although I am here principally to defend the admin sections. I can tell you from experience about the difficulties that deputes face when they have to go into an important trial at which the victims are present and there are witnesses who have taken the time to attend. I think that the public would be alarmed if they knew that that was happening. It is through no fault of the deputes: they are trying their best to go into court and to see justice done, but with very limited resources.

Mary Fee: I suppose that the pressure on staffing will also have an impact on the amount of

information that they can impart to people appearing at court.

Stephen Murray: Yes.

The Convener: Could I just get on record the figures for sickness absences that are attributable to mental health issues and stress? That information is in the written submission from the unions, but it would be good to have it on the record.

Fiona Eadie: I am happy to do that. The committee will have seen that, across the civil service, an average of 7.2 working days are lost due to sickness; within the COPFS that figure is 10.3 days. Of those sickness absences, 27 per cent are due to mental ill health, of which 76 per cent are recorded as being due to stress. That emphasises the points that we have been keen to make about the health and welfare of our staff.

The Convener: So that is due to pressure, stress and the lack of resource. Has the Inspectorate of Prosecution in Scotland, the independent statutory inspectorate for COPFS, picked up on that issue and dealt with it or highlighted it in any way?

Fiona Eadie: The staffing levels?

The Convener: The stress and sickness levels.

Fiona Eadie: I am not aware that it highlighted the issue specifically.

The Convener: It is something that seems to me to be fairly germane to the operation of the Crown Office and Procurator Fiscal Service, and something that it would be helpful to pick up on.

Fiona Eadie: My understanding—and I am not certain that it is correct—is that the focus of the inspectorate is more on the operational work of the organisation, so I am not sure whether the issue is something that it would focus on or is within the scope of its responsibility. It is certainly something that we are committed to working with the department to seek to address.

It is in nobody's interest to have high levels of sickness in any organisation. We want our staff to be at work, but we want them to be well and healthy at work. We have been working with the department on agreeing what reasonable preparation time might look like. We know from a previous staff survey that the union carried out that lack of preparation time was seen as a significant source of stress for our staff. We also know that workload is an issue that features highly in the context of work-related stress. All those issues—resource, workload and preparation time—are factors that we believe are impacting significantly on sickness levels.

The Convener: There is certainly a link there that should be investigated.

Was there an issue that you wanted to come in on earlier, Mr Crossan?

Chief Superintendent Crossan: I would like to come back to support for victims. We need to recognise that many of our victims are extremely vulnerable and will have been traumatised by the crimes that were committed against them. The fact that some cases are extremely complex means that, when we provide information and guidance, it is not easily picked up. Quite often, people need to go back and get more support. More and more pressure is being put on services to provide information so that we are seen as victim centred.

Oliver Mundell (Dumfriesshire) (Con): I will follow up on the point about sickness absence. It is worrying that the sickness rate has crept into double figures. That is a warning signal. How does that relate to the results of the civil service people survey? It is quite concerning that, in effect, one in 10 people want to leave the service as soon as possible, 15 per cent say that they are being bullied at work and a fifth say that they do not have the tools to do their job. Those things seem to be quite heavily related.

Rachael Weir: We have anecdotal evidence that there is undoubtedly such a connection in our members' minds. On the ground, it certainly feels as if there is a connection between the two elements. It comes down to us having enough to do what is required of us and what the people of Scotland expect of us.

It is clear from the evidence that the committee has received in writing and the oral evidence that it has received so far—I know that it has some way to go in its oral evidence taking—that the expectations that are on us as an organisation are high, which is properly the case. That expectation weighs on our members when they find themselves struggling to deliver to the standard that is expected of them. Some of that is borne out by the survey results that you mentioned; in particular, it is borne out by the sickness levels.

Oliver Mundell: Another concern that has come up is that a number of staff, particularly at a junior level, do not feel that they have the discretion or the authority to do the job that they are being asked to do, and they find it difficult to navigate their way through the system. A fifth of people say that they cannot fulfil their duties. Is that because they do not feel supported or empowered to take the decisions that are in the best interests of justice?

Rachael Weir: I need to be careful not to stray into matters of policy, because that would not be appropriate in this forum. There are undoubtedly members who have fed back to us that they feel that discretion has been lost. It is important to say that prosecutors across Scotland have never had

unfettered discretion—we have always worked within guidelines that have been given to us by the Lord Advocate and, through his commission, to local commission holders as procurators fiscal. However, there is certainly such a sense among many of our members.

Oliver Mundell: Does PCS have anything to say on those issues, given that they are highlighted clearly in its submission?

Stephen Murray: Yes—I would not be doing my job as a union rep if I did not highlight the fact that a sickness rate of 10.2 days is extremely high compared with the norm in the civil service.

I see my members' experience at first hand. People are very stressed, which leads to them being off sick, and it is not always short-term sick leave. Often, what makes the figures so high is people being off on long-term sick leave. We have attendance management policies in place to attract them back to work as best we can, but that is often difficult. We are talking not just about people having a sore leg that will improve in time but about people feeling pressured.

I share the FDA representatives' concerns, although I confess that their staff have even higher pressure, because they go into court. They are very much the public face of the department. Our guys on the admin side are behind the scenes, in the main, but there is no doubt that the pressure that is on them is still considerable. That is reflected in the figures and in the opinions that people expressed in the staff survey that was mentioned.

11:15

Fiona Eadie: Oliver Mundell quoted figures from the 2015 staff survey. The survey is annual and we have just completed this year's survey, although we have not yet published the results. The committee might wish to bear it in mind that, in the past year, we have had significant change in the organisation's senior leadership. We have a new Crown Agent and new law officers.

Oliver Mundell talked about the pressure that a lack of discretion puts on members, but Rachael Weir was right to make the point that there has never been unfettered discretion—we have always operated within guidelines. However, the committee may be aware of a speech that the Lord Advocate made recently in which he signalled the desire to empower staff and instil in them a sense of confidence about their decision making. The anecdotal evidence that I have heard from members is that that has been well received. It will take some time to filter through, because it involves a change in culture and approach and the skill needs to be redeveloped in our members, so it might be useful to look at the results of not just this year's staff survey but the one that will be carried out next year. We hope that we will start to see improvement on that.

The Convener: Members might have other questions on how policy impacts on discretion.

Mairi Evans has a question. Is it a supplementary on staffing and sickness levels?

Mairi Evans (Angus North and Mearns) (SNP): It is a supplementary to a question that Mary Fee asked earlier—I am a bit behind. I do not know whether you want to continue and I will come back to my question later.

The Convener: We will move on.

Douglas Ross: Mr Steele and Mr Crossan, you represent the same profession and I presume that you have read each other's submissions. My reflection on them is that they are starkly different, even though you both represent police officers. Is that fair? Will you give your views on that?

Chief Superintendent Crossan: Although we represent the same organisation, we represent different members of it, so the engagement is at totally different levels. The evidence that I have provided shows that, at a strategic level, my members are confident that they have an excellent working relationship with the Crown Office and Procurator Fiscal Service and with other stakeholders who are trying to improve the delivery of justice.

We absolutely recognise at the front end of policing the impact of the changes in the Crown Office and Procurator Fiscal Service and how that is affecting some of our officers. However, I based our submission on our members' views on how the work on efficiency and effectiveness is taking place.

To give that a bit of context, I note that a lot of the work that the justice board is doing to put in place processes to make us more efficient and effective across the partnership is unseen by our front-line police officers because the processes have not yet been developed, the information technology structures are not in place and there are challenges with the finance to deliver some efficiencies. However, the feedback from my members is overwhelmingly that they are comfortable that they have a good working relationship with the Crown Office and Procurator Fiscal Service.

Douglas Ross: Your superintendents are at the level that some officers would go to in order to raise their concerns. In your submission and in what you just said, are you saying that superintendents are not receiving some of the stories that we are getting from Mr Steele's organisation?

Chief Superintendent Crossan: No—absolutely not. We are absolutely familiar with such information. We understand that our officers get affected by going to court and getting countermanded at the last stage. Having to make such readjustments affects them and their families.

We recognise that procurators fiscal do not seem to have enough court preparation time, so they are potentially attending at court unprepared, which is not their fault. We recognise that the staff who work there are professional and dedicated and are working in extremely difficult circumstances. I acknowledge the challenges, but Calum Steele's submission gives members the view from a front-line officer's perspective. I am balancing that by saying that, at a strategic level, the operational leaders of policing feel that there is good engagement.

Calum Steele: I think that we agree that the quality of the engagement that we have with COPFS staff when we meet them and deal with them one to one is second to none, to use the term that I wrote in my evidence and which has been used today. We are dealing with highly dedicated, professional public servants who want to do their best in trying and difficult circumstances.

Let there be no doubt that the issues that my submission identified are absolutely the experience of our members. Of course, they are not representative of a homogeneous police service. That is why we have different associations to represent different views. As I am sure that Mr Ross appreciates, the experience of rank-and-file police officers is generally not the same as that of senior officers.

Douglas Ross: One issue that is quite stark is the use of digital technology. You say in your submission that you do not think that it will make a great deal of difference, whereas the superintendents say that the digital vault is a great way forward. Perhaps you could both discuss that.

Mr Crossan, I will ask you about a point that you made. You say:

"A 'Digital Evidence Vault' is most welcome given the significant increase in cases where there is a digital footprint."

One of our first panels for the inquiry involved defence advocates from across Scotland. I questioned them on digital evidence and one of them—Stephen Mannifield—referred to

"inquiries ... into ... forgive me if I do not get the terminology absolutely right—a virtual evidence vault."

He went on to explain that,

"If that can be brought into existence, and it is very much only at the talking-shop stage, it would help."—[*Official Report, Justice Committee*, 25 October 2016; c 35-6.]

From looking at your submission, we would almost say that the digital vault was operational and working well, yet defence agents have told the committee that it is just a talking shop and pie in the sky and that there are good intentions but they are not using it. Do you understand that difference?

Chief Superintendent Crossan: Absolutely. I clarify that I am not saying that the digital vault is up and running and efficient; I am saying that we welcome the fact that we are moving to it. I am sure that committee members will understand that more and more crime now has a digital footprint across it, whether that involves the taking of CCTV images or the use of people's mobile phones, computers, tablets or whatever. A common frustration that comes to us from the public is that we take their telephones off them, which can be their only means of contact with other people. That costs people a lot of money, because they are on contracts and we cannot give them their phone back because it has become a piece of evidence.

Anything that can make the situation easier—for example, by stopping the need to take phones and so on away from people—and can get the evidence in a format that can be easily produced in court, which is one of our biggest challenges, should be welcomed. That work continues under the justice board sub-committee on the digital something—I do not remember exactly what it is called. We absolutely welcome that on-going work on what has been a challenge for a number of years. Although it is still work in progress, we must recognise that that kind of stuff is on-going in the background.

Calum Steele: It is important to clarify that, in the Scottish Police Federation submission, which is in my name, we did not specifically discuss the digital evidence vault when we talked about technological challenges. That was more about the practical experiences of what we deal with today. I suspect that we might get on to that question shortly.

Douglas Ross: The quote that I took from your submission was:

"it is difficult to envisage that any technological advancements could expedite the current processes."

Calum Steele: That is fair enough; that relates specifically to fatal accident inquiries.

Douglas Ross: I was not sure whether that was the case.

My final question to Mr Crossan and Mr Steele is about different opinions on officers being cited to give evidence in court. Mr Steele mentioned

that the process is disjointed, that there is no particularly good way to manage it and that it has been a problem for many years that does not seem to have been addressed. However, Mr Crossan's submission says:

"Better use of the Police Witness Scheduler should lead to a reduction in citing officers for court during days off".

Mr Crossan says that things are progressing well, whereas Mr Steele says that you have tried various changes to the calling of police witnesses but that has not improved in recent years. I ask nearly everyone about the issue, because it has been raised with me by many front-line officers—often close to home—who talk about the number of officers who are called to court and are therefore taken off our streets, which means that our communities do not have the visible presence of bobbies on the beat because they are stuck in a room at the back of the court or the police station.

What can we do to address the problem? Is it about agreeing evidence or being realistic about the cases that are called? What can we do to ensure that all witnesses are treated well and that so much police resource is not wasted through the citing of many police witnesses who are never called to give evidence?

Calum Steele: At the risk of incurring the wrath of sheriffs, I will say that our court system needs to work at times that are more attuned to the demands on the police service. Attempts at dealing with police witness scheduling were being trialled when I joined the service 23 years ago and I suspect that they were trialled a long time before that. There have been various iterations over the piece, but the problems continue unabated. When, for the understandable reasons that we have discussed, preparations are taking place as little as 24 hours before a trial, that points to the fact that the wider Criminal Justice plc needs significant financial investment.

Peak police demand invariably occurs between 6 o'clock in the evening and 4 o'clock in the morning, yet the peak abstraction for police to appear in courts is between 9 o'clock in the morning and 5 o'clock in the afternoon. That is not logical. Moving resources from one point of the day to service another part of the criminal justice system in another part of the day is only ever going to create a merry-go-round of disturbance.

The question ultimately comes down to what Scotland wants. Do we want a justice system that is invested in and carries the confidence of communities? If so, it is time that someone put their hand in their pocket and made difficult decisions about investing in courts and having them sit beyond the hours that they currently do and about investing in the police, prosecutors, sheriffs, sheriff clerks and the whole shebang.

Chief Superintendent Crossan: I echo Calum Steele's points. To go back to the police witness scheduler, the issue is that an IT solution is needed—many of the things that we hope would work well do not do so because the police IT system cannot support the COPFS system. There is a solution for that, but it would take investment. That investment would realise a benefit: it would enable the witness scheduler to go online to mine data from SCOPE—the database that we use for personnel—to determine what shifts people are on. That would mean accessing real-time information, rather than going through email and paperwork, which is clearly inefficient.

It is important to recognise that in the police we are doing our bit to reduce the number of witnesses who are cited for court. Traditionally, police officers named every person from whom they took a statement for a police report and called them as a witness. However, in reality, many of them would probably never be a witness. We have heard evidence that there is insufficient time for fiscals to read some of the cases in advance and take out the unnecessary witnesses. Work is being done between the Crown and the police to educate officers on naming people but adding in brackets that they are non-witnesses, rather than witnesses. That should reduce the number of people who have to attend court.

11:30

Douglas Ross: Before I come to the other witnesses who might want to come in, I make the point that when so much work is being done at the last minute because of a lack of resources, that means that, if there is any plea bargaining or if a fiscal decides once they have all the evidence that a case will not go forward or that another conclusion might be reached, that happens on the day when people have already been cited. They have already been taken away from their leave and from their days off with their family and have already had their shifts changed. Even if we were to get the IT system—I always worry when we speak about IT systems, because Scotland currently seems to have a particularly bad way of doing them—sorted and have it as a focus, that would not solve the problem of a lot of cases being looked at only in the last 24 hours, because although the IT system might work, the backlogs would still be there.

My questions to PCS and the FDA are about technology, which you both mentioned briefly in your submissions. PCS made quite an interesting point that contractors come in to work with the technology but do not seem to share the information. Did I pick up your point correctly? I think that it is that there is maybe wastage of funds, as we pay quite a lot of money for

contractors to come in to deal with the technology and they train only some staff rather than all staff.

The FDA states that the benefits of new technology

"may not be realised for months or years".

What is your view on more technology being used in our court system? Is it the big thing that we are looking for that could address many of our concerns or is it just a side issue that might lead to some improvements but might not bring about the big change that we need?

Stephen Murray: I will respond first. Our concerns as a union are about the IT side of the organisation. From what we can gather, the cost is £730,000 or even more than that—I am led to believe that that figure covers only contractors and does not include other specialists that the organisation brings in for different areas.

Our concern has always been to get good value for money for the department. The difficulty is that there is no knowledge transfer to in-house IT staff. When contractors come in, there should be a contractual obligation that means that, in addition to fixing the problems that we face, they show our guys how that is done so that in future budgets the spend on contractors can be brought down. You would ask somebody who came in to fix your television when it was not working what was wrong and, if the solution was fairly simple, you would not call them out a second time, because you would hope to fix it yourself. That is all that we are asking for.

We have concerns and—for whatever reason; I do not know why—the answers that we are getting are not sufficient. Maybe it is because—dare I say it—the IT guys tend to have a high opinion of themselves and to think that they are above other areas of the department. We definitely have concerns about the issue.

Fiona Eadie: Both trade unions regularly meet the director of the information systems division in the COPFS. From the information that he has given us, I understand that the contractors that come to us are required to impart the sort of knowledge that Stephen Murray talked about. I cannot comment on whether that occurs in practice, but I understand that it is a requirement of the contractors.

Another aspect is that contractors are used for some specialist tasks because, while for certain aspects of the day-to-day running of any IT system people will be required to be on the ground and to be available every day to respond to issues, there are other things that do not crop up every day, so it is not considered to be essential to retain those staff permanently. They are brought in as and when they are needed.

On your question whether the benefits will be realised quickly, I think that you might be referring to the part of our submission that is about other structural reforms and changes that have occurred recently. For example, one of the big things that we are waiting for is the introduction of iPads in courts so that, rather than taking big bundles of files, fiscals will be taking an iPad. That might just be a different method for them to access information. The savings probably relate more to administration staff, who have to spend a lot of time physically putting together bundles of papers for court on any given day. The idea is that that will be done electronically. The effective operation of that involves a number of dependencies, and I can speak about some of them, if you want.

Douglas Ross: For the record, page 5 of your submission states:

"We know that work continues within COPFS to exploit new technology solutions and streamline work practices in order to deal with the challenges we have outlined above. The continued difficulty for our members in such a strategy is that any benefit felt in such changes may not be realised for months or years down the line."

That maybe goes back to the issue about all the people who are on short-term contracts. Why would somebody get up to speed with and develop their use of new technologies if they were not sure that they would be there to use those technologies in the long term?

Fiona Eadie: We have welcomed the recent recruitment, which has resulted in some additional permanent appointments, but an element of reliance on fixed-term contractors remains. Unless and until the organisation is sufficiently resourced to have an adequate and full staff complement, and while the pressures remain on overall budgets, that is likely to remain the position.

Liam McArthur: After Stephen Murray's comments about the IT team, I hope that he does not go back to the office and find that he is locked out of his email system.

I want to go back to Calum Steele's remarks about some of the problems. You were understandably complimentary about the professionalism of those in the COPFS, and you acknowledged the constraints that they are under in terms of budgets and personnel. However, you are critical in your written evidence, suggesting that COPFS policy decisions are

"directly impacting on the capacity of the courts and by extension the COPFS staff."

You state:

"These primarily relate to cases (usually but not exclusively domestic violence cases) where it is known from the outset that there is not a sufficiency of evidence to secure a conviction, yet the case proceeds regardless."

Will you expand on that? It seems to be in no one's interest for cases to be brought forward where there is no prospect whatsoever of a conviction being secured. That is not in the interests of those bringing the cases, the witnesses, the victims or indeed the accused. I would welcome your further views on that and on what we might be able to do to address it.

Calum Steele: I appreciate that this takes us into the area of COPFS policy, which for understandable reasons we did not want to touch on earlier. However, from a police perspective, this is an issue. Police officers speak to fiscals all the time, and in some cases where the police officers were the arresting officers, they knew at the time of the arrest or detention that there was probably an insufficiency of evidence. The situation arises because we are dealing with crime according to the Lord Advocate's guidelines and not the Scottish crime reporting standard, which is problematic in its own right. Those policy decisions impact on police demand from the beginning and then on court demand and certainly on demand on COPFS staff, first in marking cases that have no prospect of ever going to court and then citing witnesses and getting them to court to go through a process that will never result in a conviction.

Am I able to point to specific cases of that? I suspect that the answer is yes. Over the past couple of weeks, a fairly comprehensive editorial piece on the issue was undertaken by a reporter for the *Sunday Post*, and the report included comments from sheriffs indicating that there are cases that they know do not have sufficient evidence and will not be prosecuted but which come before the courts and everyone has to go through the charade of getting them there because of what appear to be policy decisions. It might suit a policy objective, but going through such a rigmarole does not seem pragmatic or the best use of resources for a service—and by that I mean all the services involved—whose staff are under time pressure.

Liam McArthur: Is that because of an insufficiency of discretion? You have mentioned guidelines. One would assume that guidelines would, by any definition, be open to a level of discretion but from what you say, it appears that that discretion is not being exercised by people who are in possession of pretty much all the facts and therefore should be able to make a judgment that does not result in such an outcome.

Calum Steele: It would be wholly inappropriate for me to speak for fiscals, but we heard earlier of at least a perception of a lack of discretion. However, if I were to draw a parallel with the police service's experience of some of these cases, I would say that there was absolutely a lack of discretion.

I do not want to distract us from discussing the general issue by highlighting a specific aspect—domestic violence—but, in Scotland, we have now got to a stage at which, for example, couples cannot have a row in their house or, if they do and the police are informed, there is a very strong likelihood that one of them will leave in handcuffs. There are, of course, understandable reasons why the police and Crown Office focus on domestic violence has changed massively over the years but—and I suspect that I am seeing tomorrow's front pages already—are we really saying that we are best served by families and relationships experiencing the interference of the criminal justice system just because someone happened to phone the police on overhearing raised voices?

Rachael Weir: It is worth saying that, in the almost 19 years in which I have been a prosecutor, I have never initiated proceedings in a case where I did not believe that a crime had been committed and where I did not think that there was a sufficiency of evidence. No policy in the world would direct our members to do such a thing, and not one of our members would do it in those circumstances. Sometimes there is a misapprehension about the difference between whether there is sufficiency and whether we might get a conviction. It is not a prosecutor's role to secure a conviction in a case. There are many reasons why a conviction might not be the final outcome, but proceedings are still in the public interest.

It is also worth noting that we have an adversarial system of criminal justice and that there are no right or wrong answers in criminal law. It is a bit like medicine in being something of an art rather than a science. There are often disputes between the Crown and the defence with regard to the sufficiency of evidence, and sometimes there can be disagreements between the Crown and the police on the matter, too, but we are all working towards the same goal of ensuring that the interests of justice are served. The suggestion that prosecutors in Scotland are initiating proceedings in cases where there is an insufficiency of evidence is not matched by my experience or that of any of our members and is, in many ways, an attack on their professional dignity.

The Convener: We have heard about insufficiency of evidence not on one occasion but on a multitude of occasions from different witnesses, and I am really concerned that there is such variance on this matter. After all, you represent many people who apparently, we hear, feel under pressure to prosecute even when there is an insufficiency of evidence and to continue the case to court in order, we are told, to avoid having to throw it out because they do not want the complaint. We have heard evidence that that is the

culture that runs through the service. We have heard it from defence lawyers, people in the court, the third sector and the police, but the union that represents the Crown Office and Procurator Fiscal Service does not recognise it.

Fiona Eadie: I support what Rachael Weir said. There are two issues here. It is worth noting that our policy on the prosecution of domestic abuse is supported by Scottish Women's Aid, Rape Crisis Scotland and other organisations. It is, in effect, a zero tolerance policy and, in a modern Scotland, it is absolutely right that we should have that.

The crucial difference in what is being described here, though, is where there is insufficient evidence. I agree with Rachael Weir; I do not believe that our members would mark a case to proceed if there was insufficient evidence. That is different, because in Scotland there is a different test for prosecution that relates to whether there is a realistic prospect of getting a conviction. That might be to do with any number of factors; one factor might be the attitude of the complainer, but there are other reasons as well. It would be true to say that some cases might proceed to court where there is not a realistic prospect of getting a conviction, but that is different from saying that there is insufficient evidence.

11:45

The Convener: And the public interest test?

Fiona Eadie: That is a matter of policy. You have to determine whether, as a matter of policy on zero tolerance and tackling domestic abuse, you want to proceed with a prosecution because it is considered to be in the public interest to do so or to proceed with a prosecution only where you think there is a realistic prospect of getting a conviction. That is not something that I can comment on.

The Convener: We are going to have to watch our time now, but I realise that I interrupted Liam McArthur. Liam, do you want to add something after Ms Weir has commented? After that, I will bring in Oliver Mundell.

However, I cannot stress enough how fundamental this is. I do not think that the unions can, on the one hand, come here and talk about resources and the pressure that their members are under and, on the other, not acknowledge what such a variety of people who work at the coalface is telling the committee.

Rachael Weir: On Fiona Eadie's point about the correlation—or lack of it—between the tests for sufficiency of evidence and convictions, it is important to remember that prosecutors cannot and should not usurp the role of the court. There are cases where there are questions about the credibility and reliability of witnesses' evidence. There could be concerns about how that evidence might be presented or about how it might be challenged by the defence were the matter to go to trial. There are very fine questions of judgment that require to be addressed to ensure that the role of the court in assessing the credibility and reliability of the evidence is not usurped. In summary proceedings, those are properly matters for the presiding judge; in jury proceedings, they are matters for the jury. It would be wrong of prosecutors to usurp that role. That might be where some of the disparity is being seen.

The Convener: Liam McArthur will continue with this theme, and then I will bring in Oliver Mundell. However, we will need questions and answers to be quite short.

Liam McArthur: I want to go back to something that Rachael Weir said earlier about centralised marking. You talked about building up expertise because of the number of cases, but another way of looking at that is that, because you are seeing so many cases, there might be more of a tendency to gloss over differences between them. On the issue of coming up with an ideal system, I suppose that the question is not whether you move away from having central expertise but whether you have local marking that includes the input of that central expertise or a central marking system that embeds local input better than appears to be the case at the moment. Do you have a preference in that respect? It is clear that something has to change, because things are not working as intended. It is not that anyone here has a particular agenda; it is just that there is no doubt that those local relationships—the local expertise and insight—are being lost at the moment. Indeed, we have heard evidence on that front from a wide range of stakeholders.

The Convener: Quick answers would be helpful.

Rachael Weir: Ultimately, it comes down to resourcing. It is up to the department to ensure that, with a team of that nature, it has sufficient resources not only to do the job at hand but to spend time with communities to hear local input. Of course, that is only if that model were to continue; if it were not, there would be any number of options. Our organisation has been through a number of periods of change and it is important that we take time to allow what is a relatively recent change to bed in and be properly evaluated before we rush to judgment on what, if anything, ought to replace it.

Oliver Mundell: I want to return to the issue of insufficient evidence. Repeated mention has been made of time and resources, and I do not know that there is always an awareness that there is insufficient evidence. Given the way in which the

case management system works behind the scenes, fiscals are sometimes given cases without having the time to do full due diligence and they just have to make the best of bad circumstances. That means that, on occasion, they do not have time to look properly at CCTV evidence, have the chance to speak to defence solicitors about defence evidence, or have the time or the opportunity to speak to the police about other evidence or information that they might have to contribute to the process. From what we have heard, there are definitely cases that are slipping through the net in which, through a lack of time rather than a lack of skill, fiscals cannot consider all the relevant points in deciding whether the matter should go to court.

The Convener: It is just that there is a lack of time to look at everything.

Rachael Weir: I think that fiscals are able to look at all the information that is presented to them. You mentioned the example of information that might be available to the police but which is not in the report that is submitted to them. Why is that the case? It might be because of other factors that are beyond the control of the officer concerned.

It is also important to remember that the circumstances of cases change over the life—

The Convener: Can I stop you there? You have told us in evidence that prosecutors are going into court unprepared because of the volume of cases that they are being asked to take on. Oliver Mundell is asking you whether that could be one of the reasons why proper consideration is not being given to whether there is a sufficiency of evidence. Cases are going ahead when they should not, just to meet a time target.

Rachael Weir: When we talked about preparation time, we were talking about preparation time in the context of preparation of a court for trial, for intermediate diet or for other diets of court. Please correct me if I am wrong, but I understood the question—drawing on the SPF's evidence—to be about the initial decision to initiate proceedings and sufficiency of evidence at that stage. That decision is reliant on a police report, and it is often reliant on CCTV that might not be available because of factors beyond the police's control. They might not have been able to seize that evidence or reformat it in a way that would allow anyone to view it. We work with the information that we have at that stage.

What I can say is that, on the basis of the evidence that they have at that stage, procurators fiscal would not initiate proceedings if there was not a sufficiency of evidence.

Oliver Mundell: Do you recognise that the pressure on that process is just as severe as the pressure that exists at other stages of trials? Fiscals are juggling multiple cases while trying to review evidence. Police officers and defence solicitors are actively trying to phone fiscals, but they cannot get hold of them. We heard in previous evidence that police officers and defence solicitors often go above fiscals' heads in an effort to find someone else within the organisation who can help them. The fiscals say that they do not have time to make those calls or that they cannot track down their superiors in the required timeframe. Is that not a worry?

Rachael Weir: It is correct to say that the experience of our members is that there are pressures at every stage in the prosecution process. I would not want to leave members under any illusion about that; it is clear that that is the position across the board.

Oliver Mundell: Do you accept that that could lead to some cases in which the evidence is insufficient proceeding? Given the sheer pressure and volume of cases, is it not possible to conceive that there might occasionally be cases that make it to court when the evidence is not what it appeared to be, because the fiscal has had only a few minutes to review it?

Rachael Weir: There are cases in which the circumstances change over time and new information comes to light. It is not my experience that prosecutors are taking the wrong decision deliberately or negligently—

Oliver Mundell: I would not say deliberately—

The Convener: Given where we are, we will have to move on.

Mary Fee: We heard evidence from prosecutors who said that they were not allowed to use their discretion and that there was almost a direction to prosecute. Is that a scenario that you are familiar with?

Fiona Eadie: It perhaps depends on what particular situation or circumstances you are talking about.

Mary Fee: I am talking about domestic violence or sexual abuse cases.

Fiona Eadie: If, on the face of a police report, there is a sufficiency of evidence, our instructions are to mark that case for prosecution.

The Convener: Please can members keep their questions very tight.

Fulton MacGregor: I will keep it to just the one question, which follows on from points that other people have already made. To pick up on what Calum Steele said, the committee has heard from a large number of stakeholders about the increase in the number of domestic violence cases being heard in the court. Having said that, I agree with

Fiona Eadie and Rachael Weir that that is what we would expect in a modern-day Scotland. What do Rachel and Fiona think about there being more robust diversions for those offences? What would the public expect? Could we look at bringing in rehabilitation programmes at an earlier stage so that certain individuals and witnesses are not brought through the whole court process?

Fiona Eadie: I agree. The evidence suggests that a number of diversion schemes can be very effective in lowering reoffending rates. I recall that you may have some experience of criminal justice social work, which is an area of the criminal justice system that has suffered in relation to funding. Our members are willing and able to exercise their power and discretion to divert cases reported to us as part of a diversion system, but to do that effectively relies on adequate resourcing within a given locality.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I have two quick questions. Fiona Eadie, can you clarify a point from the earlier discussion about junior fiscals and trainees? I understand that in the past three or four years, there has been a constraint around second-year trainees being at the forefront of the process—which is necessary for their development, but perhaps not overly so—and there not being permanent contracts thereafter. Are there now more permanent contracts available and is that expertise being developed and maintained in a more advantageous way? Do you have any comment on that in relation to building capacity in the future?

The ASPS's submission refers to concerns about any exit from the European Union, as that would

"undoubtedly decrease our capability to deal with cross-border policing investigations such as the use of European Arrest Warrants and sharing of intelligence in a timeous manner."

Can Gordon Crossan comment further on that?

Fiona Eadie: As I indicated, we welcome the recent permanent recruitment of legal staff. However, our view is that we do not have the necessary staff resource and resilience for us to be able to provide the service that we would wish to provide. I fully expect our senior manager to give evidence to the Parliament and say that he can probably just about manage to deliver the same service again with the same money next year. I make no criticism of that: his job is to manage the department within the budget that he is given. However, if the committee wants to see the sorts of improvements that we have spoken about today and the standard of service that we all want to deliver and that the people of Scotland expect, additional resources are required.

We spoke about domestic abuse in particular. Our current budget includes an additional element for tackling domestic abuse cases. That additional element suggests that the resources would not otherwise be required and we reject that view.

12:00

Ben Macpherson: I want to clarify that the fixed-term contract concerns are primarily around administrative staff, and that although there are still concerns about fixed-term contracting for junior fiscals, there has been a development in making more permanent positions available. Is that the case?

Fiona Eadie: Our members are also still recruited on fixed-term contracts and we continue to have a concern about the use of fixed-term contracts for any staff, whether they are legal or administrative. A former Lord Advocate said that you cannot just knit deputes, and that is true. We need to recruit, develop and train the staff. You can only do that effectively if you have permanent staff, rather than temporary staff who may leave the organisation. That applies to legal staff as well.

Ben Macpherson: Thank you for clarifying that.

The Convener: That concludes our questions.

Ben Macpherson: What about my second question?

The Convener: I am sorry but we are going to have to wind up—we have a 12 o'clock deadline. Please ask your question and the witnesses can reply in writing.

Ben Macpherson: I have already asked the question.

The Convener: Sorry. Someone can come in if they are very brief.

Chief Superintendent Crossan: We welcome a lot of foreign nationals in Scotland and quite rightly so. That brings its own challenges in relation to criminality because we do not know what people's backgrounds are. An exit from the European Union could significantly hamper our ability to deal with foreign nationals who are involved in crime and our ability to share intelligence in relation to that.

To put it into perspective, there are a number of cases in Scotland where, through our good working relationship with Europol and Eurojust, we have been able to bring people back to Scotland very quickly, which is a victim-focused approach. If we do not have those mechanisms—I cannot overemphasise the power of a European arrest warrant—the delivery of justice across Scotland will be significantly hampered.

The Convener: Stewart Stevenson has a question to which a written response would be appreciated.

Stewart Stevenson: My deliberately naive question is your homework. Why do sheriffs allow cases to be scheduled in advance of both sides of the case having indicated that they are ready to proceed?

The Convener: It would be appreciated if you could reply to that question in writing. That concludes our questioning. I thank all our witnesses for what has been a comprehensive evidence session. We will have a short suspension to allow for a changeover of witnesses.

12:02

Meeting suspended.

12:05

On resuming—

The Convener: I welcome our second panel of witnesses, which comprises Michael Meehan, law reform committee member, and Derek Ogg QC, both from the Faculty of Advocates. The faculty has also provided very helpful written evidence.

Concerns have been raised about the deskilling of the Crown Office and Procurator Fiscal Service as senior prosecutors are being diverted, for example, to serious sexual abuse and homicide cases, which is perhaps to the detriment of other court cases, such as those involving complex fraud. It would be helpful if you could comment on that.

Derek Ogg (Faculty of Advocates): Thank you, convener, for inviting us to give evidence. First, I have interests to disclose: I am a former head—indeed, I was the first head—of the Crown Office's national sexual crimes unit, and I finished in the Crown Office in 2011 as the assistant principal advocate depute, so I have experience on that side of the fence. I am also the chair of Justice Scotland, although I do not appear here on its behalf. Justice Scotland is the Scottish division of the United Kingdom organisation Justice, which is a member of the International Commission of Jurists.

You asked about deskilling by specialising some people and advocate deputes in the Crown Office. I suppose that specialisation started in the Crown Office with the national sexual crimes unit, for the very good reason that we wanted to be able to train a cadre of people exclusively in sensitive investigation and prosecution in difficult cases, so that we built up quickly a level of expertise. People would be rotated out of NSCU into the general pool of Crown counsel—or trial counsel—but they could be called upon at a later date to do criminal trials in rape cases.

We never allowed any woman in a rape case to be examined in chief by a prosecutor who had not been specifically and expertly trained in that field. Even after a person had left our little nest and they had flown away, we would have still been able to go back to them because they were badged in that area. I suppose that, for the best of intentions, we created a specialist cadre, but we were feeding those people back into the system.

I am not sure that deskilling occurs a great deal at the advocate depute level. An advocate depute is a generalist by nature and should be expected to prosecute any crime that comes along, just as any advocate who is defending should be expected to defend any crime that comes along. However, the faculty is concerned that there are specialist areas of crime that advocate deputes and prosecutors are not being trained in. It is a stand-alone failing due to the lack of time and training resources that advocate deputes are not getting their in-service expertise updated or new expertise given to them.

As the police have fairly observed, there can be a disparity—and perhaps a frustration—in that whereas the police have highly specialist units dealing with highly specialist crime, they are not finding an appropriate read across in the Crown Office.

The Convener: That is helpful.

Michael Meehan (Faculty of Advocates): Homicide and sexual cases are, of course, specialist cases. The feedback from advocate deputes about non-specialist cases, however, is that they have noticed a deterioration in the quality of cases that come to them to prepare for the preliminary hearing stage. It had been envisaged that the preliminary hearing stage would be the fine tuning, but more now needs to be done for cases at that stage compared with cases that came across their desks years ago.

An issue that we touched on in the faculty submission echoes what was said in the earlier panel about the lack of time to prepare cases. There is now more work to be done, but advocate deputes are finding that they are being taken away from the hearing preparation to do other work. Preliminary hearing preparation is so important, because that is when the case is ready for trial. If the time is not ring fenced, there is a risk that, if the cases that come to them are in a state that is not as good as it was in previous years, they will not have the time to bring them up to the standard required.

The Convener: Does that inevitably lead to delays?

Michael Meehan: I am not sure that it does. Given that there is delay in the court system—trials may be fixed for six or seven months down the line—work could be identified to be done in the next month or two that would bring a case up to speed. A preliminary hearing judge could be told that the case at this stage was not ready for a trial to be fixed. Had statutory time limits been met, however, the trial would be in a month's time. We know, for example, that the forensic and the phone reports would not be ready in a month's time, but if one is operating a system with a six-month delay, the fact that work is being instructed late does not matter. Advantage can be taken of the failure to meet the statutory time limits.

John Finnie: Good afternoon, gents. I want to ask about the role of the prosecutor—which would presumably apply to a PF or an advocate depute—and the comments that you made in your submission about discontinuing proceedings:

> "This can be due to a number of factors; but a recurring concern is the blurring of the public interest with the perceived interest or expectations of the complainer."

From other sources we have heard a suggestion that the prosecutor is increasingly being seen as the complainer's lawyer. Will you comment on that and on what the implications are, please?

Derek Ogg: In fact, that concern was expressed by the dean of faculty in an open letter to the Lord Advocate. Of course, we have had a change of office.

There is simply very often a perception on the part of victims of crime that the prosecutor is their person in court—that they are there to get justice for them. However, the prosecutor has a different role that is not readily understood—and that might not, even if you were to put it out to referendum, be agreed by the public that it is the role that the prosecutor should have—but it is in fact constitutionally correct. The prosecutor's job is to prosecute fairly in the public interest. If the evidence does not match up to the requirements of evidence, whether that be through its quality, reliability or quantity, there might be no substantial prospect of a conviction at all. The prosecutor is not there to represent the victim to get the case limping into court under any circumstances. A judgment has to be made in the interests of justice to say whether there is no public interest in prosecuting the case further.

The process of prosecution must not be a punishment in its own right; there should only be a punishment if a person is convicted following a fair prosecution. Domestic abuse cases were mentioned. I have to beg to differ with the representative who made remarks about that issue. I have had personal experience as counsel where I have been told by fiscals that we simply had to proceed. They do not even bother now going to their senior—that might be part of the culture, because it might be seen to be causing a bit of trouble if they were to say, "This isn't going anywhere."

The real problem very often is in the failure to precognosce complainers. As you all know, precognition is a process whereby the prosecutor engages precognition officers—not police officers—to take a further statement and say, "We know when you gave a statement on the night in question you said this. Now, we've heard from your next-door neighbours and we've got the CCTV from when you left the grocery shop. What do you say about that?" The person might say, "I don't remember that. I was off my face on Valium," or "I had taken Buckfast or whatever that night," or "I had been drinking champagne all evening."

12:15

If that precognition has been taken, that allows the prosecutor to make a judgment at that stage as to whether it is in the public interest to prosecute. Indeed, they might sometimes say to the complainer, "Do you really wish to complain about this matter, given what you have just told me about those other pieces of evidence that we have now discovered?" The complainer might well be the first to say, "Do you know what, let's just forget this—it has been a terrible mistake."

The decision not to take precognitions of complainers and other witnesses was a purely economic one. In my view, precognition officers were moved on to the task of doing disclosure work—looking at whether matters should be disclosed and preparing disclosure documents in important cases. That is one of the difficulties. There is definitely a perception of difficulty. The Crown Office needs to advertise more freely that it is not a complainer's solicitor; it is the public prosecutor.

John Finnie: Is the issue perhaps to do with the terminology? Politicians like to talk about victims and victims' rights, but of course the accused have rights too. I do not think that the term "alleged victim" would be very popular, but "complainer" is the technical term.

Derek Ogg: It is the right term, given that we operate under a system of a presumption of innocence. A person in that situation can only be a complainer. We call the indictment a libel, and we do so for a reason, which is that the presumption of innocence exists and it is a libel until it is proved to be true. The term "complainer" is good. I have sometimes spoken individually to complainers who have taken offence at the term, because they think that I am saying that they are just complaining, rather than that they are the complainer about a

crime. The terminology might sound a bit old-fashioned, but it is constitutionally correct.

John Finnie: I have one other brief question, which relates to disclosure. Your evidence on that again uses a succinct phrase. It says:

"It is hoped that a regime for the early disclosure of evidence would obviate the need for the consequent delays."

Is it the case that disclosure still is not working correctly?

Michael Meehan: That is the feedback. There are still issues with disclosure. One hears about situations in the course of a trial when matters are disclosed late. There seems to be continual feedback that disclosure is not as good as it could be. In particular, there is an issue with items being added by a notice under section 67 of the Criminal Procedure (Scotland) Act 1995. Certainly in solemn cases, that is probably as good a way as any to test what is happening, because if such items are added to the court bundle late, they have often been disclosed late. It does not often happen that something is disclosed in good time and then there is a delay in lodging it as a production. There is on-going feedback of an issue with disclosure.

John Finnie: This may seem apparent but, just for the record, is it the case that, if the disclosure of evidence is timely, that might affect how an accused pleads, which would avoid all the consequential process?

Derek Ogg: Absolutely. The legal requirement on the Crown and the separate stand-alone requirement on the police is to disclose matters that may undermine the Crown case or that materially assist the defence case. We have discovered that a lot of decisions on what to disclose are being made at precognition officer level. We should bear it in mind that precognition officers are not legally qualified, so it is an enormous burden on them to require them to make decisions of legal significance as to whether something should be disclosed.

I simply cannot believe that, once the precognition officer has done the exercise, fiscals have time to look over the precognition officer's work to see whether there has been full disclosure. I cannot believe that, when serious cases go up to the Crown Office, advocate deputes have much time either to look at that and consider what has been disclosed. It is all being dumped on the precognition officer at a low level to do that, but that work is critical and, when done properly, it can result in cases coming to a complete stop or in people putting up their hands and saying, "The game's up—we've exhausted every avenue and there is nothing there for the defence."

John Finnie: Forgive me, because I cannot recall who told us this, but at some point it has been suggested that, although there is a requirement to disclose statements, if the fiscal sought further clarification from the police service and that exchange took place not by way of a further statement but by an exchange of emails, there is no requirement to disclose that.

Derek Ogg: Oh yes there is, and the requirement is on both parties—the police and the fiscal.

John Finnie: Thank you—that is helpful.

Oliver Mundell: You have highlighted the issue of readiness and touched on the fact that prosecution should not be a punishment in itself. On the basis of some of the other evidence that we have heard, I wonder whether the issue is not just that cases are being delayed as a result of a lack of preparation but that cases are coming forward for prosecution when there is insufficient evidence or that probably would not have gone to court in the first place if the fiscal or depute had been fully aware of all the facts.

Derek Ogg: There is no getting away from the fact that, to master a case—and to make a judgment on whether to prosecute a case, you need to master it—you have to sit down and spend some hours reading page after page of sometimes pretty horrendous stuff. I can understand all the comments that have been made about how stressful that job is, but you have to read the evidence to get a flavour and to make a judgment on the second part of the test. The first part is whether there is sufficient corroborated evidence, and the second part is whether there is a realistic prospect of a conviction in the case. There is also the overarching consideration of whether it is in the public interest to proceed with the prosecution.

There is no substitute for sitting down and reading the papers. If you are not even going to precognosce witnesses to get a deeper flavour and to drill down a little into the statements that were made at the time, I do not see how you can make effective judgments. Also, people who are overworked do not make good judgments, anyway. It is a bit like an arrow leaving a bow—once someone has made a decision somewhere, no one wants to interfere with the decision and it just rattles on down the track, sometimes ending up in court by accident, rather than design.

There might be a suggestion that, because of political correctness or because of zero tolerance, prosecutors are deliberately putting unsupportable prosecutions into court just to punish the man, if you like, by having him experience the prosecution. I do not think so, but I think that there is a culture that does not allow for deep

penetration of the case, discussion with complainers, good precognition and good judgments.

Oliver Mundell: That is not exactly the point that I am getting at. I do not think that it is deliberate. As you have said, people throughout the process are under considerable strain and do not have time even to read through a case properly or to personally review all the evidence. Therefore, they take things at face value and make their best judgment call. There is certainly a possibility, in what is a significant number of cases, that people are in effect taking the wrong punt based on what they have seen. Does that have wider ramifications for justice?

Derek Ogg: If I may respectfully say so, all those considerations are correct but, to superadd to that, the default position is generally to say, "Prosecute", because then it becomes someone else's problem. Rather than me having to explain as a prosecutor why I have made a decision not to prosecute, it is easier to say, "Prosecute", and the case will make its appearance some time in the future.

I can tell you how it used to be done in the Crown Office before the national sexual crimes unit. You would read a rape indictment folder, for example, close it and put a little piece of blue paper on it with a paperclip and write "Pro HC Rape", which meant, "Proceed; High Court; rape," because you would not want to take the next step that you would have to take if you decided that it should not be prosecuted, which was to do a lengthy note to the Lord Advocate or Solicitor General to get their personal approval to abandon the prosecution. You might be supported in that, but what would happen if you were not?

If senior advocate deputes were trepidatious about that, imagine that filtering right down through the system. It becomes a bit like defensive social work used to be, with people saying, "Let's not make decisions that could be risky." The same kind of thing can infect the Crown Office. Where people do not want to make decisions that are risky, it is easier just to prosecute. I have heard, "Let the sheriff throw it out, not us" so many times that it is almost a cliché.

Oliver Mundell: I have a final question. Do you think that there is there a definite presumption towards prosecution? Is that the culture that exists within the Crown Office and Procurator Fiscal Service as a whole?

Derek Ogg: No, I do not think that. Do you mean for the prosecution of all crimes?

Oliver Mundell: Is there a presumption towards prosecution, in general, when cases are being marked?

The Convener: Are you talking about the protocol, or the assumption for, domestic abuse cases, or in general?

Oliver Mundell: In the culture, is there a presumption towards prosecuting in order to avoid having to make a decision, so that the decision is passed on?

Derek Ogg: I would not say that. Sexual crime is such a hot potato and it engages so many different stakeholders in the system that we have to set it to one side.

In general, at the Crown Office, if there is insufficient evidence, the case fails at the first fence. We can send a note down to the fiscal and instruct them to go back and look for more fingerprints or for a particular kind of DNA, or to go abroad and see whether there is information on the guy. We can make further inquiries—but if the case is half-dead, kill it.

Oliver Mundell: So, do you not think that there a scenario in which people are under time pressure, so they do not look at the case in the detail that you were talking about and which would allow them to say whether the case is in the balance or leans towards prosecution. Is there a culture in which people just say, "Prosecute, and let the sheriff decide" and do not take on the additional workload, or is that unfair?

Derek Ogg: The dean of the Faculty of Advocates—I agree with him—has expressed the view that, to some extent, what happens depends on the level of public interest in the case, the public profile of the case, the political interest in the case and the type of case. If there are sensitivities about the case—for example, if it is a zero tolerance case such as for sexual offences or domestic abuse—we have observed, as I have indicated, that the default is to let the sheriff or judge take it away and say that there is insufficient evidence. Some prosecutors regard it as a win if they get a case to the jury. They feel that they have done their job and that it does not matter if the jury is out for five minutes and comes back 15 to nil for an acquittal.

The Convener: That is certainly the evidence that we have heard from other people. In certain cases, prosecutors will let the court decide, rather than take the decision themselves.

Derek Ogg: I understood the point that was made by the fiscals' union that prosecutors are not judge and jury. However, they have public interest considerations to take into account. A court is not a public inquiry; it is a court of prosecution. There is only one person going to jail if there is a conviction and that is the person who is sitting in the dock, who has rights. For example, careless prosecution—by which I mean that a lack of care has been put into the decision making—of a rape

case not only damages the complainer, but has horrendous effects on the person who might be innocent and who is accused in his own community of being a rapist. I imagine that any man would rather be called a murderer than a rapist.

Stewart Stevenson: Have things changed in recent times in that regard? I say this not to be humorous, but I happen to have been reading a rape case in the court papers from 10 November 1830 which sounds exactly like what you have described, because the prosecution deserted the case. It was clear that preparation had not been properly done, although there were precognitions, as there would have been in those days. My question really is how much has changed, or has it always been a difficult area of public policy and prosecution?

Derek Ogg: Michael Meehan has most recently been an advocate depute, as well as representing the faculty, so he might want to comment.

Michael Meehan: I thought that you were going to say that I had been about since the 1830s. [*Laughter*.]

Stewart Stevenson: I get accused of that.

Michael Meehan: I will strip this back slightly. I was a fiscal between 1990 and 1995 and, at that time, as a fiscal, one would be involved in precognition—legally qualified people did the precognition. My recollection is that "Renton & Brown's Criminal Procedure"—the bible for criminal practitioners—used to say that when precognition officers are employed, they are to be under the direction of someone who is legally qualified. Gradually, there has been a shift from experienced solicitors carrying out precognition to their doing no precognition, so there has been a change in that regard.

12:30

The essence of precognition is that it is a way of testing the Crown case at an early stage. If one speaks to sheriffs or judges about it, they might say "The Crown is finding out about its case for the first time." I still appear as an ad hoc advocate depute and can give an example of a prosecution in the High Court a few years ago, when I went to introduce myself to the complainer just to say, "I'll be the person who'll be wearing a wig in court and I'll be asking you questions." Those discussions are very superficial because one cannot get into the evidence; if we do that, things can be said that we would have to report to the defence. So, we are really there just to introduce ourselves. However, one of the things that I might tell a person in a rape case who has not been precognosced is that I will be asking them to look at photographs of where they say they were raped. In that case, the complainer was shocked and told me that she was glad that I had told her that, because if it had just been put to her in the courtroom, she would have been taken aback.

One of the advantages of precognition is that witnesses in a room just with the fiscal or the precognition officer can look at photographs and say, "Yes, that's where it happened." In presenting a persuasive Crown case, if we have a witness who is reliving their ordeal, a jury is very likely to find that witness credible and reliable. We do not want to add to their hardship, but we want to find aids that will assist them in telling their story in a persuasive way. The way in which to familiarise them with the aids, and for the prosecutor to know how they will react, is to precognosce them and show them the photographs. We could also say, for example, "An hour after you left that location, you sent a text that may give the impression that there was consensual intercourse. What do you say about that?"

I think that Sandy Brindley's evidence was that complainers are precognosced, but in my experience that certainly does not happen in every case, although I can speak only anecdotally. Doing precognition added real value because the Crown could find out the competing things that people were saying.

I will touch on what Derek Ogg said. Precognition might provide evidence that could undermine what a complainer says, but the complainer might also be able to point to evidence that supports what they say, which is an advantage. Once a trial starts, the prosecution cannot add new witnesses, so if a complainer was to say then that, for example, her sister or neighbour could help with evidence, that would be too late because the case would be up and running.

Precognition really added value to cases; I would say, as a prosecutor, that a good precognition was worth its weight in gold. One would know, for example, what a witness had to say about medical records. A witness might tell a police officer at the time that they had one drink, but say to the doctor who is carrying out a medical examination that they had four glasses of wine. If we do not precognosce that witness, we do not know how they will explain the discrepancy between their statements, but if we do they might say, "Actually, I was panicking when I spoke to the police officer, but when I spoke to the doctor, I'd composed myself, so that's why it's different." Such areas are where the credibility and reliability of witnesses can be undermined. However, if the witnesses have that time, they can give us an answer; the real advantage of that for the prosecutor is that we know that they have the answer. If we are going in blind and we know that

the police statement says that the witness had one glass of wine but the police surgeon says that they had four glasses of wine, we are very uncomfortable about saying to the Crown witness "Well, that's not what you told the doctor."

It is a great shame that the direction of travel—in relatively recently times; I look back to 1990, when key witnesses were precognosced—is that witnesses are not precognosced. It is not happening now. There is no doubt, as Derek Ogg pointed out, that that is bound to be a resourcing issue.

Rona Mackay: In your submission, you talk about the fact that fiscals and deputes are often very hard to contact. That is something that we have heard a lot during the inquiry. What impacts does that have on a case? Have you had any thoughts on how that situation can be improved?

Derek Ogg: Again, Michael Meehan can answer that, having had recent experience and, as an ad hoc advocate depute, having his office on a charge line.

Michael Meehan: First of all—I might be jumping ahead of myself—the criminal justice secure email system is a concern. Let me give members an example. I was prosecuting a case relatively recently and received an email that seemed to have been copied in to a cast of thousands, with the complainer saying that there was a change in the requirement for special measures. When I replied, my message came back to me saying, "invalid CJSM account". People send me emails, but when I try to reply, my messages do not get through and I am told that the person does not have email. Communicating by email is problematic, and the phone line on which we can contact people is a premium-rate line.

There can be issues to do with availability. One can receive papers that say that the case preparer is a particular person, but when one phones the number, that person is on holiday—of course, people are entitled to their holidays—so one has to find out who else is dealing with the case. There would be a real value in getting a sheet of contact numbers for every case, with the direct-dial number of the person who is carrying the case.

One of the differences in the High Court with the smaller numbers of cases is that advocate deputes often speak to the defence counsel outwith office hours. If I was dealing with a case with Derek Ogg, I would have no issue with him phoning or emailing me in the evening or at the weekend. I appreciate that that can be an intrusion into personal time and there are concerns about stress levels, but sometimes that is the only way, given that people can be in court until half past five—even though the court day finishes at 4 o'clock, we often have to consult a client or go to the prison to see someone. There is often contact outwith office hours. An area that might require to be looked at is how one contacts people outwith office hours. Of course, there are issues to do with work-life balance and the impact on people's welfare.

Rona Mackay: From what you are describing, it seems that there should be a fairly easy fix, in that there could be a list of alternative contacts or an agreement that someone can be contacted out of hours, considering that that has such an impact. I wonder why people have not put their heads together and said, "Let's sort this."

Michael Meehan: I think that advocate deputes in the High Court are comfortable with being contacted outwith office hours. I am not in a position to speak about fiscals—sometimes an email will say, "Give me a call", but I think that that does not happen to the same degree. There is a data protection issue, of course. Will someone who is contacted at 7 o'clock in the evening have the papers with them? I think that fiscals tend not to take papers home, but for people working in the High Court it is inevitable—we have to work in the evening, so we will have the paperwork with us. There is an issue to do with confidential information as well as contact.

Derek Ogg: There is a big difference between procurator fiscal practice in the local courts and High Court practice. In general, it used to be that advocate deputes were advocates, who were dealing with other advocates. They would have each other's home phone numbers and would speak on a confidential counsel-to-counsel basis. Nowadays, some advocate deputes are less comfortable—if a solicitor is instructing a solicitor, for example—having people's numbers and phoning them at home at night. There are perhaps some old-fashioned apartheid issues there.

As far as the fiscals are concerned, there is no real ownership of a case until the night before. One might speak to someone who is in the right department, but the person might not be capable of doing, or have the time to do, anything about what one is asking, and they might not be the person who is conducting the trial.

Douglas Ross: My question is similar to Rona Mackay's. As I said when defence agents gave evidence in the first evidence session in our inquiry, I cannot believe that there are such problems with the premium-rate line, information going missing and CJSM, which Michael Meehan talked about.

What does the Faculty of Advocates do to address the problem and make its concerns known? The Glasgow Bar Association said that it has useful meetings with the Procurator Fiscal

Service, but the problem has been going on for five years. I presume that you have expressed concern, but there has been no improvement. Is that acceptable? What more could the Faculty of Advocates or others in the legal profession do to say that the system simply is not working for you or anyone in the justice system?

Derek Ogg: The Criminal Bar Association, which is the association within the Faculty of Advocates for advocates who specialise in crime, or have a special interest in crime even if they do not do a great number of trials, will regularly contact the Crown Office to express concerns and difficulties. Also, because the faculty is such a collegiate body—remember that our members supply prosecutors as well as defence counsel, so when we sit down together we do so as members of the faculty—not a single person in the Crown Office can be under any illusion about the problems. It does not require us to have a committee.

Douglas Ross: So why is the situation not improving?

Derek Ogg: It is not improving because we are using a clunky old English IT system on CJSM, and I take it that the old 0844 number is a money maker.

Douglas Ross: It probably is, because people are saying that it is a premium-rate line, but what we heard from the defence solicitors was similar to your experience in dealing with the High Court—that fiscals are actually saying, "Here's my mobile number. Contact me directly." I do not know how much that number is being used now, because everyone whom we have spoken to says that the phone line does not work and does not do what it is supposed to do. You are saying that information goes missing, and we have just heard the example of emails coming in and your being unable to reply to them. I just cannot believe that anyone in the justice system or the legal system would accept those problems and not do anything to resolve them. We are living in 2016: it should not be the case that everyone is highlighting the problems but no one is willing to come forward with a solution.

Derek Ogg: Someone from IT in the Crown Office has to come up with a solution to provide a criminal justice server that is securely encrypted and also works. The way to stop the other problem with the 0844 number is to stop using it. I do not think, however, that I would like to be a young fiscal knowing that 40, 50 or 60 solicitors in Glasgow had my mobile phone number and might want to phone me at night about cases that I may or may not have.

Douglas Ross: I do not think that they were saying they had 40 or 50 calls a night, but they said that they were embarrassed when they got into court and were told that certain information had been requested from their offices and they had no idea about it. It is not that they think that they will be plagued with phone calls; it is a question of there being a mutual benefit when they do not get embarrassed or told off in court for not responding to such requests.

Derek Ogg: I quite agree.

Douglas Ross: I have asked everyone why they are putting up with that if they are not happy with it. You are saying that concerns are shared in the legal profession but that we are not yet at a stage to get over the next hurdle to a solution to those concerns.

Derek Ogg: I think that there is a Scottish digital roll-out committee or organisation that might come up with something, but someone is going to have to write a cheque for an IT system that works.

The Convener: I hope that our inquiry will help. It will certainly raise the issues.

Michael Meehan: One of the difficulties that defences face is that the Crown insists that documents must be sent through that system. We could say that we do not feel that the system is fit for purpose, but if the Crown says that when we communicate with it, that is what we have to use, we do not have much choice in the matter, until it puts in place an up-to-date system.

Douglas Ross: I would also like to ask about an issue that has been raised by a number of people today, in your evidence and throughout the inquiry. Until today, the perception has been that younger fiscals with less experience are not willing to take decisions for fear of repercussions from further above. However, the dean of the Faculty of Advocates, Gordon Jackson, in a letter to the new Lord Advocate, following his appointment, cited an example of a long-serving advocate depute who said that she used to be a good decision maker but has got so used to not making difficult decisions that she has almost lost that skill. I know that we have had some discussion of that, but could you expand further? My perception was that that was an issue only in the early stages of people's careers, when they were worried about the repercussions, but now we are hearing about people losing that skill because, even with a great deal of experience and at quite a senior level, they are not allowed to take decisions.

Derek Ogg: I think that the dean is right about that. It works at both ends of the experience spectrum: if you are junior, you are too scared to make a mistake at that level; if you are senior, you are too scared to make a mistake at that level.

As I said, the default position—the easiest position—for a decision-maker is not to have to

make a decision once someone else has commenced a prosecution, but simply to push it on to its next base in the game. People can get out of the way of making decisions.

12:45

When I was in the Crown Office, I was making 20 or 30 decisions each day about the future of perhaps very serious cases, including child abuse and rape cases. We just got used to it. It is like going to the gym—get used to the weight and then you can up it. People cannot do that if they are not used to being trusted with making that level of decision.

It is not necessarily the fault of the decision-maker, but of the senior person up the line. We should trust our fiscals. I happen to think that we have brilliant procurators fiscal in Scotland. I have had Americans over here from the Federal Bureau of Investigation, the Department of Justice and so on who cannot believe how skilled and confident the fiscals are and the amount of work that they get through. I have never been a fiscal. They are a real asset and they should be cherished. People must trust in their judgment: they will get things wrong sometimes, which is when politicians need to understand that anyone in a job can make mistakes, particularly if they are under pressure and stress. Also, as one person said, there is not always a right answer—sometimes it is a judgment call.

As long as it is not outrageous and rebelling against all public policy considerations and all good sense, I think it is good to see a Lord Advocate loosening the reins somewhat, as I think the new Lord Advocate will: I genuinely believe that of James Wolffe. He has recently worked in the Crown Office as an AD—indeed, when I was there he was working there—but he has also worked outside the Crown Office as an advocate at the bar and he brings that fresh mind to the post. He tends to say, "I have no reason to question this person's judgment. They hold a commission in my name as an advocate depute, so let them do what they are paid to do, which is to deputise for me and make a judgment." In the olden times, which I think James Wolffe will bring back, the Lord Advocate stood behind the judgments of his people lower down the line. Perhaps there has been a corporate fear that that big-wig backing is not always there in sensitive cases.

The Convener: The committee has been very encouraged in conversations that we have had; it is not on the record yet, but there is a real willingness from the new Lord Advocate, the Crown Office and the Solicitor General to look at issues in the Procurator Fiscal Service. We very much hope that the issues that we are raising here will be addressed.

Before we close, do you have any suggestions about who would be competent to talk to the committee if it wanted to take evidence on crimes on which there is perhaps not expertise in the Procurator Fiscal Service—for example, cybercrime and some corporate crime such as fraud?

Derek Ogg: One of the solutions to that absence of expertise lies in the relationship that the Faculty of Advocates and the Crown Office used to have. It involved borrowing expertise—the Crown Office could hire it from the faculty on a case-by-case basis. The Crown Office does not have to have a top regulatory crime person on the staff for three years. For a case concerning a certain football club limited, it could bring in a particular QC who is a known expert in regulatory crime for that one case. Expertise can be bought in, on a locum basis.

Michael Meehan: One of the difficulties is that the case that Derek Ogg has made reference to is an on-going case; a person is still being prosecuted in relation to that, so I am loth to say too much. It is not so much whom one can speak to, but when one can speak to them. Once a case is closed people can ask, "What about this and what about that?", but while a case is on-going it is difficult to speak about it.

Derek Ogg is absolutely right that one way to deal with the issue is to bring in people on a case-by-case basis. Equally, I think that the Lord Advocate will want some advocate deputes within the Crown Office. There has been a recent appointment—Martin Richardson—who is very experienced in the Supreme Court. As time goes on, we may well see the profile of advocate deputes changing to include people who have commercial law backgrounds.

Derek Ogg is right that there cannot be people to cover every single case and that the opportunity exists to bring in people case by case. The Lord Advocate raised that in a recent letter to recruit people, asking whether they might be interested in coming in for a shorter period instead of it being a full-time commitment—it would be not quite an ad hoc arrangement but an in-between stage. That would allow such expertise to be considered, so it looks as if that line is already being considered by the new Lord Advocate.

The Convener: Thank you both for the insightful evidence that you have provided to the committee today.

12:50

Meeting continued in private until 12:56.

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