OFFICIAL REPORT
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Criminal Justice Committee

Wednesday 25 October 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 25 October 2023

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CRIMINAL JUSTICE COMMITTEE
26th Meeting 2023, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Sharon Dowey (South Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*John Swinney (Perthshire North) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jonathan Campbell (Edinburgh Bar Association)
Jamie Foulis (Family Law Association)
Stuart Munro (Law Society of Scotland)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 25 October 2023

[The Convener opened the meeting at 10:00]

Victims, Witnesses, and Justice Reform (Scotland) Bill: Stage 1

The Convener (Audrey Nicoll): A very good morning, and welcome to the 26th meeting in 2023 of the Criminal Justice Committee. We have received no apologies this morning. Pauline McNeill is running a little bit late and will, I hope, join us shortly.

Our first item of business is the continuation of evidence taking on the Victims, Witnesses, and Justice Reform (Scotland) Bill. As a reminder, we are in stage 1 of our scrutiny of the bill, in which we are focusing specifically on taking evidence on parts 1, 2 and 3, which cover the establishment of a victims and witnesses commissioner, the embedding in the justice system of trauma-informed practice and the extension of special measures to civil cases. We expect stage 1 to run until about mid-November, after which we will move on to consider other parts of the bill.

We are joined by a panel of witnesses from organisations that represent the legal profession. I welcome Jamie Foulis of Balfour and Manson, who is a member of the Family Law Association; Stuart Munro, who is convener of the criminal law committee of the Law Society of Scotland; and Jonathan Campbell, who is president of the Edinburgh Bar Association. Welcome, to you all.

I refer members to papers 1 and 2. I intend to allow around 90 minutes for this session. Before we get under way, I ask members to be succinct with their questions and panel members to be succinct with their responses. If we can, let us try to work through parts 1, 2 and 3 in turn in our questions.

I will begin with a question on part 1, which deals with the proposed establishment of a victims and witnesses commissioner. In broad terms, are you supportive of the proposal for a statutory victims and witnesses commissioner and, if so, why? We will begin with Jamie Foulis.

Jamie Foulis (Family Law Association): The Family Law Association is broadly supportive of the introduction of the office of a commissioner. I note from the bill that how that may operate in a civil context remains to be seen. As a result of that, I suspect that my ability to comment on it is limited.

I will pick up on an observation that was made during the previous evidence-gathering session, which is that what exactly the commissioner would do that is not already done by other agencies needs to be clarified. It appears to me that the value of the office would be to parties who consider themselves, or are seen to be, vulnerable, and that the creation by statute of an office for them to go to and represent their views and interests would be valued by them and would enable them to feel that they were being given a voice that they do not already have. It seems to me from the powers that are envisaged at the moment that the main ability of a commissioner would be to bring political pressure to bear, through the preparation of a report with recommendations and the conducting of investigations, presumably along with the power to make recommendations at the conclusion of those investigations.

In looking at the bill, it occurred to me that, when it comes to the power to request information, if that power is to have some force, it would assist to have clarity on the timescales within which it is expected that information would be provided to the commissioner.

I will touch briefly on a more narrow observation on the remit of the commissioner that perhaps applies more to part 2. If it is anticipated that the commissioner will be an individual who is expected to ensure that trauma-informed practice is observed in the criminal and civil justice spheres, I wonder whether a commissioner for victims and witnesses would cover every situation in which trauma-informed practice is important. In saying that, I am thinking about family cases in which an individual has made allegations that they have been the victim of abuse. It is clear that trauma-informed practice should be in the minds of the people who deal with such individuals.

There is also, in my view, the potential for an individual to experience trauma if they are the subject of such allegations and they face a scenario in which they cannot see their children in the short term, and they face the prospect of that being a long-term scenario. I raise that simply as an observation about whether a commissioner for victims and witnesses, if that is the label that is chosen for the office, is the best person to monitor compliance with that principle broadly. Those are my general observations.

Jonathan Campbell (Edinburgh Bar Association): The Edinburgh Bar Association supports the appointment of a victims and witnesses commissioner. We have some concerns about the functions in the bill being ill-defined and extremely broad, but we recognise that they may be refined in time.

There is an on-going tension with some of the terminology that has been chosen in so far as, in the criminal justice sphere, we use the term "victim" in the context of someone who has gone through the process of a criminal trial in respect of which there has been a conviction. The term that is used in the criminal law sphere prior to that is "complainer". One of the concerns that we have is about the name that has been selected for the role. As has been detailed in the Law Society of Scotland's submission, we want there to be sufficient recognition of the legal terminology that we use in practice.

We also have some concerns about the way in which the commissioner's role would encompass defence witnesses and, potentially, accused persons. We understand that there is perhaps not such a clear distinction in the civil sphere, but in the criminal sphere we often require to call defence witnesses. They are often persons who have underlying vulnerabilities and, in particular, as we will come on to when we talk about trauma-informed practice, there can be quite a significant crossover in the criminal sphere, as a person who, on one occasion, might have been called as a witness by the Crown can, on a separate occasion, themselves face allegations as an accused person. One of the concerns that we have is that there is perhaps not adequate recognition in the bill of that.

I concur with what Jamie Foulis said about the lack of specification of time limits. There is also perhaps a lack of clarity on what the potential penalties would be for failure to comply with requests for information or requirements to give evidence. For the proposed role to have full effect, that needs to be clearly defined, in the way that it is in the context of other professional bodies making requests of defence solicitors.

Broadly, we support the appointment of a victims and witnesses commissioner. We recognise that there is a place for it and that there is scope for it. We recognise that it must be an independent role and one that, in particular, is independent of other criminal justice partners. I can say in respect of criminal defence solicitors, and certainly the Edinburgh Bar Association, that part 1 is one of the less contentious areas of the bill.

Stuart Munro (Law Society of Scotland): Even though I come from the criminal law committee, I point out that the Law Society of Scotland represents all solicitors in Scotland, not just those who do criminal defence work. As do the Edinburgh Bar Association and the Family Law Association, the society supports in principle part 1 of the bill and the objectives that are set out therein.

The only thing that I will to add to what has already been said is that, in a legal sense, the position of witnesses and complainers in the criminal justice system has been slowly evolving over the years. The courts have recognised that witnesses and complainers in particular can have particular interests that need to be protected—for example, in relation to the release of confidential medical records or any proposed attack on the character of witnesses in the court process. Those concerns have resulted in changes in practice through hard-fought cases that have been brought before the courts, very often by way of judicial review. Those are not processes that are easy for individuals to access.

In addition, there is sometimes a concern that legislative change such as that in the Victims and Witnesses (Scotland) Act 2014 has not always had the practical effect for individuals of filtering down to practice on the ground.

Finally, there are countless anecdotal accounts of poor experiences in the system that can often be to do with issues as simple as a lack of communication or issues around resources, which are not really something that this committee or Parliament can necessarily do a great deal about.

For those reasons, we feel that it would be of benefit to have somebody whose job it is to champion the interests of witnesses and complainers in our system and to try to shine a light on some of the issues that exist.

The Convener: Thank you very much. There is plenty there for members to focus in on. I will bring in Sharon Dowey.

Sharon Dowey (South Scotland) (Con): My question is about the commissioner. What do you think the commissioner will do that will be better than what is done by the charities that we have that already speak out on behalf of victims, complainers and witnesses? We heard from some of them last week. Setting up the commissioner's office will involve a substantial cost, so what do you think the commissioner will do that is not done by the charities that already hear their voices?

Stuart Munro: That is a fair point. Some of the charities that are involved in this area do tremendous work, including some that the committee heard from at its previous meeting. The charities are often able to speak with real authority because they have a very close working relationship with individuals who have been through such experiences. I suppose that the issue is simply that a commissioner might have a more structured mandated role in being able to access information from public bodies and criminal justice agencies, and to speak for the cohort of victims and witnesses as a whole, rather than just the individuals they represent. If it were to come

down to a choice as to where to spend the money, I appreciate that that is a very different matter altogether.

Jonathan Campbell: Perhaps the setting up of the commissioner is simply a formalising of the process. The organisations that the committee heard from previously have been very successful in lobbying the Government and other justice partners. They are largely voluntary organisations that perhaps do not have one formal figurehead. The victims and witnesses commissioner would be a representative who would act in their interests and somebody to whom the many and varied considerations and concerns that they have could be directed.

10:15

As to whether the role of commissioner is necessary, we support the appointment, but it is for others to assess whether the money is best spent in that particular area. Without a clearer definition of the role, it is difficult for me to comment on how specifically it would operate and work. Perhaps it would take some of the burden away from the voluntary sector by providing a single point of contact, which can always be useful and can help in enabling changes to be implemented more quickly and in a more coherent way.

Sharon Dowey: I would be concerned that, in going to one person, some of the voices might be diluted. How accountable do you think that the commissioner will be? At the moment, we already have a cabinet secretary and a minister who are accountable to Parliament. How accountable will the commissioner be?

Jonathan Campbell: That is a difficult question for me to answer. I can understand your concern about the dilution of the voices that we have already, but it is within the remit of the commissioner to ensure that they have a very broad function. They will have to ensure that they take into account all the views of the interested parties. It is a very difficult role that encompasses many aspects. In its submission, the Law Society gave a breakdown of the different categories of cases that appear in our courts. It is important that we do not simply focus on the sexual offences that are perhaps at the heart of a number of the proposed reforms. The commissioner's role is certainly a broad and difficult one, but I do not necessarily think that it would dilute the work that is already being done. I think that it would provide a focal point where perhaps there is not one at the moment.

Sharon Dowey: Stuart Munro, do you want to comment on that?

Stuart Munro: Everything that has just been said is perfectly fair. It is important to remember that sexual crime accounts for a relatively small proportion of the business that goes before the criminal courts. That is not to say that there are not very specific issues that arise in those cases, but the bill as a whole is focused on victims and witnesses across the board. It is important to keep that in mind. There are bound to be voices that are heard more clearly than others in this process, and one of the arguments for a commissioner is to try to ensure that everybody's voice is heard in one way or another.

Sharon Dowey: The power given by section 12 is restricted when the person is a member of the Crown Office and Procurator Fiscal Service but there is no similar exemption for defence agents. I know that concerns about that were expressed in the submission. Could you expand on what the concerns are?

Stuart Munro: I think that that was in the Law Society's submission. It might be difficult to conceive of a situation in which that would arise. The drafting of section 12 is clearly consistent with the way in which similar investigative powers of Parliament are set out in the Scotland Act 1998, as I understand it. There is a particular reservation for circumstances in which the Lord Advocate considers that it would not be in the public interest to supply material that a parliamentary committee called for.

There could conceivably be circumstances in which somebody representing the interests of an individual complainer, or indeed an individual accused, was concerned about the public interest issue that might arise from disclosure. However, equally that might be protected by section 12(3), which effectively provides that no material requires to be produced that would not be required in equivalent proceedings before a court. That might be for consideration, but I am not so sure that it would give rise to any real difficulties at a practical level.

Jonathan Campbell: I echo that. We were concerned about the provisions of section 12(4) and there not being a like exemption for the defence bar. However, I think that section 12(3), which provides the general exemption on matters that a person would be entitled to refuse to answer questions or produce documents on in a Scottish court, perhaps covers matters of legal privilege. It is sufficient that it would address any of our concerns.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, panel. I will ask Stuart Munro my first question, then go on to Jamie Foulis.

Stuart, I want to pick up on something that you said. You are concerned that the legislation could have no practical effect and that the change would not filter down and so on. Could you put some context around that and expand on what you mean? It is incumbent on the legal profession and solicitors to carry out legislation that is passed here, so could you expand on what you meant by it having no practical effect?

Stuart Munro: That comment was about the example of the Victims and Witnesses (Scotland) Act 2014. It was not really from the defence perspective; it was about the extent to which complainers in criminal cases are able to get the information that they consider they are entitled to under that act. Again, the entirely anecdotal experience is of a very variable response, whether that is from the police or the Crown Office, in giving information about what is happening in cases.

Rona Mackay: I am sorry to interrupt you. Should the onus of that not be on you in the legal profession to make sure that they have it?

Stuart Munro: No. I am talking about information being provided by criminal justice agencies. The example I am seeking to give is that of a complainer who wants to know what is happening in a criminal case, and who makes inquiries of the police or Crown Office, maybe with the assistance of a solicitor, and is concerned about the lack of information being provided. That is variable in my experience. Certain individuals can get comprehensive information and others cannot. The point that I was seeking to make is simply that the end users, or the complainers in the system, do not necessarily find that the 2014 act gives them a straightforward solution. The question is to what extent the principles are capable of being acted upon and enforced, and the focus of that example is not on the defence bar but on the criminal justice agencies and how they engage with that legislation.

Rona Mackay: Jamie Foulis, you said in your opening statement that you are broadly in favour of a commissioner and that, in your view, they could be there to represent the interests of victims or witnesses. Given the fact that they cannot be involved in individual cases, how effective do you think that would be? Would your preference be that they were involved in individual cases?

Jamie Foulis: I will deal with those questions in reverse order. In the civil context, no—I do not think that I would be in favour of the commissioner being able to become involved in individual cases. Procedurally, their locus would be difficult to ascertain when there is a difference between the criminal sphere, where an individual who is a complainer probably does not have the benefit of legal representation, and a civil case in which there is a pursuer and a defender.

On procedural questions, during the course of the process if there are more than two parties in the proceedings, both or all parties will have an opportunity to make representations and, if they have legal representation, to have their position represented to the court on those questions. I do not necessarily see a justification for the commissioner being able to become involved in specific individual cases in the civil sphere.

In civil cases, I am conscious that how the involvement of a commissioner might work is very much a work in progress. That is acknowledged in the bill. It occurs to me that, logically, there is merit if a commissioner has the ability to represent the interests of complainers or victims—whatever terminology is being used—in how the criminal justice system is operating, and there is overlap in a significant number of cases between individuals who have been involved in criminal cases, particularly concerning domestic abuse, and individuals who are involved in civil cases. Again, particularly in the context of family proceedings and proceedings concerning the welfare of children, it is logical that if a commissioner has the ability to ensure that proceedings within the criminal justice sphere appropriately safeguard the rights and interests of those individuals, they equally have the ability to ensure that those same rights and protections are not undermined by how proceedings within the civil justice sphere are conducted and are operating.

Rona Mackay: Do you think that there could be a role in that for the commissioner?

Jamie Foulis: Yes. It might well be a narrower role and one that is less frequently used than in the criminal justice sphere, but I do think that.

The Convener: Before I bring in Russell Findlay, I come to Stuart Munro. The Law Society's submission welcomed the proposed restriction on the commissioner intervening in individual cases. Are there any additional points that you would like to make about that, following the response from Jamie Foulis?

Stuart Munro: No, not really. A lot of this also brings in what exists later in the bill on the provision of independent legal representation for complainers in certain cases. That could go a long way towards addressing some of the concerns that might be in members' minds.

Jamie Foulis is right that, in civil cases, both parties will generally be legally represented, whereas in a criminal case, complainers will usually not be. Anecdotally, complainers often speak of the very considerable benefit of having access to independent legal support and there are very serious questions about the funding of that,

signposting the right advice, knowing who they can go to for practical advice, and some of the remedies that I was talking about earlier, such as those in the Victims and Witnesses (Scotland) Act 2014.

It is difficult to see how it would work in practice if the commissioner became involved in individual cases. Given the sheer volume of cases that go before the courts, how could their time be split effectively to allow meaningful engagement in individual cases, what might that mean for apparent imbalances in treatment, and to what extent could it impact upon the criminal justice process as a whole? Broadly speaking, we were of the view that there are probably better ways of addressing those concerns than allowing direct involvement in individual cases.

Russell Findlay (West Scotland) (Con): I have two initial questions and perhaps, if we have time, I can ask a more general one towards the end. The first question relates to part 1, the victims commissioner, and it is about the evidence supplied by the Law Society in its written submission:

> "Section 21(2) obliges criminal justice agencies to comply with a request ... to co-operate with the Commissioner in any way considered necessary for the purposes of the Commissioner's functions."

However, the society goes on to say:

> "there is no enforcement mechanism provided in the event of non-compliance."

It might well be that there is no likelihood of non-compliance by criminal justice agencies, but we have already heard evidence from some contributors to the committee that the commissioner could lack teeth. From the Law Society's point of view, what could be done to fix that and ensure that co-operation is guaranteed and that there is some mechanism to ensure that?

Stuart Munro: We would like to think that criminal justice agencies would be slow to reject any request for information from the commissioner. By the same token, you can see the parallels in the bill with the phrasing of the powers of committees in the Scotland Act 1998. The Scotland Act 1998 does have teeth in the penalties for non-compliance. I do not have it in front of me but I am pretty sure that it does. There might be sense in having a broadly comparable provision in the bill that would effectively create a penalty for failure to comply. Whether or not that will ever have to be deployed in practical terms, of course, is another matter.

10:30

Russell Findlay: It would be a sensible amendment to include, presumably, on the basis that it might happen.

Stuart Munro: Yes. Ultimately, there is little point in having a power to request something if there is no compulsitor attached to it.

Russell Findlay: On part 2 and trauma-informed practices, we hear repeatedly about the difficulties that victims or complainers, depending on your preferred terminology, experience when they are going through the criminal justice process. They often talk about the same issues of lack of communication, delays, uncertainty, and all the difficulties that go with that. Is there really a need for legislation to bring trauma-informed practice into the criminal justice process? Why do we need legislation to do that? That question is open to anyone.

Stuart Munro: I do not want to steal anybody's thunder. Trauma-informed justice is not a completely new and entirely different way of approaching things. One would like to think that most practitioners in the system are broadly facing in the same direction.

The Convener: I will intervene at this point and pull members back to part 1, focusing on the victims commissioner. I do not like being too precious about questioning, but can we pull it back so that members have the opportunity to explore part 1 first? I apologise for interrupting you, Stuart Munro.

Russell Findlay: I am sorry. I did not realise the process.

The Convener: No, that is fine.

Russell Findlay: I will come back to that question.

The Convener: Thanks very much. Pauline McNeill, I will bring you in.

Pauline McNeill (Glasgow) (Lab): My apologies to everyone for being late. Feel free to stop me if I have this wrong on part 1, because there is a little bit of crossover, but I understand how we are doing this.

On the question of the establishment of a commissioner, it strikes me that what you might be setting out are the arguments for and against a commissioner as against some of the inadequacies in the system for the rights of victims and complainers to know what is going on. You said, I think in answer to Sharon Dowey, that the bill does not really give any rights. Is it a question of creating a victims commissioner that would not take on individual cases but could investigate certain matters as against giving complainers the legal right to know what is going on with their cases? Might that be a better alternative, if you see where I am going with this? That is the way I see it. Would the money be better spent in giving those rights? Do you think that we should put a duty in the bill to provide information to

complainers and victims about the status of their case?

I will just finish on this. In previous sessions, the Law Society and the legal profession have pointed out in relation to the delays that it is impossible even for practitioners to know when their case will be called. There is no transparency around whether a case will be called in time or whether powers will be used under the Covid legislation. I understand, having questioned the Scottish Courts and Tribunals Service on this, that it will be down to the availability of counsel and courts. I am not suggesting that one case is being preferred over another, but I am clear in my own mind that currently, as the delay gets less, there is still no transparency around when cases are called.

Fundamentally, my focus is on giving victims better rights to know when their court case will be heard. Do you see that as a question of a victims commissioner versus other things that we could do in the bill to make that better? I am sorry that question was so long.

Stuart Munro: Is that directed at me? Sorry, I do not want to hog the microphone.

Again, from the society's point of view, it is recognised that there are many things that could make the system better. Everybody shares an interest in making the system as trauma informed, efficient and inclusive as it possibly can be and nobody wants to see people finding the system any more damaging than such an adversarial process inevitably will be.

There is a whole range of things that could be done to make the system better. We already have certain provisions in law. For example, on the entitlement to know what is going on in a case, section 6 of the Victims and Witnesses (Scotland) Act 2014 defines what information means in particular cases. That is where it starts getting tricky. Who do you go to to get that information? Who will be providing it? How do you access somebody who knows what is going on with the case?

On delays, I do not want to speak for witnesses or complainers, but I suspect that, for many people, one of the worst things about the criminal justice experience is the idea that you have to wait for years for cases to come to a conclusion and the uncertainty in not knowing when a case will be listed. One of the things that I know groups such as Rape Crisis Scotland complain about is the fact that we still have the concept of floating trials in the High Court. A trial might start on a Monday or a Tuesday or whatever and you might have a complainer who has already given pre-recorded testimony sitting at home worrying about what is happening, not really knowing what is going on, and it being almost capricious as to whether they are getting regular feedback from a point of contact in one of the criminal justice agencies.

Many ideas have been floated about how things could practically be better, such as investing in the system to reduce the delays; or having an app that a complainer would have on their phone that would give them information about the process of giving evidence, such as fly-throughs of courtrooms so they can see what it will be like and they are not so traumatised by going into court in the first place, and which would allow them direct contact with a named individual. There is lots that can be done that does not necessarily have to have a victims commissioner, but if those things are not otherwise going to be done, it might be that a commissioner is the best person to try to jockey that change along.

The Convener: I will ask a final question and then we will move on to look at embedding trauma-informed practice.

We heard concerns from Scottish Women's Aid that a commissioner post would essentially add an additional layer of bureaucracy into the system. It might limit what it described as fairly positive current access for organisations such as Scottish Women's Aid to policy makers and justice agencies. Do you have a view about how a victims commissioner might interfere with or change the current process of communication?

Jonathan Campbell: Touching on what I said earlier, I think that a victims and witnesses commissioner would provide a focal point. The remit of the victims and witnesses commissioner would clearly be much wider than the individual organisations that presently represent the interests of victims and witnesses that fall into various groups. I can see why there might be concerns about the additional layer of bureaucracy, but we are in a situation where witnesses and complainers often feel that they do not have a champion of their interests. I take the view that a commissioner would provide that focal point, that champion of their interests and somebody whom they can readily identify as acting independently and solely in their interest. As long as the bureaucratic processes were straightforward and streamlined, I do not think that it would cause any additional problems.

Unfortunately, the criminal justice system is inherently bureaucratic and protracted. When we go on in a moment to talk about trauma-informed practice, I certainly have much to say about the inherent delays in the system. I am encroaching into that point slightly, but I do not think that the victims and witnesses commissioner would have any power or any ability to impact the delays that we find in our courts.

In terms of the representation of the interests of different groups, I think that the post would provide a figurehead and, as long as the processes are streamlined, it would have merit.

The Convener: I will stop there and we will move on to the next part, which is embedding trauma-informed practice. I will bring Russell Findlay back in.

Russell Findlay: You know my question now, but I will reframe it slightly in a more provocative way. Legislation is being brought forward to ensure trauma-informed practice and my question is this: is this legislation needed because the legal profession has failed to ensure trauma-informed practices in all the past years? I will open that up to anyone who cares to answer.

Jonathan Campbell: My answer to that question is no. The legal profession has had regard to trauma-informed practice in an informal way. I do not think that anyone could operate in the criminal justice system without having due regard to the many and varied traumas that are experienced by the persons they represent and by the witnesses they encounter in court.

I principally represent the Edinburgh Bar Association, which is an organisation of principally defence solicitors working in the criminal courts. Our role is many and varied. We encounter clients and witnesses daily who have a wide variety of difficulties and challenges. It is often said that our role is not just to represent accused persons; we also find ourselves acting almost as a proxy social worker. There is not necessarily formalised training at the moment that recognises the impact of trauma and the way in which it affects the behaviour of the persons whom we represent and the witnesses who appear in the cases that we deal with. I can see that there is a benefit and a focus in ensuring that the profession understands the way in which traumatic experiences impact the behaviour of witnesses and the way in which they are exhibited but also the way in which we can conduct ourselves in court to try to avoid retraumatising witnesses.

I am acutely aware that there is often criticism of the way in which defence solicitors and solicitor advocates behave in court. I think that some of those criticisms are unwarranted and some are outdated. I accept that there are individual cases where the conduct has been below that which might be expected and there are, of course, cases where the mark has been overstepped, but in general the profession understands that it has to take a very careful approach, particularly in sensitive cases and sex cases. Formalised training does not currently exist and I think that a uniform and comprehensive package of training would be to the benefit of the whole profession.

Jamie Foulis: I broadly agree with Jonathan Campbell's assessment. Looking at it from the perspective of the area of work in which I and members of the Family Law Association practise, I do not think that you could credibly conduct yourself in that area without being aware of the trauma or potential for trauma that a vast number of the individuals who we come across go through. We act on behalf of and encounter individuals who have been the victims of abuse of many different forms. We act on behalf of individuals who are the subject of allegations of that nature that are unfounded. We act on behalf of individuals in almost all our cases whose personal lives as they have known them for a number of years have fallen apart and who are coming to terms with their financial position being radically different from what they have known and were expecting it to be.

I would like to think that we are always mindful of that and try to put an awareness of that into practice when we are conducting cases and when we are dealing with these individuals. That does not mean that we cannot improve on that. I think that there is a growing appreciation that having a law degree or a diploma in legal practice or having completed a traineeship does not necessarily mean that you are all-knowing in these areas. For example, the Law Society recently rolled out a training module on trauma-informed practice, which was fully booked well before it began. That indicates an awareness on the part of practitioners that there are areas for improvement in this and that we can do better.

10:45

The formal benefit of having a statutory footing for trauma-informed practice is that, if ministers, the Scottish Courts and Tribunals Service and so on are required to have regard to that as a principle and in their actions they fail to do so, that gives a basis for legal challenge to that act, whatever it may be. That perhaps is a significant change from being aware of the principle and trying to put it into practice.

Russell Findlay: Victims and witnesses tell us that repeated delays to their cases can cause additional trauma. Sometimes that happens when solicitors seek to postpone proceedings, usually at the instruction of their client. Some victims perceive that to be a deliberate tactic on the part of the accused. Will the bill go any way towards curtailing the worst examples of that?

Stuart Munro: I agree with what both my colleagues have said about trauma-informed practice. Delays in our system are endemic and incredibly corrosive to everybody's interest. Accused people sit in remand for periods of time that we would never have contemplated only a few years ago. That is a product of Covid, certainly,

but it is also a product of the resourcing of our system.

I do not recognise that there is any meaningful number of instances of trials being adjourned improperly because of some tactic on the part of the accused. Again, one cannot speak for every individual case. Maybe that does happen, but the courts are there to be the guardians against improper use of procedure. Few judges would tolerate an adjournment or a postponement of proceedings unless that was properly founded. Often delays occur because of difficulties with witnesses, disclosure of evidence and so on. The complainer may see an adjournment but not quite understand the full context in which that has happened. Ultimately, it is the judge's job to ensure that the interests of justice are protected in any scheduling decision that is made.

The question raises the wider issue about what trauma-informed practice means. Yes, it behoves the defence lawyers to conduct themselves properly in proceedings. That is a given, it is understood and it is rigidly and robustly enforced by the courts. The High Court in particular has a clear direction of travel in that regard. However, trauma-informed practice requires more than that. It requires proceedings not to be extensively delayed as they are at the moment. It requires people to be given some appreciation and understanding of what is going on in the case—that is the point about communication that was touched on earlier. Ideally, it would involve scheduling certainty, so that we do not have floating trials. Ideally, it would involve judicial consistency so that the same judge makes decisions from the start to the end of a case, rather than somebody different on every occasion.

There is a range of issues that arise, which may be bigger or smaller but all of which contribute to the aim of having a properly trauma-informed system.

The Convener: Quite a few members want to come in. I will bring in John Swinney and then Rona Mackay.

John Swinney (Perthshire North) (SNP): I want to explore some of the contents of the Law Society's submission to the committee. The submission opens with the statement:

"The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas."

Then it goes on to say:

"While all those who come before the courts should be treated with respect and dignity, the court process is an adversarial one."

Mr Munro, do you believe that everyone who comes before the courts is treated with respect and dignity?

Stuart Munro: I absolutely believe that they should be.

John Swinney: That is not my question. My question is: are they? You are the regulator.

Stuart Munro: Plainly, one cannot comment on every experience that every individual has in every case. That is a given. There are, doubtless, cases when individuals come before the courts and are not treated with appropriate respect and dignity. Within that, I do not simply mean in the context of, for instance, how examination takes place in a trial; I mean a whole gamut of experiences that people have within the system. It is about having trials cancelled without receiving notification in advance and turning up. It is about the physical geography of our courts, which put witnesses in the same physical place as an accused person or an accused person's family. It is about the delays and the concerning levels of remand in custody.

John Swinney: My question is to you as the representative of the regulator of the legal profession. I hear all that you say about the other contextual information. I want to focus on your regulatory role and how you see your role as a regulatory organisation in ensuring that everyone who comes before the courts is treated with respect and dignity. I want to understand what the Law Society sees as its role in ensuring that that is the case.

Stuart Munro: My personal role is as convener of the criminal law committee, which has a focus on looking at the practice of the criminal courts and proposals for legislative change involving the criminal courts. A different part of the society deals with regulation.

I make that caveat in fairness but, to come back to the point that you are driving at, from time to time, the courts express concern about the conduct of individual solicitors. Equally, the courts will express concern about the conduct of prosecutors, police officers who give evidence and so on. When that occurs, the regulatory processes and functions of the relevant body—whether that is the Law Society, the Crown Office and Procurator Fiscal Service or Police Scotland—will kick in. If a judge said, "This individual behaved improperly and breached their professional rules," the professional regulatory bodies will take that seriously and act on it.

John Swinney: Do you believe that the professional regulatory bodies do that?

Stuart Munro: I have seen it happen. Can I warrant that that happens in every case? I simply cannot comment on that. Others in the Law

Society might be better placed to do so. However, it should not be suggested or believed that there is no regulatory bite, because there is. Mechanisms exist for concerns about the professional conduct of individuals to be investigated and, if appropriate, sanctioned.

John Swinney: The reason why I pursue this line of questioning is that, in the submission, although the Law Society says it believes that placing

"the principle of trauma-informed practice ... on a statutory footing should better focus court users",

the society's commentary on the application of that principle is pretty half-hearted.

I will give a couple of examples of that. First, the submission goes on to say that the

"duty to have regard to trauma-informed practice will extend to justice agencies",

and it lists the various agencies. To me, that begs the question whether that should be extended to solicitors, so that solicitors are as bound as the agencies are.

The submission goes on to say:

"We have supported the principle of trauma-informed practice, but the extent to which this principle will transform hearings and scheduling remains unclear."

That leaves me with a sense that the Law Society is advancing a tokenistic attitude towards this point in principle without embracing the concept of trauma-informed practice being applied to court proceedings in the way that is clearly envisaged in the bill. There is support in principle for the concept but not necessarily support in practice.

Stuart Munro: I respectfully disagree that the Law Society's position on trauma-informed justice is "tokenistic". That is simply not correct. The Law Society, like any body responding to the bill, is required to respond to the bill as it is presented, and the comments are made based on how the bill is drafted. There are undoubtedly issues about definitions. It is important to be clear about, for instance—again, I appreciate that this is later in the bill—the degree of training that might be required to gain rights of audience in the sexual offences court. It is important to be clear about what practically that will involve and what sanctions might be in place if that training is not conducted and so forth.

If the submission gives the impression that the Law Society has a difficulty, that is certainly not intentional. The society entirely supports the proposed embedding of trauma-informed practice within the criminal justice system and does not for a moment regard that as a token gesture.

John Swinney: I am surprised by that. The entire sentence in one of the bullet points in the Law Society's submission states:

"While all those who come before the courts should be treated with respect and dignity, the court process is an adversarial one."

That strikes me as essentially having a big caveat about the proceedings of court. Yes, everybody should be treated with respect and dignity but, fundamentally, the court system is adversarial and the adversarial principle has to prevail, which gives rise to a lot of the conduct that I am raising concerns about. The Law Society, as a regulator, does not regulate this effectively or nearly as emphatically as it should. How can I be persuaded that that is not a half-hearted statement from the Law Society?

Stuart Munro: The point about the fact that we have an adversarial system recognises that, in a typical prosecution, particularly a sexual offence prosecution, a prosecution case says that an event happened and a defence case says that it did not, or that it happened in a different way. The court's job is to determine which account is correct. Inevitably, that means that a witness who speaks to the prosecution version of events has to be challenged on the veracity of their account. That is what an adversarial system involves.

That does not mean that you cannot do that in a trauma-informed way. It does not mean that those involved in the process should not have at all times at the forefront of their minds the need not to retraumatise an individual who may have been through a traumatic event. However, where a complainer comes to court and their account will inevitably be challenged, that is likely to be difficult. That is the point that is made in the submission.

John Swinney: But do you believe that the bill will have the effect of ensuring that that appropriate and necessary approach to cross-examination will be conducted in a trauma-informed way, or will the bill not materially change the basis on which cross-examination or that process is undertaken? Earlier in the proceedings this morning, you or one of your colleagues said that legislation had not had a practical effect on changing practice. I am interested in the approach to practice.

Stuart Munro: To be crystal clear about that, I point out that I was referring to the Victims and Witnesses (Scotland) Act 2014, which is not about what happens in a courtroom. It is about, for instance, the ability of a complainer to get information about what is happening in a prosecution from criminal justice agencies. That was the point made earlier.

On the conduct of trials or the examination of witnesses, this proposed legislation is not being introduced in a vacuum. There have already been changes to how evidence is taken, and those are continuing. For instance, in sexual offences cases in the High Court, complainers almost always now will give evidence by commission. There is judicial oversight of the nature of the questioning that will be permitted. It is a different world to the situation 10 or 20 years ago or longer. The same applies for vulnerable witnesses, such as child witnesses and the like.

11:00

The embedding of trauma-informed justice as a cornerstone of the system as proposed in the bill is another step in that direction, but it should not or cannot be seen in isolation. My point is that we are already in a process of change. The courts already exercise ever-greater control over the way in which examination takes place in cases of this nature. Practice is already shifting as a consequence of that and other aspects.

John Swinney: What will the Law Society do to ensure that trauma-informed practice is embedded in the activities of solicitors?

Stuart Munro: As has been alluded to, the Law Society has already developed a comprehensive and heavily subscribed course on trauma-informed practice for solicitors. We are engaged in discussions with other agencies. I have seen the Crown Office training and the Scottish Courts and Tribunals Service training on trauma-informed practice. We are discussing how we can learn from those already-established processes to try to make sure that everyone is given access to that kind of support and training. Ultimately, once Parliament has decided how the bill should land and what provisions for trauma-informed practice are to be embedded in the system, the Law Society will respond accordingly.

Rona Mackay: First of all, I am pleased to hear you say that you will embrace trauma-informed practice. Jonathan Campbell, you said that you would always take a sensitive approach, but as I think that you will appreciate, there is a difference between taking a sensitive approach and being trauma informed.

Most of what I was going to ask has already been asked by Mr Swinney, but I would just highlight that the committee has taken countless pieces of evidence from women—primarily, victims of sex offences—who have said that their court experience was often worse than the actual crime itself, mainly because of defence lawyers. I am trying to believe you when you say that things will change, but as far as the committee's experience is concerned, we are not hearing of victims being dealt with sensitively. As I have said, this is along the same lines as Mr Swinney's questions, but how will you evaluate and monitor whether that sort of thing is actually happening, if this bill is passed?

Jonathan Campbell: I am happy to come in on that question.

As Stuart Munro has said, practice has already been shifting, and there have been a number of changes to how we deal with cases, particularly in the High Court. We have heard mention of evidence on commission, which is the use of pre-recorded evidence. It does not require the complainer to attend on the day of trial at the court itself, perhaps, and the evidence is taken in an environment that is far less intimidating and designed to assist them in feeling relaxed when they give that evidence.

I cannot stress this enough: there is a culture of significant judicial oversight. The judiciary is acutely aware of the criticisms that are often made, and it is alive to any instances of misconduct on the part of defence lawyers. Practice notes are issued to dictate the practices that we have to follow, and there are also legislative provisions that restrict, particularly in sexual offence cases, the questions that can be asked. As Stuart Munro mentioned a moment ago, there has been significant change, even in recent years.

That said, while no one has an interest in retraumatising witnesses or complainers, we have to understand that the subject matter that we are dealing with is often extremely difficult and that the adversarial process can be inherently upsetting. We can minimise upset and distress, but we cannot eradicate it. We have to be realistic about what we are doing and how our criminal courts operate.

We have to be in a situation where complainers understand that the adversarial process entitles the defence to challenge their account of particular events. The fact is that this is anecdotal evidence, but practitioners often take the view that that is not sufficiently understood by complainers in certain situations when they come to give evidence. Perhaps part of the problem and part of the difficulty that they experience is that they are not fully apprised of what to expect. In certain situations, the court process might be the first time that a witness has had their account challenged, or the first time that they might feel that they are not believed in the course of questioning. We have to be realistic about what we are doing, because the allegations and subject matter are often very difficult.

Defence lawyers are acutely aware that they have to be very careful in how they deal with

witnesses and complainers. We can see the benefit of formalised trauma-informed training to ensure that we adequately recognise the problems that can be caused by careless questions or an inappropriate approach, but I make it clear that defence lawyers do not have free rein to ask what they like or to aggressively or persistently question complainers. That simply does not happen. I would say with respect that if it were allowed to happen, it would be a matter for judicial oversight, and there should be judicial intervention at that point during the trial to stop it before it continued.

As I mentioned in response to an earlier question, we are aware of the criticisms, and we are also aware of the evidence that has been given about the conduct of defence lawyers. However, defence lawyers recognise that, in their role, they have to walk a tightrope between representing their client's interests and ensuring that they do not do anything improper that causes upset or distress to witnesses.

Rona Mackay: You have said that things have been changing over the years, but I am talking about recent accounts of complainers' experiences in the courts. Either what you have said is not happening or there is no judicial intervention, but something has to change.

Jonathan Campbell: We occasionally see criticisms that the complainer or the witness feels as if they were the person on trial. I can understand why that would feel incredibly difficult, but some of those criticisms about, for example, their account being challenged or the fact that they are not believed are, unfortunately, inherent in the adversarial system. Clearly, it is not the defence lawyer's job to assess whether they believe or disbelieve the allegation, but it is their duty to ensure that the Crown's case is tested, given that the burden of proof rests with the Crown. It has to prove the case beyond reasonable doubt and the defence lawyer has to ensure that any potential for reasonable doubt is highlighted respectfully and within the rules. Sometimes that necessitates asking difficult questions and putting it to a witness or complainer that their account is inaccurate, unreliable or untruthful.

The Convener: Thank you very much. As we still have a number of members who want to come in, I must ask for fairly succinct responses. I call Fulton MacGregor, to be followed by Katy Clark.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I can be quite brief, convener, as there has been a good bit of coverage of this particular area in the past half hour or so.

What do you believe the bill is trying to achieve through the trauma-informed practice provisions? Perhaps I can give you a bit of background to my question. We have already heard from a couple of the panellists that this is not some new theorem or idea with regard to the justice system; I agree with that, but what I think that the bill is trying to achieve is to ensure more of a focus on victims and witnesses.

Coming from a criminal justice background, I would say that a great degree of trauma-informed practice is already happening in criminal justice social work and so on with the accused, and then with offenders, but the role of witnesses and victims in the justice system is a bit different—a bit more stand-offish, perhaps. They come into it only at certain points.

What are the panel's views on that? Do you see a distinction between those who are accused—and who are then possibly convicted—and witnesses? Do you think about that when you think about trauma-informed practice?

The Convener: I must ask just one panel remember to respond to that, please. We have a wee bit to get through.

Jonathan Campbell: Is your question about the distinction between how we deal with the trauma that accused persons might face and that of witnesses who come into court for particular cases?

Fulton MacGregor: It is, but it is more about whether you think that the bill's provisions will add value to how the current system deals with victims and witnesses.

Jonathan Campbell: It will add value in the sense that it will provide uniform training for every practitioner, if it is to work as I anticipate. As I am sure that you are aware, we already have to undertake a required number of hours of what is called continuing professional development, and those with extended rights of audience—say, solicitor advocates who can appear in the High Court—have to undertake particular training to satisfy the CPD requirement in order to allow them to continue to appear and fulfil those rights of audience. I can see value in its becoming a mandatory requirement for practitioners.

The defence bar is, principally, privately run. The firms are often particularly small; for example, no firm in the Edinburgh Bar Association has more than 10 solicitors. We have around 100 members, and I think that only four firms have more than five solicitors. Therefore, these are small organisations—disparate groups, if you want to put it that way—and in that sense, the approach adds value, because it will bring us all together under one umbrella and ensure that we all get uniform training and that the practices that we follow are applied by everybody. We are, of course, regulated by the Law Society, but there is not the same sort of oversight that you might have with, for example, the Crown Office and the

Procurator Fiscal Service, which can provide uniform training to all fiscal deputes and advocate deputes across Scotland.

Jamie Foulis: Perhaps, convener, I can make an observation on civil law in relation to Mr MacGregor's question about what the bill adds in this respect.

It seems to me that, with regard to the preparation and enforcement of procedure rules in civil cases, the value of the provisions on trauma-informed practice is that they make such practice a cornerstone of the law of procedure in that area, with the ministers and the Scottish Courts and Tribunal Service required to have regard to it when those rules are prepared. Giving it that formal footing will, in my view, have the benefit of ensuring that proper regard is given to trauma-informed practice.

Fulton MacGregor: That was helpful.

The Convener: Thank you very much. I will bring in Katy Clark and Pauline McNeill and then we will have to move on.

Katy Clark (West Scotland) (Lab): I fully appreciate that everybody on the panel plays a particular role within the judicial system and that they did not create the system as it looks. However, I would just say, speaking particularly as an Opposition member of this committee, that our role is to ask whether the bill will make any difference at all. Everybody on the committee—and this picks up on what Rona Mackay has said—has had many dozens of conversations about how the system is not working for those who are victims of rape, in particular, but other offences, too.

It has been said quite a number of times now that we have an adversarial system. The big question, then, is: is it possible to make changes to an adversarial system to deal with some of the genuine concerns that have been raised repeatedly, or do we need to look at a more inquisitorial model? If changes have already been made, what do they look like? If they do not seem to be resulting in a significant belief that things have changed substantially, would it be possible to make what would be relatively minor changes to address some of the genuine concerns that have been raised with us?

Does anyone on the panel have a view on that? Stuart, do you want to come in?

11:15

Stuart Munro: I will volunteer.

Yes, it is possible to make changes—indeed, fairly substantial changes—to the system. We have already touched on the fact that, in rape prosecutions—to take your example—complainers typically now give their evidence via commission. That pre-recorded evidence is taken under the supervision of a judge, very often with some discussion about the scope and nature of questioning happening at a prior hearing. That is almost unrecognisable from practice, say, 10, 20 or however many years ago, and it is an entirely new process that is, I think, likely to have transformed the experience of complainers.

Softer steps perhaps can be taken, too. For example—Jonathan Campbell has already touched on this—complainers very often get to the stage of giving evidence, whether it be in court or pre-recorded, without anybody ever sitting them down and saying, "By the way, you might be challenged on this." I know that some victims groups have expressed the need for, perhaps, a process in the system that gives complainers some indication of what to expect, which in itself will make the process more bearable for them to go through. Changes can be made, some high level and some low level, and the bill will make a positive difference.

Whether we move to a non-adversarial system is an altogether more enormous question. Our system has developed over the centuries, with various bits bolted on. It is always legitimate to ask whether we would be better off starting from scratch, as it were, but that would be an enormous and complex process.

Pauline McNeill: My points might have been covered by what Stuart Munro said about the changes in the system. I will follow on from Rona Mackay's line of questioning. I agree with her that we have heard about poor practice and more-than-robust cross-examination. Cross-examination must be robust—it is the nature of the system when someone faces a jail sentence—but, over the years, lots of bad examples have been reported in the press. Anecdotally, some practitioners will say that in such cases, there have been failures of the prosecution and judges to intervene. I know of one case in particular.

In the early years of this Parliament, section 275 was added to the Criminal Procedure (Scotland) Act 1995. Our predecessor committee was so willing to change the processes to protect victims who had experienced trauma not just because of the failure of the defence in its efforts to be robust and not cross lines, but because of the failure of prosecutors to raise things such as previous offences. Judges in particular were criticised for not intervening when a witness was clearly traumatised by a line of questioning.

Do you accept that the whole system makes witnesses feel traumatised? Given what you have said about the experience of the commission, will judges be forced to ensure that robust cross-

examination does not result in the witness being traumatised in the process?

Stuart Munro: Yes. Clearly, improper questioning should not happen. The primary responsibility for that rests with the person engaging in the improper questioning. The prosecution has a role in that—the advocate depute can intervene—and the judge has a role in that. The judge is responsible for ensuring that the process is conducted fairly and with appropriate respect to those appearing before the court. The primary responsibility, however, rests with the person engaging in the improper questioning, and that should not happen.

I hear what you say about the early days of section 275. Inevitably, any legislative change can take time to filter down into the system, but those who practise before the criminal courts now experience a strong culture of compliance on the part of the senior judiciary in particular and an absolute expectation that the provisions of sections 274 and 275 will be applied rigidly and carefully. That carries across to other areas of practice.

In essence, whatever criticism might be made of the early days of the application of section 275, there is no room for criticism of how it is applied now. There is no reason to believe that we will not see a similar approach from the judiciary in respect of the principles of this bill.

The Convener: We will move swiftly on to questions on part 3 of the bill, which is on special measures in civil cases.

At our previous evidence session, Scottish Women's Aid and Rape Crisis Scotland argued that the scope of who is deemed vulnerable in the bill was not broad enough and that special measures should be available to those who are deemed to be vulnerable. Can you all say, as succinctly as possible, what your view on that is? Is there any drawback to the proposed changes?

Jonathan Campbell: Perhaps Jamie Foulis is better placed than I am to comment on that part of the bill, because my background is solely in criminal law. However, special measures are routinely granted in criminal cases and have been for quite some time. The system is well placed to accommodate requests for special measures. There are statutory provisions for what are called "deemed vulnerable witnesses", who are automatically entitled to special measures, should they wish to take them up. It is difficult for me to comment on how that would operate in the civil sphere. Jamie Foulis perhaps can comment.

Jamie Foulis: Yes. I am cautious about special measures being automatically available. The bill provides robust protection with the measures that are available to witnesses. My hesitation about them being automatic is that there must always be a discretion available to the decision maker, whether that be sheriff or judge, to ensure that the measures that are in place do not prejudice the rights of the other party to the proceedings.

As I alluded to at the start of the meeting, in a large number of civil proceedings, particularly family proceedings and those concerning the welfare of children, there is the potential for significant trauma to be caused to both parties. It is critical that a person making allegations of abuse, for example, can give their best account in support of them and that appropriate measures are available to support them in doing that. It is, however, also appropriate and important that the other party can challenge that account. It is important that the judge or sheriff presiding over proceedings can ensure that the measures that are put in place safeguard and balance both of those rights. I am concerned about an automatic entitlement undermining that.

I say that partly because the logistics of certain sheriff courts limit the measures that can be put in place.

Stuart Munro: The Law Society broadly supports the provisions in the bill. There is no difficulty with the notion of certain individuals being deemed to be vulnerable and therefore entitled to special measures.

The only observation that I would make is one that applies in any type of judicial process. We should be slow to remove agency from the witnesses. We should not be overly paternalistic and assume that, because this witness falls into a particular category, they should be put in a different room and so forth. It is important to take the witness along and to engage with them in identifying what they think might be appropriate and take that into account in any decisions that are made. Anecdotally, in certain cases, witnesses are frustrated by the fact that decisions are made without consultation with them and feel that they then do not get to give the evidence in the way that they might prefer. I simply make the point that it is important that their views are always taken into account in that process.

The Convener: Is the point that you are making about the mechanism for identifying who might be vulnerable in the context of the bill?

Stuart Munro: Not necessarily. Stage 1 is about determining whether somebody is vulnerable, and stage 2 is about what you do about that, if they are. With regard to stage 1, the bill extends the principle of deemed vulnerability, which we already have in the criminal courts covering certain situations and with which we have no difficulty. The issue is simply that at the second stage, when determining what a witness's deemed

vulnerable status should mean for the mechanics of how they should give evidence, it is important to take the witness's views into account.

The Convener: That was helpful. I will bring in Sharon Dowey.

Sharon Dowey: Section 48 of the Children (Scotland) Act 2020 aims to address some of the weaknesses of the Vulnerable Witnesses (Scotland) Act 2004 by making changes to it. However, the provisions in that section are not yet in force. Can you comment on the provisions that have not been brought into force and say why they have not been? Also, why are you confident that the provisions in the bill would be implemented when it is passed?

I am interested in the reasoning behind the implementation of provisions. The Law Society's submission describes how the High Court and Court of Session already have powers to set out rules on practice and procedure in court proceedings. The submission says:

"Achieving a properly trauma-informed system requires much more than legislative change."

We have heard from you that commissioners now take evidence that is pre-recorded. Practice is already shifting and there has been significant change in recent years, and that seems to have happened without legislation. When we have passed legislation, provisions have not been implemented. Why do we need legislation to make these changes when it seems that you can do it already?

Jamie Foulis: The short answer is that the legislation changes the position in so far as it introduces a presumption in favour of special measures being available to individuals, and presumptions would not have operated in the favour of such individuals previously. The example here is of individuals who are involved in proceedings with a party who has been convicted of or is the subject of proceedings concerning domestic offences, for example, or who have protective orders in their favour against that party.

The value of the provisions that are being introduced and the provisions that were introduced by the 2020 act is that, as opposed to it being entirely at the court's discretion whether measures should be in place to benefit the individual making the allegations or who has the benefit of the protective orders, the bill and the 2020 act create a presumption that those special measures should be available to them.

From my own experience and from what I have heard anecdotally, I suspect that in a lot of those situations, if the measures were applied for under the 2004 act, there is a reasonable chance that the court would grant them. When we go back to the question that we have discussed at some length about whether our justice system—civil justice, in this context—is adopting a trauma-informed approach, having the presumption that those measures will be available to somebody when they come to court to give evidence is of, I suppose, symbolic or principled significance. Somebody knowing that those measures will be available to them unless there is a good reason otherwise is perhaps different from them having it in their mind that there might be special measures available but their use might have to be justified.

11:30

Sharon Dowey: Are the measures in place? Are those provisions in force?

Jamie Foulis: The measures in the 2020 act are not in force, and I am afraid that I cannot comment on why they are not. The bill broadens the circumstances in which the measures are available, which is something that I and the Family Law Association welcome. I am afraid that I cannot comment on why the measures introduced under the 2020 act are not in force.

Sharon Dowey: Is anybody able to comment on why they are not in force?

Jonathan Campbell: I am sorry, no.

Stuart Munro: No.

Sharon Dowey: Why would you be confident that anything put in legislation through this bill will be put into force?

The Convener: I am not sure that anyone is able to comment.

Sharon Dowey: You are not able to comment. Okay, I will leave it there.

The Convener: I want to ask a question about the proposed register of solicitors. The Law Society of Scotland's submission raises concerns about how that register would work in practice. Those include a concern about how much detail will potentially be left to secondary legislation. Does Stuart Munro want to pick up on that and add any other comments? I will then seek the views of Jonathan Campbell and Jamie Foulis on the concerns that have been raised.

Stuart Munro: There are practical issues around that. Plainly, if there is a requirement that an individual cannot directly cross-examine an opponent in a civil case if a case is set down for proof, that, in fairness, will affect a relatively small number of cases, because most civil cases do not end up in a contested hearing and evidence. However, if that were to arise, there would plainly have to be some other mechanism in place for that cross-examination to take place. The obvious way of doing that is through the possibility of the court

appointing a solicitor to take on that particular responsibility, which there is in certain sexual offences cases.

The bill proposes a register. We are saying that there needs to be a bit more flesh on the bones about how that would work in practice, the arrangements for remuneration, the expected standards for qualification and so on. However, in principle, the provision makes sense.

The Convener: Is there anything that Jonathan Campbell would like to add to that?

Jonathan Campbell: We have an existing system in the criminal courts in which accused persons are prohibited from representing themselves in sexual offences cases. The Scottish Legal Aid Board has a duty scheme in which each firm of solicitors in turn has a period in which it is available to be appointed by the court should an accused person be unrepresented. I can see the parallels between what is proposed in the civil courts and what already exists in the criminal courts.

The system generally works, although resourcing issues in the criminal courts mean that there are often not enough solicitors to fulfil the appointment requirements. However, that is a wider matter, and I will not expand on that at this stage.

The Convener: I might come back to that. Is there anything that Jamie Foulis would like to add?

Jamie Foulis: Yes—just briefly.

In principle, the Family Law Association supports the idea. It seems to me that the intention is, broadly, to replicate the register that exists in respect of criminal cases, which Jonathan Campbell has mentioned. The difficulty is likely to be in resourcing and ensuring that practitioners register themselves. Inevitably, the provisions regarding remuneration will be a part of that.

As I am sure the position is in relation to criminal cases, those cases will be complex and difficult ones to become involved in. They would be anyway for the individual's nominated solicitor. When a practitioner is going to be parachuted in—there might be the starting position that a representative is foisted upon an individual whom they do not want—that practitioner will inevitably face a difficult task. That said, the principle that an individual should not be retraumatised by being subjected to cross-examination by the individual who has subjected them to abuse is sound, and I could not contradict it.

The Convener: Okay. Thanks for that.

On special measures that are in place for criminal cases in a broader sense, are the current arrangements for special measures adequately used and making a difference? I go back to previous evidence that we have heard, particularly from Children 1st. It had concerns about the effectiveness of special measures in the criminal context, and it did not feel that they were working as well as they should.

Stuart Munro: Experience probably differs according to where the evidence has been taken. In the High Court, children in particular would not be expected to give evidence at a trial. There would be a reliance on evidence on commission or, more likely, pre-recorded testimony. A statement that was given at an earlier stage in the proceedings might take the place of their evidence.

That gives rise to various issues relating to resources. We know about the bairns' hoose model, for instance. I think that there is currently one bairns' hoose in existence, and I know that there is an aspiration to have them across the country. If children are to give evidence in the form of pre-recorded testimony, ideally that should be done in an appropriate therapeutic environment such as a bairns' hoose. However, how is that done when there is only one of them?

Through the Scottish Courts and Tribunals Service, there are growing facilities in which commissions can take place. Those are increasingly in appropriate locations around the country, and that is assisting in the process in High Court cases. The implementation of the recent legislation to extend the use of commissions and pre-recorded testimony to sheriff court cases is still under way.

There are undoubtedly variable levels of facilities in our sheriff courts around the country. There are pressures in the system that are brought about by resourcing, and the experiences of individual witnesses in being taken through the journey of how they might give their evidence will no doubt be variable. There is no doubt that steps can be taken to improve that through better communication, better interaction and maybe more resources. However, there is no doubt that there is a mixed picture, particularly at the sheriff court level.

Jamie Foulis: My view is that the special measures are operating successfully for children in civil proceedings. In fact, my personal and anecdotal experience is that it is very rare for a child to be expected to give evidence in civil proceedings. In my personal experience, when allegations of a domestic nature, for example, require to be considered by a court in civil proceedings, in every case a pre-recorded interview of the child has been obtained and has been relied upon without the child being subjected to cross-examination.

The Convener: I am asking about the criminal justice space. Obviously, I am interested in your comments about children in the civil space, but my question was more about the experience of special measures used in criminal cases.

Jamie Foulis: As the question relates to criminal matters, it would be better to pass it over to Jonathan Campbell.

The Convener: Is there anything further that you want to add to what you were outlining?

Jamie Foulis: No, I do not think so. Thank you, convener.

Jonathan Campbell: To touch on what Stuart Munro has already said, in the High Court, the practices are well understood and well followed. My personal experience of trials in the High Court is that evidence on commission is increasingly used, and often the original joint interview of the child by a police officer and a social worker is the evidence in chief. It is the prosecution evidence that is led, and consideration is given to whether there is to be cross-examination. If there is not to be, that is the evidence; if there is to be, we fix a commission and, before the trial, the evidence is pre-recorded. In relation to children, we are often directed to submit written questions to the judge in advance of the hearing to ensure that the questions are properly framed. There is a slightly different scenario in the sheriff court.

I take the view that there is a resourcing issue. In relation to children, we use commissions or live links in particular. A child can give evidence from a different place over a live link. However, we do not have sufficient resources to roll out that approach in the sheriff courts as a norm. We tend to use it more in indictment matters in sheriff and jury cases, in which the maximum sentence is up to five years' imprisonment. That is not routine in summary cases, in which the maximum sentence is 12 months' imprisonment. I understand that a number of justice partners desire that, but we do not have the facilities. We need rooms to which the witnesses can go to give their evidence. Some of them might be off-site, but some of them might be in the court building. We do not have enough of those.

I had a recent experience in a High Court trial that did not relate to a child witness—the experience relates to smaller courts in particular. A witness was to give evidence from Forfar, but there was a problem because the room that was available there was double-booked. The court had to explore whether surrounding courts had the facilities to take that evidence. Smaller courts are disadvantaged. Edinburgh and Glasgow and perhaps Dundee and Aberdeen have existing facilities, but problems arise in smaller courts in which multiple cases are conducted and witnesses give evidence in them. Resourcing is the issue. Greater investment would be needed.

The Convener: That is an interesting point that speaks to some of the commentary that we have heard previously about a trauma-informed environment in addition to trauma-informed practice. Thanks for raising that issue.

I think that Rona Mackay wants to come in.

Rona Mackay: I want to give a wee update. Stuart Munro mentioned the bairns' hoose. For the record, the Scottish Government has put £6 million into funding six bairns' hooses. Those are in Fife, north Strathclyde—that one was mentioned—Aberdeenshire, Aberdeen city, Tayside and the Outer Hebrides. They are coming down the line, which is good news.

The Convener: Thank you for that update.

We will draw our session to a close. I thank all the panel members for attending the meeting. I will suspend the meeting for a few minutes to let our witnesses leave.

11:43

Meeting suspended.

11:47

On resuming—

Access to Court Transcripts

The Convener: Our next agenda item is consideration of correspondence from the Scottish Government on access to court transcripts. I refer members to paper 3. Members will recall that we have been writing to the Lord President and the Cabinet Secretary for Justice and Home Affairs with a view to the process for survivors of rape and sexual offences to access court records being reviewed and any charges being eliminated. As part of that, the cabinet secretary agreed to set up a pilot, and the latest update from Angela Constance is set out in this week's papers.

Before I open up the discussion to members, I want to highlight a couple of points. First, we might wish to check whether the pilot will be retrospective and open to the survivors who first raised the issue with the committee. The clerks could be asked to check that with Scottish Government officials. Secondly, members are asked to note that copies of the cabinet secretary's letter have been sent to Rape Crisis Scotland, Scottish Women's Aid and Victim Support Scotland.

I invite members to consider whether any further action is needed at this stage, beyond keeping the Scottish Government's plans under review and taking the action that I have mentioned already.

Russell Findlay: There are two issues. The letter from Angela Constance talks about an application form being developed. I wonder what that might look like. It should not be a barrier or a hurdle. It should be user friendly. It should also be—to use the buzzword—trauma informed. How can we ensure that the application form will not present a difficulty for those who seek access to court transcripts?

In addition, the letter talks about establishing why people want to access court transcripts. I do not see why that is an issue. Surely, in the interests of open justice and transparency, people should be entitled to do it for whatever reason they see fit. However, that is more of an observation.

Pauline McNeill: We have the pilot, which is welcome. Russell Findlay is quite right to say that we need to make sure, if we proceed with the pilot and assess it, that the process is easy and accessible.

There was coverage of the issue this morning on BBC Scotland, which quoted the figure of £100 an hour for obtaining a transcript of Scottish court proceedings. If the courts are transcribing court cases, which I presume they do for the purposes of recording and publishing proceedings and appeal processes, I do not understand why there is not a simpler process for making those transcripts available. There is a question about whether that is desirable, but that is a thought that struck me. Perhaps the committee might want to think about getting an answer to that during the assessment of the pilot.

The Convener: Okay. Thank you very much.

As no one else has any comments to make, are members content that we write to the Scottish Government on whether the intention is for the pilot to be retrospective and for it to be open to the survivors who first raised the issue, and that, in doing so, we flag the other points that members have made, in particular around the application form and the need for the process to be trauma informed? I imagine that that will be at the centre of that piece of work. We will also note the comments that Pauline McNeill made on simplifying the process of transcript production. Do members agree to that proposal?

Members *indicated agreement.*

Forensic Pathology Services

11:53

The Convener: Our next agenda item is discussion of the annual report of His Majesty's Inspectorate of Prosecution in Scotland. Specifically, Laura Paton, inspector of prosecution at the Crown Office and Procurator Fiscal Service, has raised several concerns over the current model for the provision of forensic pathology services in Scotland. Those concerns are outlined in the annual report, extracts from which can be found in paper 4. Laura Paton has described the efforts to reform the forensic pathology system as

"ad hoc, rather than transformational",

and she notes the COPFS's preference to move towards a national forensic pathology service.

We are invited to consider whether to ask COPFS, the national health service and the Scottish Government for their views on the points raised by the inspector of prosecution, and to ask whether there are any further plans to review the current model for providing forensic pathology services in Scotland. I ask for members' views on our proposed course of action.

John Swinney: If I read between the lines of the chief inspector's words, there is a sense that there is a clear need for reform. The existing arrangements are not satisfactory or sufficiently robust. Although the COPFS has an obligation to be responsible for such activity, it does not have an obligation to undertake it—it is dependent on others to undertake it—and it cannot get the necessary focus on undertaking reform.

I am certainly happy for the committee to consider trying to provide a bit of impetus for a reform agenda here. I am not arguing for a national model, but I am arguing for a model that is available in all parts of the country—that is an absolute necessity—to the right levels of satisfaction for us all. That is my fundamental point.

My additional point is that I have had experience of constituency cases that have come to me over a number of years where the experience of families when a pathology service has been required to act has not always been that great. If there has been a fatality, that is a traumatic period. In my constituency experience, I have had a couple of cases, many years apart, during which I have had assurances that the arrangements in question were becoming stronger. However, based on recent experience, I am not absolutely sure that that is the case.

We could probably do with giving a bit of impetus to the reform process. I certainly support the suggestions that are made in the paper from the clerks.

Pauline McNeill: I agree with John Swinney. In my experience over the years and in more recent times, families have to make representations about the release of a body in unexplained circumstances, particularly on religious grounds when burial within a certain period of time is required. There is huge pressure on the Crown Office and Procurator Fiscal Service and pathology services to do that. To say that the process should be driven forward not by the COPFS but by the Government is quite a radical proposal. I do not know enough about the issue to comment on whether that is the right approach.

We have absolutely no time, but it strikes me that we would want to know a bit more about what modernisation of pathology services has taken place. Some families have made representations to the Parliament about the trauma that they have experienced and about the need to change the principles according to which pathology investigation is done, which is not within the parameters of what we are talking about here. Whoever is in charge of the service in the long run, we need to be assured that pathology services will be modernised so that we can have the most efficient service. We can then take a view on who is best placed to run it to achieve the required change in the dynamic of the process.

Russell Findlay: Laura Paton's report is shocking. The overarching tone is one of complete and utter frustration. She says that everybody knows where the problems are. This is a significant cost to the public purse. She even talks about not wanting to conduct another review because doing so will cost more money, will take more time and will reach the same conclusions on issues that are already known to be the problem.

I agree with John Swinney. I presume that impetus from us would be helpful, but I am not entirely sure what that would look like in practice, given that we appear to know what the problems are, yet the agencies responsible do not appear able to find a way to deal with them.

12:00

The Convener: Do members have any other comments?

Thank you very much for those comments, which are all absolutely appropriate. From my perspective, I welcome the observations of HM Inspectorate of Prosecution. This has perhaps been a long time coming. From personal experience, I know about some of the challenges that are faced in relation to the provision of pathology services in local areas. I highlight the fact that the challenges that we face in that regard

perhaps extend to other organisations, such as Police Scotland, the Convention of Scottish Local Authorities and even education bodies, but that is perhaps a bit further down the line in terms of our wider approach.

With regard to the recommendation that is made in our paper, are members happy for us to pursue that approach now and then to revisit the issue?

Members *indicated agreement.*

The Convener: Thank you very much. That concludes the public part of our agenda. At our next meeting on 1 November, we will continue our evidence taking on the Victims, Witnesses, and Justice Reform (Scotland) Bill. We will hear from organisations on the proposals to embed trauma-informed practice in the criminal justice system.

We now move into private session.

12:01

Meeting continued in private until 12:35.

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