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THE WORK OF PRECOGNITION AGENTS IN CRIMINAL CASES

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EXECUTIVE SUMMARY

The precognition of witnesses by the Defence is an important feature of the Scottish criminal process. It is through the process of precognition that the Defence is made aware of the strength of the Crown's case. Armed with the information contained in the precognitions, the Defence can offer clients full advice on their position and prepare cases for trial if necessary.

Precognitions differ from other statements in the sense that they cannot be put to witnesses during the course of a trial. Whereas a witness statement is essentially an account of what the witness has said, a precognition is a precognoscer's account of the witness's evidence. This is perhaps a subtle distinction but it is an important one given the exclusion of precognitions from the court process.

Precognition-taking is also a distinctive feature of the Scottish system. In most other jurisdictions, including England and Wales, there is disclosure of the Crown's case which virtually removes the need for independent investigation by the Defence.

The practice of precognition-taking costs the taxpayer between £20 million and £27 million per year.

The Research Project

This project looked at the work of precognition agents in criminal cases. The research was limited to one Scottish city, namely Dundee, and was compiled through questionnaires and interviews. The project may be seen as a small scale pilot study which could either provide a limited snapshot of precognition-taking or pave the way for more extensive research into this area.

The present project was limited in its aims relying as it did on small samples taken from a restricted geographical area. There were relatively few respondents who contributed to the project. The research findings were based on the contributions of thirteen solicitors, fifteen precognition agents and nine witnesses. While there was an attempt to use a balanced survey sample, it is difficult to say whether or not this was in fact achieved. Accordingly, it is impossible to say whether the views and experiences which have been reported are in fact representative.

The research began in March 1998 and the fieldwork was completed in August 1998.

Main Findings

- The vetting of precognition agents prior to recruitment appears to be highly informal and sporadic. Most appear to be selected from word-of-mouth recommendation rather than any formal procedure.

- None of the respondent solicitors had carried out a criminal record check prior to selecting a precognition agent. This may be thought to expose complainers and witnesses to unacceptable risk.

- The training of precognition agents also appears to be highly informal. Many precognition agents are ex-police officers and there seems to be an assumption on the part of solicitors that these precognition agents in particular do not require additional training.

- This assumption is not shared by all precognition agents, many of whom believe that they would benefit from more training. The precognition agent respondents thought that they could usefully receive additional training about treating vulnerable and difficult witnesses as well as learning more about legal points and how to obtain all the relevant information. There also appeared to be willingness on the part of some precognition agents to pay for such additional training themselves.

- There is a desire on the part of defence solicitors and precognition agents to receive more information from the Crown about the cases in which they are instructed. Many of the respondents indicated that they would like the Crown Witness List to contain contact telephone numbers and in cases involving multiple accused to specify which witnesses are speaking to which charges.

- There was also support for the idea of the Crown providing a summary of its evidence. This idea was also endorsed by the Scottish Legal Aid Board.

Some witnesses do not think that they have been treated well by the precognition process. There was a desire on the part of witnesses to have had more information beforehand about what the precognition agent was there to do. Most respondents indicated that they would like this information to be provided by the Procurator Fiscal's Office.

CHAPTER ONE: INTRODUCTION

This chapter sets the project in context by providing background information about precognitions and their role within the Scottish criminal justice process.

1.1 Introductory Remarks

The precognition of witnesses is an important and distinctive stage in the preparation of criminal cases in Scotland. Precognitions provide defence solicitors with an account of what a witness's evidence might be if the case proceeds to trial.

It is a characteristic of the Scottish criminal justice process that the Defence are entitled to precognosce witnesses. By this, it is meant that the Defence have the opportunity to interview witnesses independently prior to the trial. This is done with a view to establishing what the witnesses' evidence may be. Once precognitions have been taken, the Defence are then in a position to offer the accused client full advice on how best to respond to the charges with which he or she is faced.

Very often, the accused will choose to plead guilty before the commencement of the trial. The decision to plead guilty may be based on the perceived strength of the Crown's case according to the content of the precognitions. If the accused maintains a plea of not guilty the matter will proceed to trial. Generally, the Defence will study the precognitions carefully prior to the trial with a view to developing a strategy for conducting the case.

1.2 What is a precognition?

There is no statutory definition. Precognitions are not a creation of statute and the Defence's right to take precognitions is a matter which is enshrined in the common law (1987, *Stair Memorial Encyclopaedia*). Although Lord Thomson's *Second Report on Criminal Procedure in Scotland* (1975) devotes a whole chapter to the subject of precognitions, it deliberately makes no attempt to define them (17.06).

The term 'precognition' is, in fact, used in two related but subtly different senses. First, it is used in the sense of an interview or an examination. In this sense, a precognition may be thought to mean an oral examination of a witness in respect of a matter which is likely to be the subject of court proceedings. The term 'precognition', used in this sense, refers to the actual process of examining the witness and recording what he or she says. Once a witness has been precognosced a report is written for future reference. This report is almost invariably typed. The second sense applied to the term 'precognition' refers to this report. So 'precognition' may be thought to have two meanings: first, the actual examination; and second, the report which is written as a result of that examination. A distinction is drawn between precognitions and other witness statements. (See 1.11 below.)

1.3 Who takes precognitions?

This project concerns itself with precognitions taken by the Defence. It is not concerned with precognitions taken by the Crown. Defence precognitions are usually taken by people known as precognition agents. These are people engaged by defence solicitors to interview witnesses and record what they say. Chapter Three of this project looks at precognition agents in some depth. It considers who they are, what their backgrounds are and how they are recruited, trained and paid.

While most precognition work is done by precognition agents there is no rule to say that it must be. In practical terms, anyone may take a precognition. There does not even have to be a contractual relationship between the precognoscer and the defence solicitor. In some cases, defence solicitors may wish to take the precognitions themselves. In other cases, precognitions may be taken by trainee solicitors, paralegal executives, secretaries or administrative staff. The matter is entirely within the discretion of the defence solicitor.

1.4 Where are precognitions carried out?

It would appear that many precognitions are carried out either at the witness's house or place of work. However, there are no rules stating where precognitions should be carried out. It would be quite feasible for precognitions to be carried out at the defence solicitor's office, or even at the Procurator Fiscal's Office in exceptional circumstances. Victim Support Scotland has, on occasion, encouraged the Defence to precognosce witnesses from one of its own offices. It argues that this provides a convenient and safe environment for both the witness and the precognition agent.

If a witness refuses to attend for precognition the Defence may apply for a warrant to cite those witnesses for precognition before a sheriff. These precognitions are taken under oath and may be referred to in any subsequent trial. This procedure is known as precognition on oath and appears to be fairly rarely invoked in practice. More common is an informal request from the Defence to have access to the Crown's statements. It is understood that the Crown may be willing to comply with these requests although this is not the usual practice. More frequently, the Crown will provide an outline of the evidence or assist by writing to the witness to encourage compliance with the Defence request. Such cooperation helps to minimise the inconvenience to both sides as it avoids the more drastic and time-consuming step of arranging precognitions on oath. Release of information by the Crown is also understood to facilitate the agreement of evidence between the Crown and the Defence, since greater disclosure appears to reduce the range of contentious issues. However, there is no statistical evidence to support this claim.

1.5 Are witnesses under an obligation to give precognitions?

Witnesses are not under any direct legal obligation to agree to be precognosced by the Defence. There is some authority for the view that they have a civic duty to do so but that is all.

In *H.M.A.* v. *Monson* (1893) 1 Adam 114, the Lord Justice-Clerk expressed the view that:-

> "... every good citizen should give his aid, either to the Crown or to the Defence in every case where the interests of the public in the punishment of crime, or the interests of a prisoner charged with a crime, call for ascertainment of facts".

In *Wilson* v. *Tudhope*, 1985 SCCR 339 (Sh Ct), Sheriff Gordon took the view that this duty is merely a moral one and cannot be enforced.

1.6 Should defence solicitors be able to compel witnesses to give precognitions?

The fact that witnesses are under no legal obligation to agree to be precognosced may be thought to pose a potential problem for the Defence. Given the importance of precognitions in the preparation of the Defence's case, it could be argued that witnesses should be obliged to co-operate. The issue of whether the Defence should have the power to compel witnesses to attend for precognition was considered by the Grant Committee in 1967. However, the Committee recommended against it. It took the view that if defence solicitors were granted these powers of compulsion, there was a danger that the powers might be overworked. The Grant Committee was also concerned about the difficulties which might arise where the accused chose to defend himself. The Committee recommended that instead it should be possible for the Defence to cite witnesses for precognition before a sheriff.

This issue was revisited by the Thomson Committee in 1975. The Thomson Committee did not consider the issue of whether witnesses should be placed under a direct legal obligation to agree to be precognosced. However, it did consider the problem where a witness refused to be precognosced. The Thomson Committee also recommended the introduction of a procedure whereby reluctant witnesses could be cited to appear before a sheriff for precognition.

This procedure was first introduced by the Criminal Justice (Scotland) Act 1980 which inserted a new section into the Criminal Procedure (Scotland) Act 1975. The procedure is currently set out in section 291 of the Criminal Procedure (Scotland) Act 1995.

1.7 Is there any protection of vulnerable witnesses?

The law presently affords no protection during the precognition process to witnesses who might be considered vulnerable. While individual defence solicitors or precognition agents may make special arrangements for witnesses who are perceived

to fall into a vulnerable category there is nothing in the law which requires them to do so. Further information on this matter can be obtained from a Consultation Paper: *Vulnerable and Intimidated Witnesses in Criminal and Civil Cases*, issued by The Scottish Office in November 1998.

1.8 Can precognitions be used in evidence?

It is now generally accepted that precognitions are inadmissible as evidence (Wilkinson, 1986, at p. 124).
If a witness, having made certain comments in a precognition, then goes on to say something quite different in the witness box, he or she cannot be challenged on this.

As the *Second Report* of the Thomson Committee put it at 17.05:-

> "It is not competent to use a precognition or any statement of the nature of a precognition to discredit a witness."

The inadmissibility of Defence precognitions during the trial is now generally accepted by criminal court practitioners. However, there is no clear rule which states it in so many words. Indeed, Wilkinson even suggests that the exclusion of precognitions from court proceedings seems to rest on a questionable basis. That being said, the modern practice is to regard precognitions as privileged and not to be admitted as evidence.

In *McNeilie* v. *H.M.A.* 1929 J.C. 51, Lord Justice-General Clyde expressed his disapproval when a witness was cross-examined about statements he had made "…under the confidential circumstances of precognition".

1.9 Can other statements be used in evidence?

The position is quite different with other statements. Normally, if a witness has made a prior statement which is inconsistent with the evidence being given in court, then this is a matter which can be brought to the court's attention. The relevant provision is section 263 (4) of the Criminal Procedure (Scotland) Act 1995. In terms of this section, a witness may be examined as to whether he or she has previously made a statement different from the evidence given at the trial. Evidence can be led at the trial to show that a different statement was indeed made.

1.10 Why are precognitions excluded from the court process?

In *McNeilie* v. *H.M.A.* 1929 J.C. 50, Lord Justice-General Clyde suggested that precognitions are confidential in nature and covered by a privilege. It has been argued that the ends of justice are better served if precognitions remain this way.

According to Lord Justice-Clerk Thomson in *Kerr* v. *H.M.A.* 1958 SLT 82 at 84:-

> "... one reason why reference to precognition is frowned on is simply that in a precognition, you cannot be sure that you are getting what the potential witness has to say in a pure and undefiled form. It is filtered through the mind of another whose job is to put what he thinks the witness means into a form suitable for use in judicial proceedings. This process tends to colour the result. Precognoscers as a whole appear to be gifted with a measure of optimism which no amount of disillusionment appears to damp."

1.11 How are precognitions and statements to be distinguished?

Given that precognitions cannot be referred to at a trial and other statements can, it is obviously important to be able to distinguish between them. However, the distinction may be a fine one as *Low v. H.M.A.* 1987 SLT 97 illustrates. Here, the Sheriff had to decide whether information that one of the accused had given to the police was a statement or a precognition. The Sheriff's comments are worth quoting at length:-

> "...It is always a question of circumstances whether a statement is a precognition or not. If a police officer takes from you what you have said about some incident, in written form, when preliminary investigation of a crime is going on, concerning that incident, that will normally be considered a statement and that is on the basis that what he is recording you are saying to him. It is obviously at its purest if you give him a lucid account which he simply writes down as you say it. It doesn't lose its character because he speaks to you beforehand to find out what you know or asks some questions in clarification while it is being taken down. It should, however, be generally what the witness is actually saying. A precognition on the other hand is a statement taken by a person engaged in actually preparing a case, or one of the parties to an action, or proceeding to take a statement from a potential witness in the later stages of a criminal investigation. It is a precognoscer's version of the witness's statement put into consecutive narrative form."

Wilkinson provides a more succinct distinction:-

> "A precognition is usually not an account of what the witness has said but is the precognoscer's reconstruction or interpretation" (1986, at p. 124).

1.12 What is the position in England and Wales?

The position in England and Wales is quite different from that in Scotland. While in both jurisdictions the Defence retains full responsibility for preparing its own case, in England and Wales it is a fundamental feature of the criminal trial that the defendant should know the case against him or her. In practical terms, this means that the Defence routinely receives copies of police interviews with the Prosecution witnesses. The Defence receive these statements at no cost. While the Defence may wish to interview other witnesses with a view to calling them at the trial, this advance disclosure of the Prosecution case effectively removes the need for the Defence to interview the Prosecution witnesses.

As Niblett puts it:-

> "Disclosure is at the very heart of the criminal process in England and Wales. The law on the subject is relevant to the way police officers and other investigators conduct and record the various steps of an investigation; the manner in which prosecutors prepare a case for trial; and the practices adopted by counsel for the Crown when discharging their responsibilities. Disclosure is also central to the way in which defence practitioners prepare and present the defence of their clients." (Niblett, J, *Disclosure in Criminal Proceedings*, London: Blackstone, 1997.)

The Criminal Procedure and Investigations Act 1996 has made some important changes to the duty to disclose. It introduces a statutory scheme for the disclosure of material by both the Prosecution and Defence. This scheme is supported by a code of practice. In this way the system in England and Wales is designed to encourage openness between the Prosecution and the Defence. (Details of the procedures currently adopted by police forces in England and Wales in relation to the taking of statements can be found in Bevan and Lidstone's *Investigation of Crime - A Guide to Police Powers*, Butterworths 1996 Second Edition. A more critical analysis can be found in Sanders and Young's *Criminal Justice*, Butterworths, 1998.)

1.13 What is the position in other jurisdictions?

The precognition of witnesses by the Defence appears to be quite a distinctive feature of the Scottish system. In other jurisdictions, there are different arrangements in place that effectively allow the Defence to have access to the Prosecution case.

For example, in France the examining magistrate has a duty to compile a collection of documents known as the *dossier*. The *dossier* is a comprehensive file containing all the available evidence about the case. The magistrate compiles the *dossier* by interviewing the defendant and the other witnesses at length, making detailed enquiries and obtaining expert evidence. While the defendant has no personal right of access to the *dossier*, his or her lawyer may see it and inform him or her of its contents (Hatchard *et al.*, 1996, p. 32).
In Germany a defence lawyer will usually be given access to the files of the Prosecution. This is a matter over which the Prosecution has discretion. Sometimes, access may be denied until the end of the pre-trial proceedings in order to protect the purposes of the state's investigations. While there is no right of appeal against the exercise of the Prosecution's discretion in this matter, applications for access are rarely refused in practice (Hatchard *et al.*, 1996, p. 121).

In addition, the German *Anklage* (the equivalent of a complaint or indictment in Scotland) contains a section on what is termed - "The Results of the Investigation" (*Ermittlungsergebnis*). This section contains quite a full summary of the gist of the Prosecution's case (Langbein, 1977, p.10). Again, this provides a sharp contrast with the position in Scotland where no such information is provided.

1.14 Why is there no formal system of disclosure in Scotland?

Part of the justification appears to be historical. In Scotland the Defence have always enjoyed the right to precognosce witnesses. This has been felt to render disclosure of the Crown's case unnecessary. Until recently, there has been no great clamour for change. In 1967, the Grant Committee considered the issue of whether there should be some system of disclosure. The Committee was divided on the issue and made no recommendation.

The Thomson Committee considered the issue afresh in 1975. It received a proposal that Crown precognitions should be made available to the Defence. In support of this proposal, it was argued that Scotland was out of step with many other countries where some sort of disclosure regime operated. Most of the respondents to the Thomson Committee, however, were against the proposal. Various arguments were put forward in favour of the *status quo*. First, it was argued that Crown precognitions contain confidential information which should be disclosed only to the Procurator Fiscal conducting the case. Second, it was argued that witnesses should be entitled to assume that what they said in precognition would not be disclosed to third parties, least of all the solicitor representing the accused. Third, it was argued that disclosure might not advantage the Defence anyway. The Crown precognitions might only give one side of the case and their availability might discourage the Defence from investigating the case thoroughly.

The Committee concluded that the Scottish system seemed preferable to other systems where the prosecution disclosed its case but where the Defence were discouraged and perhaps even forbidden from interviewing the witnesses. With the availability of criminal legal aid, the Committee thought there was no good reason why the Defence should not take precognitions from witnesses cited on the Crown Witness List.

Decisions of the European Court of Human Rights under Article 6 of the European Convention on Human Rights strongly support the desirability of disclosure in criminal cases. (See, for instance, *Edwards* v. *United Kingdom* (1992) 15 EHRR 417.) It is likely, therefore, that Scotland may need to reconsider the current position when the Convention is incorporated into domestic law.

1.15 Summary

The precognition of witnesses by the Defence is an important feature of the Scottish criminal process. It is through the process of precognition that the Defence is made aware of the strength of the Crown's case. Armed with the information contained in the precognitions, the Defence can offer clients full advice on their position and prepare cases for trial if necessary. Precognitions differ from other statements in the sense that they are confidential and cannot be put to witnesses during the course of a trial. Whereas a witness statement is essentially an account of what the witness has said, a precognition is a precognoscer's account of the witness's evidence. It is perhaps a subtle distinction but an important one given the exclusion of precognitions from the court process.

Precognition-taking is also a distinctive feature of the Scottish system. In most other jurisdictions, including England and Wales, there is disclosure of the Crown's case which virtually removes the need for independent investigation by the Defence.

CHAPTER TWO: METHODOLOGY

This chapter describes the aims of the research and explains how the research team carried out its work. It also outlines some of the difficulties which were encountered.

2.1 General

The aim of the research was to carry out a small-scale pilot study evaluating the work of precognition agents in criminal cases with a view to:

- identifying models of good practice for precognition work
- locating any gaps in preparation, training and guidance of precognition agents
- considering whether greater regulation of precognition agents is desirable and workable.

Specific objectives of the project were to:

- describe the backgrounds and relevant experience of precognition agents in Dundee
- outline the general and specific guidance given by solicitors to precognition agents
- assess the extent to which training is given to precognition agents before they begin taking precognitions
- assess the extent of any on-the-job training
- consider the arrangements made for the precognition visit
- determine the extent and quality of information provided to witnesses about the role of precognition agents
- describe the perception of precognition agents as to their function
- evaluate the presentation of precognitions to solicitors
- assess the time and cost involved in obtaining defence precognitions.

The research was located in one Scottish city, namely Dundee. The findings were based on a combination of questionnaires and structured interviews. The purpose of the questionnaires was to establish what was happening in practice. The purpose of the interviews was to expand on this material and to allow respondents to give their subjective views about the process. Three different questionnaires were designed, to be distributed to solicitors, precognition agents and witnesses respectively. A smaller sample of solicitors, precognition agents and witnesses was selected for interview. Overviews were obtained from Crown Office, the Procurator Fiscal's Office in Dundee, the Scottish Legal Aid Board, the Dundee branch of Victim Support Scotland and the Law Society of Scotland.

The research began in March 1998 and the fieldwork was concluded in August 1998.

2.2 Preliminary Inquiries

Preliminary inquiries were made to obtain background information about the precognition process. This information was used in the design of the questionnaires and the interview schedules but it was not fed into the project results. In this regard, information was obtained from the Witness Support Services at Kirkcaldy and Ayr Sheriff Courts. Preliminary interviews were held with law students at Dundee University who were known to be working as part-time precognition agents. Two firms of criminal defence practitioners operating outwith the Dundee area were also contacted for their views about the precognition process and how it is funded.

2.3 The choice of Dundee as the area under investigation

Dundee is the fourth largest city in Scotland with a population of 175,000. The Regional Procurator Fiscal for Tayside, Central and Fife is based in the city. In the year 1996 the Sheriff Court at Dundee recorded 3,094 criminal convictions. By way of comparison, Aberdeen recorded 4,842, Edinburgh recorded 8,886 and Glasgow recorded 9,773 (1998, The Scottish Office, *Costs, Sentencing Profiles and the Scottish Criminal Justice System, 1996*).

As the research team was based at Dundee University, Dundee was geographically the most convenient city to examine. It also had the advantage of being sufficiently large to allow for data collection while being sufficiently compact to allow the research team access to most of the city's criminal defence firms.

As the findings for this study are based solely on Dundee their applicability to the rest of Scotland is questionable. One fact which was drawn to the research team's attention by the local Procurator Fiscal's Office was that Dundee has a very mobile witness population. It was suggested that only Glasgow suffers from this problem to the same extent as Dundee. This issue fell outwith the remit of the present project but anecdotal evidence from some of the precognition agents who agreed to be interviewed supported the suggestion. If Dundee does, in fact, have a more mobile witness population than most other Scottish cities, this may mean that precognition agents in Dundee have more difficulty tracing witnesses than precognition agents in other areas.

2.4 The Solicitors' Questionnaire

The solicitors' questionnaire contained a mixture of multiple choice and open-ended questions. It began with general questions about the respondents and their firms. It continued with questions about how the respondents instructed precognitions and how their precognition agents were vetted, trained and paid. Respondents were also asked about what use they made of precognitions. The questionnaire concluded with a series of policy questions, such as whether there should be a system of accreditation for precognition agents and the desirability of disclosure of all witness statements to the Defence.

The questionnaires were administered to a sample of 25 solicitors practising in the Dundee area. The sample was selected from the *Directory of the Law Society of Scotland ('The Blue Book')*. Respondents with an expertise in criminal defence work were selected for the purposes of questionnaire distribution. The covering letters were addressed to senior or managing partners within the firms selected. These people were encouraged to complete the questionnaire themselves rather than delegate it to more junior members of staff. Only one questionnaire was sent per firm, no matter how large the practice or the number of solicitors working for it. It was stressed that the respondents' answers would be confidential and respondents were allowed to complete the questionnaires anonymously.

2.5 Responses to the Solicitors' Questionnaire

Of the questionnaires administered to solicitors 13 were returned. This represents just over 50% of the total distributed. Overall, the questionnaire seemed to work quite well though there appears to have been reluctance on the part of some respondents to answer the open-ended questions. Whether this reluctance was caused by lack of time, lack of interest, concern about anonymity or hesitation about becoming involved in debates on policy issues is unclear.

Of the 13 solicitors who responded to the questionnaire 11 were partners and two were associates. Only two of the respondents said that their caseload was exclusively criminal. All the respondents were, however, predominantly criminal court practitioners. The sample was balanced in terms of experience. Only one of the respondents qualified as a solicitor in the 1950s, none qualified in the 1960s, five qualified in the 1970s, four in the 1980s and three in the 1990s.

2.6 Interviews with Solicitors

A series of interviews followed, drawn from those solicitors who had been selected for the questionnaire sample and concentrating on experienced practitioners. These were confidential and varied in length between twenty minutes and one and a half hours. Four solicitors were selected for this stage. It was decided not to invite solicitors to nominate themselves for interview through the completed questionnaire as that might produce too large a sample and/or might not generate a sufficiently varied group in terms of the size of the firm. In addition, it was important to ensure that those solicitors who completed the questionnaire were not asked to breach anonymity by revealing their names. (This did, of course, have the disadvantage that we were not able to link the interviews and questionnaires together.) All those solicitors approached agreed to be interviewed. The aim in selecting respondents at this stage was to obtain balance in the research findings. The first two respondents were partners from two of the biggest criminal defence firms in the city. The third respondent was a partner in a medium size firm undertaking a mixture of court and estate agency work. The fourth respondent was a sole practitioner specialising in criminal work. The respondents were asked a series of questions in order to clarify and expand upon the material from the questionnaires.

2.7 The Precognition Agents' Questionnaire

The precognition agents' questionnaire also contained a mixture of multiple choice and open-ended questions. It began with some general questions about the respondents themselves - their gender, age and background - then went on to ask a series of questions about their training. It continued with questions about how often they received instructions in specific cases and how they were paid. Practical questions followed about how interviews with witnesses were arranged and recorded. Respondents were then asked about the difficulties which they encountered. The questionnaire concluded with another series of policy questions. These policy questions were only slightly different from those asked in the solicitors' questionnaire.

Distribution proved a problem. There is no register or directory of precognition agents and so the target respondents had to be accessed in a fairly haphazard way. Most of the covering letters were simply addressed to the criminal defence practices where precognition agents were known or suspected to work. Only a few of the covering letters were personally addressed. It was known that some law students at Dundee University worked part time as precognition agents. It was therefore possible to use University classes to distribute some of the questionnaires. Many precognition agents are former police officers.

Contacts at Tayside Police were asked to pass on questionnaires to their former colleagues who were known to be doing precognition work. Again, respondents were told that their answers would be confidential and that they could complete the questionnaire anonymously.

Over 60 questionnaires were administered in total, with 10 being given to Tayside Police, 15 to students who were known to be practising as precognition agents, five to firms of private investigators and the remainder to defence agents. Given the different distribution methods used, it was entirely possible that some respondents were contacted more than once. The covering letter acknowledged this potential problem and instructed respondents to complete no more than one questionnaire.

2.8 Responses to the Precognition Agents' Questionnaire

Fourteen questionnaires were returned. This represents just under 25% of the total administered. Of these fourteen, seven said that they had previously served with the police and one came from a background of private investigation work. The remainder were law students. It might be thought that this sample was unrepresentative, comprising too many law students and too few ex-police officers. While anecdotal evidence would support such a view, there is no way of telling for certain in the absence of any official statistics.

In many respects, this questionnaire seemed to work better than the corresponding questionnaire sent to solicitors. Perhaps respondents had more time to complete it. Many of the open-ended questions were answered thoughtfully and in detail. There was also an openness about sensitive issues such as the payment which the respondents receive for their work.

2.9 Interviews with Precognition Agents

Interviews were held with seven precognition agents. Again, these interviews were confidential and varied in length between twenty minutes and an hour.

A desire to achieve some kind of balance guided selection for interview. The sample invited for interview was a mixture of different kinds of precognition agent. The sample comprised mainly ex-police officers and law students. We advertised by word of mouth and through notices in the University for interviewees to come forward since we had no list of precognition agents operating in Dundee. (This is an important issue which demonstrated to us in the early stages of the research the lack of data on precognition agents and provided some indication of the value of our own study.) One of the respondents came from an insurance background. He was employed in-house by a defence agent's firm rather than being contracted on an agency basis. One of the respondents was a woman, who said she was one of the few female precognition agents operating in Scotland. She was based outwith Dundee but as she had done precognition work in the city her comments have been included in the project findings. This interviewee had not been included in the questionnaire sample as we were not aware of her existence until after the questionnaires had been distributed. She approached us to offer her views and her input seemed important for the project.

2.10 The Witnesses' Questionnaire

A quite different approach was taken with the witnesses' questionnaire. It differed both in style and content from the questionnaires administered to solicitors and precognition agents.

Interviews held at the Witness Support Services at Kirkcaldy and Ayr Sheriff Courts (which operate under the direction of Victim Support Scotland) and written communication with the service in Hamilton provided some guidance on witnesses' perceptions of the precognition process. A code of conduct for defence precognitions, drawn up by the Hamilton Sheriff Court Working Party on Victims in Court, was also consulted. This information was used in questionnaire design but was not fed into the project findings. The existence of a witness support service, which is not available in Dundee Sheriff Court, and the different geographical location, meant that comparisons would have been unsatisfactory in methodological terms but our discussions with the service teams were very useful in helping to shape the questionnaires and the interview schedules. We also obtained some useful input from the Victim Support Service in Clydebank which has considerable experience in supporting victims of serious crime through the criminal justice system. It may be worth noting that all these services expressed concern about the conduct of some precognition agents and provided anecdotal evidence of problems in certain cases.

It was apparent that some witnesses would not know what the terms 'precognition' and 'precognition agent' meant. In designing the questionnaire it was therefore necessary to use straightforward language as far as possible. Whereas the two previous questionnaires had referred to the project as an investigation into "The Work

of Precognition Agents in Criminal Cases", the witnesses' questionnaire referred to it as an investigation into "Taking Statements from Witnesses in Criminal Cases".

Again, the questionnaire was a mixture of multiple choice and open-ended questions. However, the multiple choice questions were kept as simple as possible and the open-ended questions were kept to a bare minimum. There was a balance to be struck here between the quality and quantity of the results. If the questionnaire was kept too simple the results would be so vague as to be virtually meaningless. If it was made more complex the results would be more valuable but it would be less likely to be completed and so it would generate fewer responses.

After a few personal questions, the questionnaire took respondents through the precognition process from their first contact with the solicitor's firm or precognition agent until the point when the precognition was completed. Multiple choice questions were used to establish what happened. Open-ended questions were used to establish what respondents felt about the process.

In cases where there are multiple accused, it is quite common for witnesses to be precognosced two, three or even more times, by different agents. This could have created confusion for a respondent trying to complete the questionnaire. In recognition of this potential difficulty, respondents were instructed to answer the questions as if they were about the most recent occasion that the respondents were visited by a precognition agent.

Unlike the two previous questionnaires, respondents were invited to leave their names, addresses and telephone numbers at the end of the questionnaire. This was so that they could be contacted at the interview stage.

Gaining access to witnesses was a problem. One idea was to seek the co-operation of the local Procurator Fiscal's Office and arrange to have the office send out questionnaires with witness citations. The difficulty was that witnesses would not have been precognosced at this stage and might well destroy the questionnaire as being irrelevant.

The idea of approaching witnesses directly at Dundee Sheriff Court - either while they waited for their cases to start or immediately after they had finished giving evidence - had certain attractions but the idea was ruled out as being too insensitive. It may also have been thought to have amounted to interference with the witnesses.

Approaching defence witnesses could only have been done with the consent and co-operation of defence solicitors.

This may have created annoyance as defence solicitors were already being asked to complete questionnaires themselves and to administer other questionnaires to precognition agents. It was therefore decided not to interview defence witnesses.

The best option seemed to be to gain access to witnesses through the local Procurator Fiscal's Office. This had the advantage of simplicity though there was a drawback in the sense that only Crown witnesses would be contacted by this route. The Procurator

Fiscal's Office supplied a set of witness lists for a diet of solemn cases. The view was taken that solemn cases might produce a survey sample with more interesting things to say than a survey sample taken from summary cases and that there was a greater likelihood of precognitions being taken in solemn cases. It seemed likely that such precognitions would be longer and more detailed and that precognition agents would be expected to test the witness's credibility and reliability more frequently in solemn cases. In short, it seemed that witnesses in solemn cases would generally have had a more interesting exposure to the precognition process than witnesses in summary cases. In methodological terms it was also easier to obtain witness lists in solemn cases than it was for summary matters. It is clear, however, that this decision to restrict the research to solemn cases, at least in relation to witnesses, may have produced a sample which was not representative of the total population of witnesses who were precognosced by the Defence and this is obviously a limitation of the study. With a longer time for fieldwork and closer links with the Procurator Fiscal's Office this difficulty could have been overcome.

Questionnaires were duly administered to witnesses from the Procurator Fiscal's Office lists. The response was disappointing, partly because many of the cases had been cancelled and the target respondents had not been precognosced. This difficulty was not anticipated and it delayed the research considerably. Approximately one month later, the Procurator Fiscal's Office supplied another set of witness lists for the next diet of solemn cases. One of the witnesses was a six year old child. Another two were fourteen years old. Special covering letters were drafted for these witnesses with a view to encouraging them to respond.

Two batches of questionnaire were released over a period of one and a half months. In total, about 70 questionnaires were distributed.

2.11 Responses to the Witnesses' Questionnaire

Some of the target respondents were not found at the addresses given. This would suggest that the wrong address was given to the police, or that the witness had moved house or changed job since the police statement was taken or that there was some administrative error, either on the part of the police or the Procurator Fiscal's Office. Interestingly, wrong addresses being given on the Crown Witness List was a common complaint among precognition agents but it was also suggested that a highly mobile witness population could create difficulties which were outwith the control of the Procurator Fiscal's Office. Two of the young witnesses referred to in the Crown lists could not be traced. This was unfortunate given that their experiences could have been of considerable significance and would have produced a more balanced set of findings. Preliminary inquiries had suggested that precognition agents often have difficulty in tracing witnesses. Ironically enough, this difficulty was now being encountered by the research team.

Fifteen questionnaires were returned. Of these, six indicated that the case had been cancelled and they had not, in fact, been visited by a precognition agent, so from the questionnaires returned, only nine provided useful information. This is clearly too low a figure for the findings to be of much statistical relevance. That being said, those questionnaires which were returned were generally of a high quality, often containing

some insightful observations. The sample included a fourteen year old girl and two professional witnesses, that is witnesses who were frequently called to give evidence as part of their job in the retail trade.

Although the sample was small, it is perhaps worth noting that most of the respondents made some sort of complaint about the process. Seven out of the nine had some negative comment to make. Two of those also suggested ways in which they felt the process might be improved. One said that she had only responded to the questionnaire because she was concerned that the precognition process would leave some people very vulnerable. We have no reason to suppose that those with negative views were more likely to complete questionnaires than those whose experiences of precognition-taking were positive, although we cannot, of course, substantiate that view in any concrete way.

Not all the witnesses who responded lived in Dundee. However, all had been witnesses in cases which had been prosecuted by the Procurator Fiscal's Office in Dundee. The sample was balanced in terms of age and gender. One of the respondents was born in the 1940s, three were born in the 1950s, two in the 1960s, two in the 1970s and one in the 1980s. Four were male and five were female. The type of cases in which these respondents were witnesses varied. Two were witnesses to a theft, three to a physical assault and four to another theft. All the respondents who returned the questionnaires indicated that they were willing to be interviewed.

2.12 Interviews with Witnesses

Again, a different approach was taken with the witness interviews from that which had been adopted for solicitors and precognition agents. The approach was much more informal and much less structured. Essentially, respondents were given the opportunity to expand on and clarify what they had written in their questionnaires. The interviews varied in length between five minutes (a telephone interview which involved a professional witness to whom the precognition-taking had been a matter of routine) and one and a half hours. The average length of interviews was 30 minutes.

An attempt was made to contact all the respondents who returned a questionnaire. Of these, seven could be contacted. All seven agreed to be interviewed.

Three of the witnesses were interviewed in person. The remaining four were interviewed over the telephone. Generally, the quality of these interviews was high and respondents were prepared to discuss their experiences with candour and in detail.

2.13 Methodological Difficulties

The biggest methodological difficulty in this research was gaining access to target respondents.

One of the issues under examination in this project was whether there should be a register of precognition agents. At present, there is not. It was therefore somewhat

ironic that one of the difficulties faced in the research was in not knowing the names and contact addresses of precognition agents. Resort had to be made to the fairly haphazard techniques described at 2.7. However, this was time-consuming and may well have led to a disproportionately high number of law students appearing in the survey sample.

Contacting witnesses was even more problematic. While the Procurator Fiscal's Office at Dundee was as helpful as it could be, the cancellation of cases meant that the first batch of questionnaires produced an unacceptably low response rate. By the time witness lists became available for a fresh diet of solemn cases, the project had been delayed for over a month.

Overall, the level of response to the precognition agents' and witnesses' questionnaire was disappointing. In the case of the witnesses' questionnaire it is difficult to see what statistical significance can be attached to the findings since only nine questionnaires contained useful data. That being said, while the size of the response was disappointing, the quality of the returns was encouraging. There was considerable openness in the responses and a clear willingness to assist the project further.

In addition, our inability, for reasons of confidentiality, to link questionnaire data with interview material in the case of precognition agents and defence agents (or to use the questionnaires as a selection tool for subsequent interviews in such cases) may be regarded as a limitation of the research. Likewise, the distinction between summary and solemn cases was not taken into account in this study and we concentrated on solemn cases in obtaining data from witnesses. Finally the exclusion of defence witnesses is regrettable but justifiable given the short timespan of this study.

No computer software package was used to analyse the data. Given the small numbers involved, manual data analysis was thought to be more appropriate.

CHAPTER THREE: PRECOGNITION AGENTS

This chapter looks at precognition agents. It examines who they are and what their backgrounds are. It also considers how they are recruited, trained and paid.

3.1 Gender

The precognition agents' questionnaire began by asking respondents whether they were male or female. All fourteen of the respondents were male. The witnesses' questionnaire painted a similar picture. Respondents to the witnesses' questionnaire were asked for the gender of the precognition agent who took their statement. All but one of the respondents said they were interviewed by a male precognition agent. These findings appear to reflect the reality of precognition work in Scotland rather than an unbalanced survey sample. Indeed it is very surprising that a sample including a significant proportion of law students contained no women since the gender balance within the Law Department at Dundee is approximately 50% male and 50% female. When precognition agents were asked if they knew any women who did this work the usual reply was that they did not. At interview, some respondents were asked why this might be:-

"Most precognition agents come from an ex-police background. Very frequently this work requires the precognition agent to venture into the less salubrious areas of Dundee..." (P2)

> "Because of the criminal element, I think that solicitors think that males are better at going to housing schemes where most crime and criminals seem to come from..." (P3)

> "A lot of the people who do this work are - or were - policemen. Historically, there were more policemen than women. Maybe in the future we will see more female precognition agents coming through..." (P1)

3.2 Age

Respondents to the precognition agents' questionnaire were asked how old they were. Nobody was aged under 25 years. Four were aged between 25 and 30 years old, four were between 30 and 50 and six were over 50. These figures reflect an 'older' survey sample than might have been expected, especially bearing in mind that many of these respondents were students - see 3.3. The witnesses' questionnaire produced a 'younger' sample of precognition agents. Respondents were asked to provide an estimate of the age of the precognition agent who interviewed them. One precognition agent was estimated to be under 25 years old, none were thought to be between 25 and 30, six were thought to be over 30 but under 50 and only one was thought to be over 50. There was one non-response.

3.3 Background

It is generally believed among people who work in the criminal justice process that many precognition agents are former police officers. Whether ex-police officers constitute the majority is difficult to say in the absence of any official statistics but anecdotal evidence would support this view. Respondents to the precognition agents' questionnaire were asked if they were previously police officers. Seven said they were and seven said they were not. This, however, may have been a slightly unbalanced sample for the reasons outlined at 2.8 and 2.13. Of the seven who said that they had been a police officer six of them had served with the police for over twenty years. Their ranks included one acting sergeant, two sergeants and three inspectors. Presumably these six were the six aged over 50 years old - see 3.2. Of those who said they had not served with the police, one was a private investigator and the remainder were law students. Respondents were asked to account for the high proportion of precognition agents coming from a police background:-

"Police officers retire at a relatively young age. Often they end their careers doing court duties and so they get to know a lot of the court practitioners. Most are getting a good pension. They don't need much money. It just sort of fits, doesn't it? Rather than having it designed that way?" (P1)

3.4 Culture

Many of the respondents to the precognition agents' questionnaire were nearing retirement - see 3.2 above. Most of the respondents come from what might be termed conventional backgrounds. The overwhelming majority of respondents either came from the police or were engaged in legal studies - backgrounds associated with conservative values and a traditional lifestyle. Yet, of course, as precognition agents, they come into contact with the poorer elements in society and, increasingly, the young. Sometimes precognition work will bring an ageing, suburban conventional man into contact with disaffected, disadvantaged youth. Does this present a problem?

"In terms of cultural diversity, I don't see that that would be age-specific. The precognition agent isn't trying to be your friend. It's more of a professional relationship." (P1)

> "I don't know if it presents a problem... I think the reason is that a lot of precognition agents are ex-policemen and it's a pretty safe bet they'll be good at it... Where we [precognition agents who have not served with the police] can't find witnesses, an ex-policeman can find them. They can phone ex-colleagues and find out exactly where these people are staying. And possibly even get the low-down on the whole problem. A precognition agent who can find people is worth more than just a good precognition agent. The best precognition agents I know are all ex-policemen." (P3)

3.5 Full or Part Time

Six of the respondents to the precognition agents' questionnaire did precognition work full time. The remaining seven who answered this question worked part time. (There

was one non-response to this question.) This finding may be explicable by reference to the fact than many of the respondents were students - see 3.3.

3.6 Length of Service

Respondents to the precognition agents' questionnaire were asked for how long they had done precognition work. Only one had done precognition work for less than a year. Four had done it for between one and two years, five for between two and five years and four for over five years.

Precognition agents were asked in the questionnaire whether they thought they would still be doing precognition work in three years' time. Four said they thought they would, six said they thought they would not and four said they did not know. The theory being tested here was the idea that precognition work is not something which people do for long periods of time. The idea was that it is usually done by law students before they graduate or by former police officers before they retire from employment and it is therefore often something of a stop-gap in which people do not have the opportunity to develop much expertise. (It could be claimed that police officers are already skilled in interviewing through their professional experience but as we suggest later in this report the role played by a precognition agent is different from that of a police officer and does not necessarily equip a person with the skills needed to undertake precognition-taking.)

It has to be said that these findings do not lend much support to the idea that precognition work is simply a short-term option. While the most popular response to this question was 'no', the majority of respondents either said that they thought they would still be doing this work in three years' time or that they did not know whether they would be doing the work or not. Perhaps this finding is not primarily about precognition agents themselves and their commitment to their work. It may say more about people's perceptions generally in an uncertain society of temporary employment contracts and shifting labour markets.

3.7 Employment Status

In the solicitors' questionnaire respondents were asked about the employment status of each of the precognition agents they instructed. These solicitors indicated that ten precognition agents were self-employed, four were employed in-house and two worked for an outside inquiry firm.

Precognition agents who are directly employed by solicitors are not of course 'agents' in the legal sense. They are employees. This difference in employment status is often reflected in terminology. These people are frequently referred to as 'precognition officers' rather than 'precognition agents'. Interestingly, the people who do precognition work for Crown Office and the Procurator Fiscal Service as employees are also referred to as 'precognition officers'. It may be that the Defence borrows this term where its precognition-takers are salaried employees since their status is then regarded as similar to precognition officers employed by the Procurator Fiscal Service.

However, it is important to note that there are significant differences between the two, particularly in relation to induction and on-going training, which is mandatory for precognition officers in the Procurator Fiscal Service.

One solicitor was asked at interview stage why she chose to employ a precognition agent in-house rather than contract the work to an agent. Her reply was that she used to use agents but did not find the standard of work to be particularly high. She continued:-

"... And I felt there wasn't any feedback between myself and the person because when you contract you just send them a copy of the witness list and they go away and get the statements... But I find it better that you've got somebody in the office and you can say to him 'This is our line of defence'... I find that much better... The only disadvantage you might possibly have would be if you didn't have enough work to keep them going especially in a small operation." (P5)

3.8 Professional Bodies

There are two professional bodies to which precognition agents may belong. These are the Association of British Investigators and the Institute of Professional Investigators. Neither body exists exclusively for precognition agents but they both welcome precognition agents as members. It is worth bearing in mind that precognition agents do not exist in England, Wales or Northern Ireland. Indeed, many lawyers practising outside Scotland might struggle to know what a 'precognition agent' was. What Scottish lawyers refer to as 'precognition work' largely does not happen south of the border because of the disclosure regime which operates there. Such investigative work which does need to be done in preparation for a criminal case is normally the province of a private investigator. The reason for making this point is to draw attention to the fact that while the ABI and IPI welcome Scottish precognition agents, precognition agents do not constitute a large part of the membership of either organisation. The observation has been made that most members of the ABI are private investigators, not precognition agents. Finally, it should also be pointed out that the two organisation are not rivals. It is perfectly feasible to belong to both.

In the survey sample only one respondent belonged to the ABI. The rest belonged to neither body. Some of the precognition agents were asked about these organisations at interview. Most of the respondents had at least heard of the ABI though many of them saw little point in becoming members. A common perception was that the ABI existed primarily for private investigators, not precognition agents.

3.9 An Informal Network

The fact that so many precognition agents come from a similar background (see 3.3 above) and that so few belong to any professional organisation (see 3.8 above) might be thought to prompt them to form informal associations with each other. There was some evidence in our findings to suggest that precognition agents in Dundee had formed an informal, loosely arranged network. This idea is supported by the fact that

the majority of the respondents had discussed matters with another precognition agent before starting work (see 3.12 below). At interview, respondents were asked if such a network existed:-

"Yeah... You can have a situation where there are multiple accused... All the different solicitors are asking all the different agents to go up... Once you've had about two or three people at your door, you're obviously going to get fed up... So therefore the remainder have to get the information from somewhere so they often get in touch with each other..." (P3)

"I think there is. You know, swapping precognitions and stuff... it's open to that." (P6)

"Yeah... But there's no sort of secret society. It just sort of happens... it sort of trundles along..." (P1)

3.10 Vetting

In the solicitors' questionnaire respondents were asked how they assessed a precognition agent's suitability and competence prior to recruitment. They were asked to tick all the boxes which applied. The options open to them were 'by interview', 'by obtaining references', 'by a criminal record check' and 'on the job'. They were also given the opportunity to state any other method of assessment. The results are given in Table 1 below.

Table 1: Vetting Methods

By interview	By obtaining references	On the job	By a criminal record check	Other	None
5	4	3	0	5	0

Source: Solicitors' questionnaires. Sample n=13. More than one response was permitted

Five said that assessment was done by interview. This statistic is more interesting if it is turned round the other way. What this means is that eight of the respondents, nearly two thirds of the sample, say that precognition agents are selected without interview. It is worth considering whether these respondents would take on people to any other position in their firm without an interview. Only four said they obtained references. Three said that assessment was done on the job. Effectively this means there is no vetting at all. Five said they used some other method of assessment but these other methods effectively mean personal knowledge or informal word-of-mouth recommendations. Responses included -

"Most precognition officers are ex-police officers so they know the job."

"We use retired police officers. We know them by reputation."

"By word of mouth."

None of the respondents asked precognition agents whether they had a criminal record. The implications of this may be regarded as disturbing, particularly where the applicants were not formerly police officers. Even where they were previously police officers it is not clear in every case that the solicitor would know why they had left the police. Although we did not ask for this information we know that the precognition agents who were also law students were not necessarily local people and that some were likely to have come from England or Northern Ireland since the Law Department teaches English as well as Scots law. Reliance on local reputation alone has, regrettably, been shown to be insufficient as a check against those intent on harming children and vulnerable adults (see, for instance, the guidelines produced by Volunteer Development Scotland entitled *Protecting Children* 1995, VDS, Stirling). In theory at least, it would be possible for a convicted child sex offender to become a precognition agent and to interview children. It is also important to note that precognition agents have access to people in their homes at a time which may be stressful for them. Such access should surely only be obtained when there are reliable indicators of a person's suitability. This is clearly an area for urgent concern which shall be discussed in greater depth at 5.1 and 6.4.

3.11 Selection and Recruitment

Most of the respondents to the solicitors' questionnaire revealed that they did not interview their precognition agents prior to recruitment - see 3.10 above. They tended to rely on more informal selection procedures such as word-of-mouth recommendation. When interviewed by the researchers, solicitors were asked what they looked for in a prospective precognition agent:-

"An ability to approach people and explain the circumstances or the need for the precognition and to allay the general fear that there is a benefit being derived to the accused in a cynical sense... Generally, there isn't... " (S2)

> Someone with a presence and appearance that could represent your firm fairly and accurately... not just someone out there rattling up statements to make a living… Generally, a knowledge of the law... a working police knowledge is useful but not essential." (S3)

> "I use a mixture of students and ex-police officers, the students for mucking about with [carrying out straightforward precognitions]and the police officers if I want anything special or clever done [more difficult cases or witnesses who were likely to be more recalcitrant]..." (S1)

3.12 Training

In the solicitors' questionnaire respondents were asked if their firm took any role in the training of their precognition agents. In a survey sample of thirteen, only three said

that they did. When asked what form that training took only one responded. This respondent answered:-

> "Discussion of case and defence to be led. Watching court proceedings. Reading literature."

It is at least arguable that this involvement, while better than nothing, does not constitute training. It might be described as instructions for a specific case but would not usually be defined as 'general training', designed to equip the precognition agent to undertake the precognition task in a broad sense.

Respondents were also asked whether their precognition agents had ever attended a course in precognition work. Of the 11 solicitors who answered this question two said they had, two said they had not and seven said they did not know. Perhaps the most interesting point emerging here is the level of the 'don't know' response. It may be that many solicitors do not take any great interest in what training their precognition agents have undergone. The respondents who supplied written answers to this part of the questionnaire pointed out that their respective firms only used experienced ex-police officers for their precognition work. There appears to be a clear but unspoken assumption that such people already have sufficient knowledge and experience.

Respondents to the precognition agents' questionnaire were also asked about their training. The question was more detailed than the corresponding one in the solicitors' questionnaire. Pains were taken with the wording. There was a deliberate attempt to avoid confusing the issue of training with that of *ad hoc* guidance in particular cases. There was also an attempt to find out what training precognition agents received before they started doing this work as opposed to any training they received on the job. The question which was asked was:- "What general training or guidance did you receive before you started doing precognition work?" Respondents were asked to tick all the boxes which applied. The responses are given in Table 2 below.

Table 2: Training Methods

Familiarisation with the content of precognitions	9
Informal discussion with a solicitor	9
Informal discussion with another precognition agent	8
Accompanying another precognition agent on visits to witnesses	6
Informal discussion with an office manager or other non-legally qualified member of staff	5
Attendance at a formal course	1
No training or guidance at all	1

Source: Precognition Agents' questionnaires. Sample n=14. More than one response was permitted.

A variety of methods were used in training precognition agents, focusing very much on informal approaches. Only one precognition agent said that he had attended a formal course in precognition work. One respondent said that he had received no training or guidance at all. However, it should be pointed that this same respondent had also ticked some of the other boxes for this question. So clearly this respondent had received some guidance even if he did not regard it as training as such.

At interview, respondents were asked for their views on training:-

> "Well, I think the whole business of precognitions is more an *ad hoc* thing. There's no training as such that I'm aware of... Certainly not in my case but then I had training as a police officer... Whether that strictly speaking covers everything you need for a precognition is another matter." (P2)

> "A lot of the skills gained in the LL.B. are transferable to precognition work. With ex-police officers, there are a lot of skills there which you are just re-packaging in a slightly different direction. I think that if you're not going to get any training, the background of being a police officer is in some ways a very good one to have." (P1)

The issue of training was also put to the Scottish Legal Aid Board:-

"I'm not aware of what training precognition agents actually get. Solicitors use experienced precognition agents and if they found that someone wasn't coming up to standard for the statements they were taking then they wouldn't use them. But I don't think even the solicitors themselves would know what training they have. Precognition agents are usually former policemen, they're used to taking statements, therefore the standard is generally okay because the police know the sort of standard that's required. But it's up to the solicitor to give the necessary guidance to the precognition agents themselves. And they'll soon tell from the standard of the statements they get whether they got it right or not."

The issue of what improvements might be made to precognition agents' training is discussed at 5.2 and 6.5 below.

3.13 General Competence

In view of the general lack of training, described at 3.12 above, some respondents called into question precognition agents' ability to do their jobs. This was a concern which was shared by solicitors, precognition agents and witnesses alike. Two of the following comments came from precognition agents and the last came from a witness who had previously been a police officer:-

> "Most of these people who are out there taking precognitions aren't trained to take precognitions as such. They're really taking statements in my view. A lot of them are ex-police, they're used to taking statements, they're not used to precognoscing... taking a statement and taking a precognition is completely different." (P5)

"There are huge differences in ability and aptitude… At the bottom end, that's an area for worry." (P1)

"I think there's a lot of budding Petrocellis working as precognition officers with the wrong idea about taking a statement." (W1)

3.14 Payment

Respondents to the solicitors' questionnaire were asked how their firm paid for the services of precognition agents. Only one said that he or she paid a salary. Five said that they paid a fee per precognition and six paid an hourly fee. (There was one solicitor who did not answer this question.) Nobody said that they paid their precognition agents a fee per sheet. Respondents in the precognition agents' questionnaire were also asked how they were paid. The results were quite significantly different. Three said that they were paid a salary, two were paid a fee per sheet, two were paid a fee per precognition and seven said that they were paid an hourly fee. Respondents were then asked how much they were paid. This provoked little if any reticence and most of the respondents provided a figure. Those respondents who received a salary were paid in the region of £150 per week. Those who were paid an hourly rate were paid fees which varied between £4.00 and £8.00 per hour. The issue of payment is discussed in greater depth at 5.16 below.

3.15 Public Image

There was some evidence in the research findings that precognition agents suffer from a public image problem. The Association of British Investigators is currently pressing for some sort of formal registration scheme with a view to raising the profile of its members. One of the precognition agents interviewed said that many witnesses do not know what a precognition agent is and that this lack of awareness can cause difficulties. So precognition agents may have to spend time explaining their role and reassuring witnesses. He stated that this was particularly true in the more affluent, middle-class areas. Another precognition agent complained that the skills required to interview witnesses are not acknowledged either in the remuneration they receive, their status or the respect accorded to them. The precognition agent struggles with an image which is uncertain at best.

As one of the respondents put it:-

"A precognition agent is seen just as somebody who goes about knocking on doors..." (P3)

It appears, therefore, that the job is regarded as one which does not require a great deal of skill or experience, both by those who employ precognition agents and by those agents themselves.

CHAPTER FOUR: THE PRECOGNITION PROCESS

This chapter looks at the precognition process itself. It is in three parts.

The first part looks at how precognitions are arranged. It looks at the involvement of solicitors and considers the amount of instruction which they give to precognition agents. It considers what special arrangements are made for witnesses who might be considered vulnerable.

The second part examines how precognitions are taken. It looks at how precognition agents go about their jobs and the difficulties which they encounter.

The third part deals with the process from the perspective of witnesses.

Part One: Arranging Precognitions

4.1 Initial Steps

When a person is accused of a crime usually all he or she is given initially is a copy of the complaint (in summary proceedings) or petition (in solemn cases). This lets the accused know the charges which he or she faces but it says little else about the Crown's case, except the date and place of the alleged offence Thereafter in solemn cases only the accused will be served with the indictment, which contains not only the charges but also a list of Crown witnesses and productions. If the accused decides to consult a solicitor one of the first things the solicitor will want to know is how the accused wishes to plead to the charges. If the accused wishes to plead 'not guilty', the solicitor will then take initial steps to prepare the case for trial. The solicitor will first want to contact the Procurator Fiscal's Office. A letter is almost invariably sent, telling the Procurator Fiscal's Office that the solicitor represents the accused in connection with the case. The solicitor asks the Procurator Fiscal's Office to send a list of its witnesses.

4.2 Deciding whom to precognosce

When the Crown Witness List arrives at the defence solicitor's office the solicitor must decide whom to precognosce. It may be that not all the witnesses will require to be precognosced. Some of the witnesses will be police witnesses. It is not usually necessary to precognosce them. Police statements are routinely made available on request in summary cases although this does not happen in solemn cases.
It is a different matter with civilian witnesses. The expectation is that solicitors will arrange to have these witnesses interviewed to establish what their evidence is likely to be. It may not be necessary to precognosce every civilian witness. Some witnesses may be speaking to uncontroversial evidence. They may, for example, simply be identifying a car which has been broken into. It would not normally be necessary to precognosce this person. Another person may be saying that he or she saw the

accused breaking into the car. It will be essential for the solicitor to precognosce this witness. No prudent solicitor would want to go to trial without knowing what this witness was going to say.

Another reason why it may not be necessary to precognosce every civilian witness is that often the case will be one where there is more than one accused. It may be that some of the charges are not libelled against the particular accused whom the solicitor represents. So the witness who speaks to these charges will not be relevant as far as the accused's case is concerned.

With these points in mind, respondents to the solicitors' questionnaire were asked about how they arranged precognitions. How often would they precognosce every civilian witness on the Crown Witness List?

From a total of thirteen respondents six said that they would always precognosce everyone, five said that they would precognosce everyone in most cases and two indicated that they would precognosce everyone in about 50% of cases.

It has been argued that some defence solicitors precognosce more witnesses than necessary. It is suggested that this adds to the inconvenience and stress of witnesses while contributing to an unnecessarily large bill in a Legal Aid case. However, a common response to such criticism, which was made by each of the four solicitors whom we interviewed, is that until the precognition is taken they do not know whether the witness's evidence will be relevant or not.

4.3 Arranging Interviews

Respondents to the solicitors' questionnaire were asked how they arranged interviews with witnesses. A list of multiple choice responses was provided and respondents were asked to tick all those which applied.

Three respondents said that they did not know what happened as matters were left entirely in the hands of the precognition agent. This perhaps gives an indication of the level of autonomy enjoyed by some precognition agents. Seven of the respondents said that they sent the witness a letter. Three said that a letter was sent by the precognition agent. Seven noted that arrangements were made by telephone. Three indicated that precognition agents employed by three solicitors called on witnesses without any prior arrangement at all. Seven noted that witnesses were allowed to choose where and when the interview would take place. All the respondents stated that the witness was given a choice over these matters.

Respondents to the precognition agents' questionnaire were asked a similar question. A slightly different list of responses was provided. Ten said that a letter was sent by the solicitors. Four noted that a letter was sent by themselves and in one of these cases a letter was also sent by the solicitor. One said that no letter was sent. Fourteen (in other words, everyone) stated that arrangements were made by telephone.

Four indicated that they would approach witnesses without any prior arrangements being made. Twelve said that witnesses were offered a choice over where and when they were interviewed, while one respondent advised that witnesses were not offered this choice.

Pulling these results together, it would appear that most witnesses are contacted before a precognition agent visits them. The majority of solicitors send letters. These letters can be charged to the solicitors' account which is submitted to the Scottish Legal Aid Board. Telephone contacting appears to be very common - see 4.5 below. Seven of the respondents confirmed that witnesses might be approached without any prior warning at all.

Given that this represents 25% of the survey sample this is surely a cause for concern. Most of the respondents to both the solicitors' and precognition agents' questionnaires said that witnesses were given a choice over where and when they were seen. It is, however, interesting to compare this with what witnesses say. Do witnesses themselves think they have been given a choice? See 4.17 and 4.18 below.

4.4 Style Letters

Seven of the respondents to the solicitors' questionnaire confirmed that letters were sent to witnesses with a view to arranging appointments - see 4.3 above. These letters normally follow a style which can be run off a word processor with minimal secretarial input. Essentially, all a secretary needs to add is the accused's name and perhaps the charge along with the witness's name and address. One solicitor said at interview that he always named the precognition agent who was coming to visit so that there would be a connection between him and the firm. Another solicitor said that she could not remember the exact content of her style letter. However, she said that it took a friendly and encouraging tone. It was put to her that some style letters adopt a more threatening approach, sometimes referring to the procedure of precognition on oath. The solicitor replied that her style letter did not refer to precognition on oath as this was something to which she had never had to resort:-

"Most people, once you speak to them and explain things to them, are quite reasonable and they're quite happy to help." (S3)

Concern was voiced by the Witness Support Service at Ayr Sheriff Court about the content of some style letters. Some style letters take an aggressive and threatening tone which some complainers and witnesses find very distressing. The co-ordinator of the Witness Support Service suggested that a more friendly tone would not only be more appropriate but may, in fact, may be more effective in securing the witness's co-operation.

There is no standardised style letter which solicitors have to use. The content of each letter is a matter within the discretion of the individual defence solicitor.

4.5 Telephone Calls

Telephone contacting appears to be the norm. Everyone who responded to the precognition agents' questionnaire said that they used the telephone to contact witnesses. This explains some comments made by precognition agents at interview, many of whom thought that the Crown Witness List should contain contact telephone numbers.

4.6 Arranging Interviews with Vulnerable Witnesses

Respondents to the solicitors' questionnaire were asked how often they were able to identify witnesses who might be considered vulnerable. A list was offered - children under sixteen years of age, elderly people over sixty five years of age, people with physical disabilities, people with mental health problems, people with learning disabilities, complainers in sexual assault cases and people who felt intimidated about giving evidence.

Respondents were asked how often they were in a position to identify when witnesses fell into these categories. Almost all the respondents agreed that they were able to identify complainers in cases of domestic and sexual violence.

This information would be found in the complaint or indictment itself. Most respondents also said that they were sometimes in a position to identify witnesses under sixteen years of age and those over sixty-five. An examination of some Crown Witness Lists showed that they sometimes, but not always, reveal the ages of witnesses.

The other responses varied quite widely with some respondents stating that they could always identify certain categories of vulnerable witnesses whilst others were never able to do so. This may be thought of as surprising. After all, defence solicitors have the same tools to work with - a copy complaint/indictment and a witness list. One might have expected a greater degree of homogeneity in the responses to this question.

Respondents were then asked how often they might make special arrangements for witnesses falling into any of these perceived 'vulnerable' categories. For instance, it has been suggested by the Witness Support Services that such witnesses might routinely be offered access to Victim Support or that efforts should be made to carry out precognitions of children during daylight hours. Four said that special arrangements were always made, eight said they were sometimes made and one said that special arrangements were never made.

Respondents were asked about this at interview. One solicitor confirmed that he made no special arrangements when precognoscing children but he did say that the appointment would be made through the child's mother. Other solicitors said that no special arrangements were made but that it would be usual for any child witnesses to be accompanied by an adult during the precognition itself.

Throughout the interviews there appeared to be a tendency among defence solicitors to equate the term 'vulnerable witness' with children. The statutory definition is very

narrow and applies only to children, those subject to an order under mental health legislation and those who appear 'to the court to suffer from significant impairment of intelligence and social functioning' (section 271 of the Criminal Procedure (Scotland) Act 1995 as amended by section 30 of the Crime and Punishment (Scotland) Act 1997). There may be merits in extending this definition for the purposes of taking evidence in court but it is submitted that a more flexible definition might be applied at the precognition stage in any case. In addition, the Witness Support Services at Kirkcaldy and Ayr were at pains to suggest that focusing on children only was both too broad, since some children did not need special arrangements, but also not broad enough, since other categories of witnesses might well require special consideration. One of the Service Co-ordinators argued that many children are not vulnerable and that many vulnerable witnesses are not children. Perhaps the Crown Witness List could specify more clearly those witnesses the Crown considers vulnerable so that special arrangements may be made for their precognition. This is an issue which will be referred to at 6.6 below.

4.7 Instruction of Precognition Agents in Specific Cases

Respondents to the solicitors' questionnaire were asked in what circumstances they might give the precognition agent specific instructions. Generally, instructions are offered in cases of complexity:-

"Generally, where there's a fairly unusual set of circumstances and the accused is making certain claims that don't square with the rest of the evidence of the charges..."

Precognition agents were also asked how often they received specific instructions. One said never, ten sometimes, two often and one very often. Nobody said always. This sets some of the comments made by solicitors at interview in an interesting context. If precognition taking really is as fundamental to the criminal process as some of the solicitors claimed (see 5.21 below) then it might have been expected that precognition agents would have been given specific instructions more often.

Part Two: Taking Precognitions

4.8 Persuading Witnesses to co-operate

Respondents to the precognition agents' questionnaire were asked what they would say to a witness who refused to co-operate. Five options were offered and respondents were asked to tick whichever applied to them. Twelve said to witnesses that their precognition may allow their evidence to be agreed. Twelve indicated that the witnesses' precognition might lead to the accused pleading guilty. These were the two most popular responses. It is interesting to note that they are also the two which offer some perceived benefit to the witness.

Nine referred witnesses to the fact that the Defence do not receive copies of statements given to the police and rely on witnesses giving precognitions. Eight advised witnesses that if they do not give a precognition, they may be precognosced on oath before a sheriff. Three told witnesses that they were under an obligation to give a precognition. This, of course, is technically wrong. (See 1.5 above.) Witnesses are not under any legal obligation to give a precognition. There may be practical and perhaps moral reasons why they should do so but that is all.

4.9 Physical Threats

One of the reasons suggested as to why there are so few female precognition agents is the perception that precognition work can be physically dangerous. (See 3.1 above.) Respondents to the precognition agents' questionnaire were asked how often they felt physically threatened doing precognition work. Ten said that they had never felt threatened by witnesses. Four said that they had felt threatened but only rarely. Nobody put the frequency of physical threat any more highly than 'rarely'. Of the four who said they had felt threatened two said it had happened in the last six months. The other two said that it had happened over a year ago. Nobody said they had ever suffered a physical attack at the hands of a hostile witness. Overall, precognition work appears to be less physically dangerous than might be thought. On the basis of these statistics, it appears to be no more physically threatening than, for example, school teaching which does of course have a high proportion of women in its workforce. However, it should be borne in mind that none of the precognition agents in the questionnaire sample was female. The female precognition agent who was interviewed did not consider that her work was physically dangerous.

4.10 Recording Precognitions

Respondents to the precognition agents' questionnaire were asked how they recorded their precognitions. Two options were open to them - by hand written notes and by tape recorder. Respondents were asked to tick either or both boxes. Thirteen of the respondents said that they used hand written notes. Eleven said they used a tape recorder. Clearly, the majority of respondents used both. Eight said that they typed the precognition themselves. Four used a secretary from their agency. Ten relied on secretarial support from the solicitors' firm which instructed the work. Respondents tended each to use a variety of methods for transcribing interviews.

4.11 Taking Precognitions from Vulnerable Witnesses

Precognition agents struggled when asked what special arrangements they made for witnesses who might be considered vulnerable. It may be that this is not something for which precognition agents can be blamed. Very often precognition agents will not know whether the witness is vulnerable until they arrive at the witness's house. Perhaps even then the vulnerability may be concealed. Many perceived vulnerabilities are invisible - such as learning difficulties or mental health problems. Conceivably, such vulnerabilities could go unnoticed by the precognition agent even after the precognition is completed.

Three of the precognition agents interviewed said that they would not take a precognition from a child unless there was an adult present. Other stories emerged at interview that some precognition agents would deliberately select a time to visit children (say 4.30pm) when they knew that the child would be home from school but the parents would still be at work. All the precognition agents who were asked about this disapproved of this type of practice.

Again, as with solicitors, there was a marked tendency to associate the term 'vulnerable witness' with children. A broader view of the term is taken by the Victim and Witness Support Services. Perhaps solicitors and precognition agents need more information about vulnerable witnesses (see 6.6 below) and perhaps more guidance in how to interview them.

4.12 Comments on the Witness's Credibility and Reliability

Respondents to the precognition agents' questionnaire were asked how often they provided comments on the witness's credibility and reliability. Nobody said never, three said rarely, eight sometimes. Three noted that they often did this, but none of the respondents said that this happened very often. Yet all of the precognition agents interviewed noted that they saw this assessment of the witness as an integral part of the job. As one precognition agent put it:-

"A good precognition will state how good the witness is actually going to be in court. Will they stand up to hard questioning? Or basically will they just look

truthful? Which is sometimes the biggest question of all. If somebody doesn't look truthful, it doesn't matter whether they're telling the truth or not." (P3)

4.13 Difficulties

Respondents to the precognition agents' questionnaire were asked what they found most difficult about their job. The same answers came out time and time again. Six respondents mentioned the difficulty of tracing witnesses. One suggested that the Procurator Fiscal's Office was responsible for this as often the wrong address was given on the Crown Witness List (although it should be pointed out that there are other possible explanations for this, such as the mobility of the witness population). Four mentioned the difficulties they experienced in explaining their role to witnesses. Two said that they had problems with witnesses keeping appointments. One mentioned the pressure of time and the need in summary cases to have all the statements returned to the solicitor in time for the intermediate diet. One said that the biggest difficulty which he found personally was getting paid by the solicitor. (See 5.16 below.)

Part Three: Being Precognosced

4.14 Prior Notice

Respondents to the witnesses' questionnaire were asked if they had received any prior notice that they would be visited by a precognition agent. Six said they had and three said they had not.

4.15 Method of Communication

Although only six of the respondents said that they knew in advance that the precognition agent was coming, seven answered a question about the method of communication used. Only two said they were contacted by letter. Five said they were contacted by telephone.

This is an interesting finding. Responses to the other two questionnaires revealed that it is normal for letters to be sent to witnesses. Although we do not know the name of the defence solicitor in all these cases we do know that three of the four solicitors whom we interviewed represented the accused in cases included in the witness interview sample. Yet only two of nine respondents said that a letter had told them a precognition agent was coming. It is difficult to reconcile these findings. Perhaps the letters are not being read. Perhaps they are not understood. Working with such a small sample makes it difficult to come to any hard conclusions but it would appear that there is a breakdown in communication somewhere along the line. This is perhaps an area which requires further investigation.

4.16 Time of Day

Only one of the respondents was precognosced during the morning. The vast majority (six) were precognosced during the afternoon. One was precognosced in the early evening and one more was precognosced at night. Most of the respondents could not remember the exact time of day. Four did and gave times of 2, 3, 4 and 7 o'clock. Unfortunately, the sample is too small to be statistically significant.

4.17 Location

Two of the respondents were precognosced at home. Six were precognosced at work. One was precognosced by telephone. (See 4.31 below.)

Again, it is not possible to attach much significance to this finding. Many of the respondents to the witnesses' questionnaire were witnesses to a crime which took place at their place of work. Perhaps this explains why only a minority of the respondents in this sample were precognosced at home.

4.18 Choice of Time

Five respondents said that they were given a choice of time. Four said they were not. This contrasts quite sharply with the responses to the other two questionnaires - see 4.3 above.

4.19 Choice of Location

Only three respondents said that they had been offered a choice of location. Five said they had not and one could not remember.

Again, this provides a sharp contrast with the findings reported at 4.3 above. Only two of the respondents were precognosced at home - see 4.3 above - and one of those quite clearly resented it:-

> "I didn't like the fact of letting her into my house when she's representing the person who's like caused all that grief. And then she comes up to the house and she's asking questions about it." (W3)

4.20 Name of Precognition Agent

Six respondents said that they were given the precognition agent's name. Two said that they were not and one could not remember.

4.21 Name of Firm

Four respondents said that they had been told the name of the firm for which the precognition agent worked. Five said that they were not told the name of the firm. Effectively what this means is that the majority of the respondents would not have had anyone to whom a complaint could be addressed if they had concerns about the precognition agent. They could have approached the Procurator Fiscal for help in tracing the solicitor (and we were advised by the Procurator Fiscal's Office that this does happen).

4.22 Showing of Identification

Respondents were asked if the precognition agent had showed them any identification. Nobody said that the precognition agent had done this. Eight said that the precognition agent had not done so. One respondent could not remember. None of the respondents said they had asked the precognition agent for identification. Seven said emphatically that they had not. Two could not remember whether they had asked to see identification or not.

4.23 Explanation of Purpose

Had the precognition agent explained to the respondents the purpose of the interview? Seven said that the precognition agent had indeed done this. One said that the precognition agent had not done so. One could not remember. Respondents were then asked if they understood this explanation. All seven said that they did. This is encouraging to some extent. However, the mere fact that most of the witnesses said that they understood the explanation leads on to another question - namely, what was their understanding of that explanation? When the questionnaire was being designed it was decided that many respondents might regard that question as difficult to answer and so it was not included.

4.24 Subjective Impressions

Perhaps the most interesting question in the witnesses' questionnaire was one which called for witnesses to give their subjective impressions of the precognition agent who visited them. In asking this question conventional research methodology was being turned on its head. Most research methodologists argue that a questionnaire is not the best means of collecting subjective material. That is best left for interviews. It is often argued that questionnaires should be restricted to the collection of objective data.

Nevertheless, a decision was made to include in the witnesses' questionnaire what was essentially a subjective question. Respondents were asked to provide three words or phrases to describe the precognition agent. The responses from the six who completed this question were interesting:-

> "Remote...Vague... Boring..."

> "Not too worried..."

"Smartly dressed... Stuck with words I used... Business like..."

"Aggressive... Annoyed... Pseudo Official Type..."

"Very pleasant and helpful..."

"Matter of fact... Indifferent... Not forthcoming..."

In such a small sample, it is difficult to identify any particular trend. It is, however, interesting to note that only one of these comments could be described as positive and this came from a professional witness who was used to dealing with precognition agents. Two of these responses might be described as neutral. When these respondents were questioned about their answers, one had plenty of negative things to say about the precognition agent. The other was a witness to uncontroversial evidence and seemed quite bemused by the whole process. The remaining comments could all be described as negative.

Of course, it may be observed that giving a precognition can never be a particularly pleasant experience and that little can be concluded from a snapshot question like this. However, it is surely at least arguable that there are flaws in the precognition process when this level of negative reaction is being generated.

4.25 Willingness to provide statements

Respondents were asked whether they were willing to provide a statement; or whether they were reluctant to provide a statement at first but were then persuaded to do so; or whether they refused to provide a statement. Eight said that they provided their statement willingly. One noted that she had refused to provide a statement. She was approached at interview stage and asked why she had not co-operated. She said that she had been precognosced several times before and had developed a dislike of precognition agents:-

"It's just the way they come across. They make it sound as if they're some court official. I know they're not but that's how they come across. I don't know. They just get me angry. They ask all these questions and I'm like – 'Why should I tell you?' " (W7)

4.26 Presence of friend or relative during the interview

Only one of the respondents had a friend or relative present during the interview. This respondent was a fourteen year old girl who had witnessed a physical assault. The remaining seven respondents who provided a statement did so alone. When these respondents were asked if they would have liked to have had someone else sit with them during the interview, all of them said that they would not.

Again, it is difficult to know what to draw from this. A large proportion of the respondents to this questionnaire were giving uncontroversial evidence about crimes which they had seen committed at work. None of the respondents were complainers. Two might be described as professional witnesses. Perhaps these factors explain why there was no clamour from these respondents to have someone with them during the precognition. It is difficult to say.

It is interesting to note that none of these respondents wanted a friend or relative present during the interview. Conceivably, there could be situations where a witness positively wants to be alone when giving a precognition: for example, where the witness's evidence might disclose immoral or embarrassing conduct. There was no suggestion that these factors played a part here. However, it might be that arranging to have friends or relatives sit with witnesses during their precognitions may not be the positive step forward that one might suppose it to be. It may simply be something which witnesses are perceived to want rather than something they actually want. This point would need to be investigated more thoroughly and the witness sample would need to include victims before any firm conclusions could be drawn.

4.27 Duration of the interview

Four respondents said that the interview lasted less than 10 minutes. Five said that it took between 10 and 30 minutes. Nobody said the interview took any more than 30 minutes.

4.28 Manner of the Precognition Agent

Some of the respondents used their interviews to comment on the precognition agent's manner:-

> "I don't know, it was a funny feeling... you know, as if he didn't want to speak to me. As if he was bored with it and was just, you know, rushing it through. It was just like he wasn't interested." (W6)

> "I just thought that he was distant, quite cold and calculated about the whole thing. Not very personal anyway. I felt very much on my guard. I felt that I was on trial more than anything else." (W1)

4.29 Perceptions of the Precognition Agent's Role

Respondents were asked at what stage they found out that the precognition agent was working for the accused. Three said they knew before the interview started. Four said they found out during the course of the interview. One indicated that he never found out. (There was one non-response to this question.)

4.30 Perceptions of the Process

Respondents were asked how they felt when the precognition agent left. Reactions from the seven who replied to this question ranged from the nondescript to the confused and even annoyed:-

"Alright."

"What a waste of time."

"Okay."

"So So."

"Slightly confused if I had remembered my evidence correctly."

"Worried that I had remembered facts correctly... Unsure what use would be made of what I had said."

"Pissed off that she was coming to my house using my time to defend him."

At interview, respondents had the opportunity to expand on their thoughts:-

> "I didn't really know what [the precognition agent's] role was. I mean, I classify myself as a fairly intelligent person, I have a degree and things like that but to be honest with you, I would have thought that he was along to assist with the prosecution. I responded to [the questionnaire] because I though that whatever comments I made would hopefully help other people because I certainly felt that I wasn't aware of all the facts I should have been. Say like an elderly person or someone with learning difficulties, they really could be just kicked around the park." (W1)

> "If you're not sure about one point, they kind of have to stress you to get it out. You're like - 'Well, I don't really remember but I think...' And she's like - 'You *think* you seen a knife... you sure it was a knife?' And she kind of like puts words in your mouth. It's confusing. Sometimes I just thought she was trying so hard to get my statement down, she wasn't really listening to what I was saying... I think she'd had a meeting with [the accused] before it... It's like she knew the story already and when she heard mine, she just kept clicking back to the old story. So I just had to keep putting her right." (W3)

Another respondent, a till point assistant who witnessed a cheque fraud, referred to the length of the time between the alleged crime and the precognition:-

"It's ages before they come round to ask you anything... we get that many things going on here, you tend to forget what was happening." (W4)

4.31 Telephone Precognitions

One of the respondents gave her precognition over the telephone - see 4.4 above. She said that this did not present a problem.

One of the other respondents had been through the precognition process several times and recalled one occasion where she had given her statement over the telephone:-

> "I wouldn't do that again. I couldn't express myself. It's better if you meet a person." (W3)

4.32 Giving witnesses more information

Respondents were asked if they would have liked more information about the precognition process. Of the eight who answered this question five said that they would and three said that they would not. This is an issue which we shall be considering in greater detail at 5.15 and 6.7 below.

CHAPTER FIVE: POLICY ISSUES

This chapter looks at some of the broader policy issues. It is in six parts.

The first part concerns the vetting and training of precognition agents. Consideration is given to whether there are any gaps in relation to these areas and if so what should be done to improve matters.

The second part looks at the information which the Crown makes available to the Defence in criminal cases. In particular, it considers whether there should be disclosure in criminal cases, perhaps along the lines of the approach adopted in England and Wales. Consideration is also given to the Crown Witness List. Should it contain more information? If so, what else should be included?

The third part looks at the way in which precognitions are arranged. Could improvements be made in this area? In particular, can anything be done to provide better protection to those witnesses who might be considered vulnerable?

The fourth part considers the treatment of witnesses by the precognition process. How well are witnesses treated? Is there anything which could be done to improve their treatment?

The fifth part looks at financial issues. There are two issues under discussion here: first, the payment of precognition agents and secondly, the funding of the precognition process as a whole.

The sixth part considers the overall regulation of the precognition process. What rules govern the process at present? Is there any scope for change?

Part One: The Regulation of Precognition Agents

5.1 The Vetting of Precognition Agents

The vetting of precognition agents was discussed at 3.10 where it was shown that most of the respondents to the solicitors' questionnaire employed no formal vetting procedures. An informal word of mouth recommendation was the normal method of assessing a precognition agent's suitability and competence. The observation was made by two precognition agents that this left the system open to abuse. It would be possible, for example, for young child witnesses to be left alone with convicted child sex offenders. Precognition agents are put in positions of considerable trust. They go into people's homes, often to ask deeply sensitive and highly personal questions.

Perhaps one way of helping to rectify this situation would be to set up a national register of precognition agents. This would allow for proper screening and disciplining of precognition agents.

The lack of any formal vetting procedures was put to the Scottish Legal Aid Board. Does it concern them?

"I think it concerns us in a general sense. The trouble is we have no real locus in order to control it."

5.2 The Training of Precognition Agents

Respondents to the precognition agents' questionnaire who said that they had received some form of training were asked to say how good they thought their training was.

The overwhelming majority of the respondents to the precognition agents' questionnaire thought that their training had been "useful". These respondents included one who had attended a formal course in precognition work and six others who had accompanied other precognition agents on visits to witnesses.

Only one said he thought his training had been "very useful". Closer examination of this respondent's questionnaire puts that answer in perspective. This respondent, like many of the others, was a former police officer who had retired at the rank of sergeant. Unlike most of the respondents, he was actually employed directly by a firm of solicitors and not contracted as an agent. When this respondent was asked if he would like more training his reply was that he would not and, unprompted, he added a written comment that he thought his police training had been adequate. When asked about the training which he had received as a precognition agent (as opposed to a police officer), it was not particularly extensive. The respondent's training in this regard amounted to informal discussion with a solicitor and familiarisation with the content of precognitions. Nobody said that their training had not been useful.

It is worthwhile taking a little time to consider the implications of this. What does this result actually mean?

What it means is that these respondents thought that they had benefited from their training. That seems clear. They would have rather have had this training than have done without. Moreover, the respondents who took this option include some former police officers with over 20 years of experience in taking statements. Set in this context, this finding is quite a remarkable one.

It is also instructive to consider for a moment what the overwhelming majority did not say. They did not say that their training had been "very useful". It was only useful. This can, of course, be interpreted in a variety of ways. It may be, for instance, that most precognition agents, particularly ex-police officers, consider that they do not need further training since their previous employment has equipped them satisfactorily for the job. However, neither in interview nor at the preliminary stage of the research did the majority express satisfaction with the current training arrangements for precognition agents. This does seem to suggest - it can be put no more strongly at this stage - that there is something lacking or inadequate about the way in which precognition agents are trained. At the very least it appears that there is room for improvement.

5.3 Would precognition agents benefit from more training?

Respondents to the solicitors' questionnaire were asked if they thought there was a need for precognition agents to receive more training. Five said that there was. Six said there was not. (There were two solicitors who did not answer this question.)

When asked in which areas more training was required, three respondents considered that precognition agents needed to know more about legal points and about dealing with difficult and vulnerable witnesses. Two thought their precognition agents needed more training in obtaining all the relevant information. Respondents were then asked whether they thought their firm would be willing to be pay for additional training. Only one said he thought his firm would be willing to pay for more training. Four felt that their firm would not be willing. The unwillingness of solicitors to fund more training in precognition work is interesting. It might appear to demonstrate a reluctance to invest in a process which provides solicitors with a not insubstantial part of their income. Many solicitors argue that precognitions are a vital safeguard for people accused of crimes. They say that the quality of precognition-taking has a direct impact on their ability to provide a high standard of legal representation to their clients. That argument must be weakened somewhat if solicitors are not willing to invest in improving the process of precognition-taking.

It is interesting to compare the views of solicitors with those of precognition agents. Eight of the respondents to the precognition agents' questionnaire said that they thought they would benefit from more training. Six said that they would not. When those in favour of more training were asked to state in which areas, five noted they wanted to know more about dealing with vulnerable witnesses. Four wanted to know more about obtaining all the relevant information. This is interesting. While there is no discredit to the precognition agents who selected this option, their answer suggests that perhaps precognition agents are not always successful at obtaining all the relevant information. The risk of course here is that the solicitor may not always have all the information upon which to give the accused client full advice. Two solicitors who were interviewed drew our attention to this difficulty and both were very critical of the poor quality of some precognitions, which were based on an inadequate understanding of the accused's case and a failure to explore potential lines of defence in precognoscing Prosecution witnesses. This raises the spectre of wrong plea decisions being tendered and possibly an erroneous Defence strategy being adopted. The risk of wrongful convictions should be all too apparent. Four of the respondents wanted to know more about dealing with difficult witnesses. It is somewhat reassuring to note that a higher number of respondents thought that dealing with vulnerable witnesses was a matter of concern. Three of the respondents wanted to know more about legal points, perhaps in order to avoid lengthy legal briefings from the instructing solicitor. Perhaps this is also a recognition that such briefings are rarely given.

Respondents to the precognition agents' questionnaire were then asked if they thought the firms for which they worked would be willing to pay for any additional training. Of the nine respondents who answered this question two thought the firm would pay for more training. Four believed the firm would not and three said they did not know.

These precognition agents were then asked if they would be willing to pay for such additional training themselves. Four said that they would and five indicated that they would not. One might have expected that the majority would be against the idea of self-funding especially bearing in mind that there would be no obvious financial benefit to the respondents from receiving such additional training. Most professionals who undertake training courses designed to further their continuing professional development do not have to pay the course fees themselves since the costs are usually met by their employers or borne by the partnership. This subsidising of training not only encourages professionals to undertake additional training but also underlines the value which their employer or firm places on such training.

What is interesting about this finding is the size of the minority vote. Of the eight respondents who recognise a need for more training, four would be willing to fund it themselves. It will be recalled that in the solicitors' questionnaire only one respondent said that his firm would be willing to fund any additional training for precognition agents. The reluctance of solicitors to invest in training precognition agents is interesting bearing in mind their general attitudes towards the precognition process - see 5.17 below. It is also interesting in the sense that solicitors generally make a substantial, steady and safe profit out of the precognition process. Roughly a quarter of the fee income their firms receive is derived from precognition work. This figure is in the region of £20-27 million a year, according to the Scottish Legal Aid Board. In other businesses an investment in training would probably be an essential part of income generation at this level.

Our research findings suggest that precognition agents are usually self-employed and therefore have no job security, that they are not well paid and that the income they derive from precognition work may be variable and uncertain. Not surprisingly (given the professional status of the profession) this contrasts with the position of most solicitors who are almost invariably partners or employees of a business, who can usually expect to earn considerably above the national average and who, notwithstanding the highly competitive nature of legal work today, can normally anticipate continuing remuneration until retirement.

At interview, precognition agents were able to expand on their thoughts regarding training:-

"I think there is a definite need in training because people doing precognitions are just sent out. They're given half a dozen people to go and see, they're given half a dozen statements of other people and told:- 'This is the format... Go and find out'." (P7)

5.4 Should there be a system of compulsory training for precognition agents?

Respondents to the solicitors' questionnaires were asked if there should be a system of compulsory training for precognition agents. Clearly this question is closely linked with the question of whether precognition agents should be accredited. Out of the solicitors five said that precognition agents should receive compulsory training. Eight

said that they should not. This result was broadly consistent with the response made by precognition agents to the question whether they needed more training - see 5.2 above.

5.5 Should precognition agents be accredited?

The issue of the accreditation of precognition agents is closely linked with the question of whether they should receive compulsory training - see 5.4 above. Seven respondents to the solicitors' questionnaire thought that precognition agents should be accredited. Six said they should not. Interestingly, this result does differ significantly from the training question. A bare majority of solicitor respondents were in favour of precognition agents being accredited but a larger number were against the idea of compulsory training. In practical terms, the two initiatives would probably be combined. New precognition agents might then be required to undertake a period of training leading to some sort of accreditation after they had reached the required standard.

The precognition agents' questionnaire produced a more commanding majority in favour of some kind of accreditation. The question was phrased slightly differently though essentially it was about the same issue. In the precognition agents' questionnaire the question was phrased in these terms - Should precognition agents be required to meet a certain standard of competence before being allowed to operate?

Thirteen of the respondents thought that they should. Only one thought that they should not. This is interesting. Echoing some of the other sentiments contained in this questionnaire and also obtained from interview data, there is strong evidence that most precognition agents support moves towards achieving better standards. Perhaps this desire for better standards even extends to keeping incompetent precognition agents out of their profession, as the response to this question might be thought to imply.

The Scottish Legal Aid Board is also in favour of accreditation:-

"Well, ideally, yes. If you're going to have a register of precognition agents, I think part of the requirement for getting on that register would be to meet a certain standard. I mean, in general terms, the Board with its code of practice for civil practitioners is keen to have anyone working within the system meeting at least a certain level of quality standards. There's no reason why that shouldn't apply - and indeed every reason why that should apply - to precognition agents as well as to everyone else."

5.6 Should all precognition agents belong to a national body regulating their conduct?

Five of the respondents to the solicitors' questionnaire thought that there should be such a body. Eight thought that there should not. Interestingly, the same question put to precognition agents produced a different result. Ten of the respondents said there should be a national regulatory body. Only four were against the idea. So it would

appear that precognition agents do want the discipline and regulation of their conduct which a national body would impose. Perhaps they might also wish to have recourse to a national organisation in the event of disputes with solicitors over, for instance, pay and conditions. A clear majority of respondents to the two questionnaires thought of this idea as an opportunity and not a threat.

This came from a solicitor:-

"I suppose that in any well-ordered legal system... I suppose that the conclusion is inescapable that there should be some system of control and discipline for precognition agents."

Quite independently, this came from one of the precognition agents at his firm:-

"I definitely think that there is a need, I mean, a great need, for some control over the precognitions agents. Without doubt, there is a need."

The Scottish Legal Aid Board agrees:-

"I think there is certainly a strong argument for having some sort of regulation, some control, getting them to work to a uniform code of practice."

Part Two: The Provision of Information by the Crown

5.7 Should the Crown Witness List provide more information about witnesses?

This question produced one of the most commanding majorities in the solicitors' questionnaires. Eleven of the respondents thought that the Crown Witness List should contain more information. Only two thought that it should not. The precognition agents' questionnaire also produced a fairly clear majority in favour of a more detailed Crown Witness List. Nine respondents said it should contain more information as opposed to only five who said it should not. Most of the precognition agents who came to interview thought that the Crown Witness List should at least include telephone numbers:-

"In an ideal world, there's a lot of things you could ask for but at a practical level, just having the phone number would be one big head start." (P1)

At interview most of the solicitors had fairly clear ideas as to how they would go about improving the Crown Witness List:-

"It would be useful to have the telephone numbers. And it would be useful for the witnesses not to hide behind Tayside Police as a 'care of' address. I do understand the reasoning. It's an attempt to protect people from the accused. But I think that it's kind of demeaning to the witnesses from the accused because I think most of us know that you do not give addresses out to clients. All it does is create a bigger workload. Not only for us but also for the police." (S2)

> "I think the Crown Witness List should contain more information, yes. Because in multiple accused cases, you can't tell. We don't want to precognosce everybody and get loads of statements who have nothing to do with us..." (S3)

One solicitor suggested that in an ideal world the Procurator Fiscal's Office could say briefly what each witness is speaking to and offer any non-contentious material to be admitted in a joint minute of admissions. This, he suggested, would simplify matters, reducing both the need for witnesses to attend court and court time. In response to this suggestion, this solicitor was asked whether, in his view, the Procurator Fiscal's Office was sufficiently well staffed to do that:-

"Definitely is not. Definitely is not. It's not adequately manned to do the court work that they're asked to do. I know all the individuals are all over-worked..." (S2)

Other defence solicitors echoed this sentiment:-

"The problem is you never get a fiscal. They're never there. I suspect that they're grossly overworked. It's the people who do all the statistics that get all the promotions and then you've got the trial lawyers. And the trial lawyers are at court all day until 4.30pm. So when are you going to get them?" (S1)

5.8 Should copies of civilian witness statements taken by the police be made available to the Defence as of right?

The respondents to the solicitors' questionnaire were mostly in favour of this idea. Eleven thought the civilian witness statements should be made available to the Defence. Two considered they should not. If such an idea were to be implemented this would mean that the Scottish system would be brought more closely in line with the system operating in England and Wales.

Of course, one of the implications of having disclosure is that it would remove or at least reduce the need to take precognitions, with the advantages of saving money as well as time and inconvenience to witnesses. This point was picked up by one of the witnesses at interview. Only fourteen years old and knowing nothing about the English disclosure system, she asked the following question which was quite unprompted:-

"See when you go down to the PF's Office and you have to give him a statement, how does he not just photocopy that statement and give it to the lawyer? It would save loads of stress and loads of time. I think that would be a lot easier... I don't understand why they're not doing it though." (W3)

The Scottish Legal Aid Board is also in favour of bringing in some kind of disclosure regime. In public statements it has given support to the idea of following the English example where the Crown is obliged to disclose its case to the Defence. Why does the Scottish Legal Aid Board favour the release of civilian witness statements?

> "Well, because it enables the Defence to prepare the case earlier - provided the Crown disclosure comes at an early stage. And it could cut out unnecessary work by the Defence, not least in terms of precognoscing witnesses. That's not to say that the Defence shouldn't have the right where they feel it necessary in an individual case to precognosce even though they have the details of the Crown precognitions."

5.9 Should the Crown present the Defence with a summary of its case?

Many of the solicitors interviewed thought so:-

"I'd be happier with a Crown summary. The Crown witness statements are never accurate. What should happen if they really want the thing to work right is that you should get a police summary. Now a police summary says:- 'There are three witnesses, this isn't a self defence case, the guy he never done it an there's three people saying they can identify'. Then all you need to do is toddle out to these witness and say:- 'Can you identify? How can you identify?'... Instead we're going out and saying:- 'Now tell me what happened.' We need a much quicker system of justice. What they should start off with is a summary because that way you may not need to take a precognition." (S1)

The Scottish Legal Aid Board agrees.

"Yes, a summary of the evidence would be ideal. It would focus defence agents' minds on what each witness's involvement was. It would also help us when we came to scrutinise the accounts."

Part Three: Arranging Precognitions

5.10 The decision on which witnesses to precognosce

We saw at 4.2 that a substantial number of respondents to the solicitors' questionnaire said that they always precognosced every civilian witness on the Crown Witness List. Why is this? A number of reasons may be suggested. One must simply be a natural desire to prepare for the trial as thoroughly as possible. Even if a witness's evidence turns out to be irrelevant solicitors will not know this for certain until the witness has been precognosced. Another reason might be fear of rendering the client an inadequate professional service. Perhaps some solicitors even fear having a negligence action brought against them. Whether such an action would succeed is highly questionable. Court practitioners are generally protected by a professional immunity which covers the presentation of a case in court and any work 'intimately connected' with it. It is at least arguable that deciding which witnesses to precognosce is 'intimately connected' with the presentation of the case and so would fall within the general professional immunity. Others may argue that precognition work should be seen as preparation work which is not 'intimately connected' with presentation and falls outwith the protective scope of the immunity. Given this doubt, solicitors may be justified in erring on the side of caution. Another factor contributing to the practice of precognoscing everyone may simply be economic pressure to maximise the claim to the Scottish Legal Aid Board so that more income is generated therefrom.

One solicitor, who said that he normally precognosced all the civilian witnesses, provided this explanation:-

"Say you have a drugs case. I wouldn't necessarily precognosce the forensic expert who's had a look at the cannabis plant. But I would precognosce every civilian because we don't know what their evidence is. We can guess... but you guess at your peril." (S2)

The Scottish Legal Aid Board take a different view of this kind of 'blanket' precognition taking:-

"It does seem unnecessary - or likely to be unnecessary - in a lot of cases. I mean, the skill of an experienced defence agent is to know who the key witnesses are and who should be precognosced. I mean, not just a scatter gun approach precognoscing everyone within twenty miles of the scene of the crime..."

5.11 Identifying Vulnerable Witnesses

The responses to the solicitors' questionnaire revealed that solicitors are only rarely in a position to identify witnesses who might be considered vulnerable. It might be argued that the Crown Witness List should specify which witnesses are vulnerable so that the Defence may make special arrangements to have them precognosced. This issue shall be looked at again at 6.6 below.

5.12 Should witnesses be given the opportunity to write their own statements?

At interview, one witness expressed the view that witnesses should be given the opportunity to write their own statements. The idea was that these statements could be kept to refresh the witness's memory.

The witness put her idea in the following terms:-

"I think what they should do is that if anything happens, anything, 'cause like I'm involved in that much, I've got that many different friends and there's always something going on and I always seem to get caught up in it. So as soon as the police are involved, I think they should make you write a statement for yourself and say - 'Just keep that just in case... because it's probably going to get you out of trouble one day...' 'Cause like you go to court and you're talking but it's not your words coming out, it's that person who represents other people... the defence lawyer..." (W3)

Part Four: The Treatment of Witnesses

5.13 Precognoscing Vulnerable Witnesses

Eight of the respondents to the precognition agents' questionnaire thought that there was a need for more training. Over half this number wanted more training in how to deal with vulnerable witnesses.

One of the precognition agents who agreed to be interviewed took a special interest in precognoscing children. She explained the special arrangements which she made for children:-

> "I think that we've got to remember that a child is not a mini-adult. Every child is completely different. Children can be worlds apart. You can have two children of the same age and they can be worlds apart in terms of maturity. So with children you've really got to sit down and chat with them, try to identify the level of their vocabulary. What I try to do is just write down as much as I can as I go along. I try to keep the conversation going at all times because if you say to a child - 'Just wait a minute till I write this down' then you have lost the flow and the child has probably forgotten what he or she was going to say." (P5)

5.14 Feedback from Witnesses who have been precognosced

Many witnesses are reluctant about giving precognitions. Most of the solicitors sympathised with this concern:-

> "Bear in mind that this is them, as they see it, actively helping the person to get off with dealing them a great injury. The psychology of that is wrong I think." (S2)

> "Sometimes they phone up and say 'I don't want to give a statement' because they take the view that they'll be helping the Defence and they think that someone is going to pull a fast one on them like L.A. Law. I usually speak to them and just explain to them how things work." (S3)

5.15 Should witnesses be given more information beforehand about being precognosced?

In a recent development it is intended that complainers and witnesses should routinely be given a leaflet by the police entitled:- *Reporting a Crime - A Guide to Witnesses*. However, these arrangements were not in force at the time when the fieldwork for this research was conducted, although discussions had been taking place for a number of years about the form which such information should take. At the time when this research was carried out, therefore, witnesses received no information routinely from either the police or the Procurator Fiscal until they were served with a witness citation. They could, of course, request information but this position was increasingly regarded

as unsatisfactory and led to the introduction of the leaflet by all police forces in August 1998. The leaflet notes that:

> "[t]he Procurator Fiscal and the accused person's solicitor may need to talk to you in more detail about your evidence. This interview is called a **precognition**. This helps the case to progress more smoothly and avoid delays."

Those solicitors from whom we obtained information were clearly concerned about this matter. The question about the provision of information to witnesses produced the clearest majority of all the policy questions in the solicitors' questionnaire. Twelve of the respondents were in favour of witnesses being given more information. Only one was against the idea. Interestingly, the precognition agents' questionnaire produced a response which, while still commandingly in favour of witnesses having more information, was less clear-cut. Ten of the respondents thought that witnesses should be given more information but three did not and one failed to answer. That being said, if these two results are taken together they clearly show a desire on the part of the solicitors and precognition agents for witnesses to know more about the process in which they have been invited to take part. The fact that a majority of solicitors and precognition agents do not regard the provision of more information to witnesses as a threat to them could be regarded as a positive sign of their commitment to improving the position for such witnesses.

At interview, some thoughtful comments emerged as to the practical difficulties which might arise. This account came from a student precognition agent:-

"I think I would probably look for some way to impress upon the witness being precognosced the importance of what's happening. I'm not sure how I could do that. I think it would have to come from some third party source, maybe a letter from the Fiscal. But I think that sometimes you're dealing with people who have scant regard for the law because of what's gone on before. So maybe there's nothing you're going to do in that instance which is going to turn round a lifetime's worth of their attitudes and prejudices. I dare say some of the people I deal with have had more precognition agents in their house than I could count." (P1)

Interestingly, when the same question was put to witnesses - 'Would you have liked more information about what the precognition agent was there to do?' - the majority was less pronounced. Five respondents said that they would like more information, three said they would not and one did not answer. That being said, it emerged at interview that the majority of the respondents had, in fact, been precognosced before so it is possible that this result is not representative. When asked who should provide this information, two thought it should be the police. One said it should be the precognition agent. Four felt that it should be the Procurator Fiscal's Office. Two said they did not know. When asked how such information should be provided one said it should be provided on the spot by the precognition agent, two thought it should be by letter and four by means of an information leaflet. One said it should be by telephone. None of the questionnaire responses suggested any other method. Summarising these results, it would appear that most respondents wanted more information and the favoured method of delivering this information would be by means

of an information leaflet from the Procurator Fiscal's Office. One witness who was interviewed thought that the information should be provided from some official body such as the Scottish Office, taking the view that even the Procurator Fiscal's Office would lack the necessary independence:-

"I think that the information should be provided by as independent a source as possible. So, in other words, the defence lawyer is there with an axe to grind. So, now I know, is the precognition agent. So is the Procurator Fiscal's Office. So I think it has to be as independent as possible." (W1)

Part Five: Financial Issues

5.16 Payment of Precognition Agents

Six of the respondents to the solicitors' questionnaire revealed that their precognition agents are paid by hourly fee. The size of this hourly fee varied but was usually in the region of £8.00 per hour. Solicitors in turn claim £21.00 from the Legal Aid Board for precognition work.

Clearly solicitors who value the precognition as an important part of case preparation may need to spend time preparing precognition agents to take precognitions and will always read each precognition, weighing up its contribution to the client's case. Several of our interviewees noted that this time is not itemised separately on the legal aid account. Nevertheless, concern has been expressed about the extent to which solicitors draw on precognition work as a means of augmenting their income rather than as an essential prerequisite for the satisfactory preparation of a case. It is argued that the precognition process represents a very accessible source of income for solicitors and one which is open to possible abuse by unscrupulous members of the profession. Inevitably this carries with it the issue of accountability for public funds and the importance of ensuring value for money in publicly funded services.

This is an issue which divided the precognition agents who agreed to be interviewed. Most of the precognition agents focused on the first part of this issue, the question of whether or not they are fairly paid for the work which they do:-

"I'm quite happy with the situation. I know that others consider it a bit low. But then again, I've got a pension and everything else. So I'm not poor...(laughs)... but that's perhaps not the right ay of approaching it because of course the pension is something that I contribute to. There's no reason why you should take a lower rate of pay just because of that." (P2)

> "For the position I'm in, I think I'm fairly paid. But I want to get to know people within the profession and as a student I'm not paying any taxes. So I'm quite happy but if I were a family man I might not be so happy." (P1)

> "I think that precognition agents are more than fairly paid. If someone is really good at it, they could earn a lot of money." (P3)

5.17 The funding of the precognition process

The funding of the precognition process is probably the most controversial political question raised in this research. Most people are aware that the Legal Aid Budget is continuing to rise. Criminal Legal Aid in Scotland now costs just over £80 million per year. About a quarter of that figure is spent on the precognition process. Clearly the precognition process represents a major component of the Legal Aid budget and the question has been raised as to whether the Scottish system offers value for money.

Some argue that solicitors' accounts are not being subjected to adequate scrutiny and that the system is being abused.

The Scottish Legal Aid Board has now become used to dealing with questions of this kind:-

"We are quite aware that precognition agents charge less [than the fee which the Board pays out to solicitors]... But the fee which we pay to the solicitor covers the perusal of the statement that the precognition agent has taken plus all the administration involved with instructing the precognition agent, giving them full instruction, who they should be precognoscing and any particular angles they want to get from that witness. And also it covers the thought process because obviously the defence solicitor has to think about how the statement relates in terms of the defence of the case itself."

But does this picture represent the reality of precognition work? The research findings indicate that most precognition agents receive little if any instruction from solicitors. Moreover, informal inquiries suggest that solicitors spend less time perusing the precognitions than might be expected. One precognition agent said that in many cases the solicitors will not even read the precognitions. He explained that solicitors are often too busy with other cases and often take the view that the precognitions are superfluous because the case is unlikely to proceed to trial anyway. How would the Board respond to that?

"That's something we would never know about - whether they had read it or not. But it should be within their professional responsibilities. They should make sure that they are properly prepared for the case which should really cover reading the precognition."

One of the solicitors interviewed was asked what he wanted from a precognition. His answer was:-

"I want a statement I can charge the Legal Aid Fund for... I disagree with it, I totally disagree with it but that's the kind of bureaucratic mess we're in just now." (S1)

This comment was put to the Scottish Legal Aid Board. The solicitor who made this comment did, of course, remain anonymous:-

"Well, let me say that a move to fixed fees would eradicate some of the abuse that that solicitor seems to be articulating. No. I don't think we are in a bureaucratic mess at all. I think we are in a situation where certain solicitors will abuse the taking of precognitions for their own financial benefit. It's a minority who are really abusing it but the temptation must be there."

The question which inevitably arises is whether the public cost of precognitions is too high. The Scottish Legal Aid Board thinks that that question has to be seen in the broader context of the Criminal Legal Aid Budget:-

"The cost of Criminal Legal Aid is too high and as precognitions form part of that, the answer must be yes. But I wouldn't like to say that the cost of precognitions is too high. The overall cost is too high and there should be better control of it."

When pressed on the issue of who should exercise that control, the Board's response is that it is for Government to see the level of Legal Aid fees through Parliament. The Board's role is purely advisory.

Part Six: The Regulation of the Precognition Process

5.18 Should the Defence have an enforceable right to take statements from witnesses?

Ten of the respondents to the solicitors' questionnaire thought that the Defence should have such a right. Only three said it should not.

Interestingly, the question evenly split the respondents to the precognition agents' questionnaire. Seven of the respondents thought that the Defence should have such a right. Seven thought it should not.

The precognition agents who agreed to be interviewed were asked about this point:-

> "I don't like the idea, no.... because you're very often dealing with people who have been through a very traumatic experience." (P2)

> "I think I said 'no' [in the questionnaire] but more for sort of practical reasons. I think that if the person doesn't want to talk, the value of what you're going to get becomes very limited. And the reason for people not wanting to talk that I've found personally is because they've got something which they don't want to hear. And that's maybe a bit of a tautology. But if they don't want to give it, then I would rather they were made to give it in a different arena so that the information comes out. That's better than me getting a watered down version of it or just an untruth as to what the situation was. I think the position as it stands is quite effective… On the other hand it can be very expensive if witnesses are refusing to comment after you've made efforts to track them down. And, I mean, the Legal Aid Board still pay for that time and effort even though there's no statement. So I can see that from a practical point of view, if the Defence had this enforceable right, at least you're going to get something and that's perhaps worth something. But then again in terms of the interests of justice, if you're only going to get a half-baked, watered down version, I don't really know if that's worth saving, sort of, twenty quid in petrol for." (P1)

The Scottish Legal Aid Board also took the view that giving the Defence an enforceable right to take statements from witnesses would not necessarily improve matters:-

> "I think that the present system where [defence solicitors] can go to the court and have the witnesses precognosced is probably the best."

5.19 Should defence solicitors be allowed to refer witnesses to their precognition during the course of a trial?

Eight of the respondents to the solicitors' questionnaire thought that the Defence should have such a right. Five thought that the Defence should not have such a right.

Most of the solicitors interviewed were in favour of the *status quo*:-

"No, I wouldn't be in favour of changing that rule. You don't have the quality of person doing it, you don't have the recording circumstances and it's completely against the trend of what we're doing." (S1)

Respondents to the precognition agents' questionnaire were asked to envisage a situation where solicitors were allowed to put questions to witnesses based on the content of their precognitions. Respondents were asked whether this would make any difference to how they did their jobs. Eight said that it would and six said that it would not.

5.20 Should witnesses be paid to come to the solicitors' office in order to give their precognitions?

This question was not referred to in the questionnaires but the issue came up repeatedly at interview. The best exposition of how the idea might work in practice came from a student precognition agent:-

"You could pay people for their time to give a statement rather than have SLAB pay £22 for you to go. If you paid the witness a fiver for coming in and giving a statement then I think you would find that a lot of these meddlesome, troublesome witnesses that don't want to talk to you would be at your door at five past nine quite happily. The amount of money SLAB was paying out would come down because you wouldn't be chasing folk. You then get into the issue that you're paying someone for what they saw. It's almost like buying the statement. For £15, they give you something. For £20, their account of the event would be completely different. But I don't think it would have to be like that. It's no different from having a juror turning up and giving of his time." (P1)

Other precognition agents agreed.

"We pay witnesses for going to court so there's absolutely no reason why you shouldn't pay witnesses for giving statements." (P3)

One point to make here is the observation that jurors and witnesses are paid expenses only for coming to court. They are not remunerated in any other sense.

5.21 How important are precognitions to the criminal justice process generally?

In the solicitors' questionnaire respondents were asked to rank the importance of the precognition in relation to various aspects of criminal defence work. The aspects listed were - clarifying the accused's position; helping the client decide his or her plea; formulating the overall Defence strategy; plea negotiation; preparing the case for trial; conducting the trial; and formulating pleas in mitigation.

The responses varied more widely than might have been expected but two clear leaders emerged. The respondents thought that precognitions were most important in terms of preparing a case for trial and in conducting the trial itself. The importance of precognitions in relation to plea negotiation and mitigation was also noted.

At interview other beneficial aspects of precognitions emerged. One solicitor mentioned their role in challenging police valuations of damage:-

"Precognitions have an important role to play. I think the information they provide helps. It clarifies the position as far as preparation is concerned, and it's good for trials, it's good for pleas in mitigation. Because often you find that the police statements bear no relation to what we get. I don't know why but the police don't do as thorough a job as they should. Even like valuations for damage. The police valuations are always out. Always. I've never found them to be accurate. They seem to just pick a number out of the air and bung it in their statement." (S3)

All the solicitors who came to interview were asked how they would respond to the hypothetical situation of the Government announcing it was going to stop funding the precognition process altogether. Interestingly, only one of the respondents regarded this situation as a threat to his firm's income. Other solicitors responded with an eloquent and thoughtful defence of the Scottish precognition process. It was, they said, a system which should be defended: not in the interests of maintaining their fees from the Legal Aid Board but in the wider interests of justice.

"I think that if they [the Government] did that, they would be doing every accused a gross injustice. And I think that the justice system would just become a complete farce. They would actually lose out in the long run because every trial would last forever. And the accused would have no idea what the case against him was so he would just stick to his 'not guilty' plea. So where do you go? No. I think that would be a retrograde step. By several miles..." (S2)

> "It's the way the system works. There's a certain balance struck. The Crown have all the best witnesses. They've got professional witnesses, it's part of their job - they're trained to give evidence in court, give it precisely, to identify positively so there's never any doubt about their evidence. One of the few advantages the Defence has is that the Defence, as the system operates at present, do individual preparation. We do an extreme amount of preparation. We find out what the Crown case is, find out what the client's saying about it, so we are ready to answer all these allegations. If we were not allowed to prepare the case, there would be an imbalance. And that would swing in favour of the Crown..." (S4)

CHAPTER SIX: CONCLUSIONS AND SUGGESTIONS FOR FURTHER RESEARCH

This chapter makes some tentative conclusions based on the research findings. It then goes on to suggest areas where further research may usefully be focused.

6.1 General

This project looked at the work of precognition agents in criminal cases. The research was limited to one Scottish city, namely Dundee, and was compiled through questionnaires and interviews. The project may be seen as a small scale pilot study which could either provide a limited snapshot of precognition taking and/or pave the way for more extensive research into this area.

The present project was limited in its aims, relying as it did on a relatively small collection of data. There were relatively few respondents who contributed to the project. The research findings were based on the contributions of thirteen solicitors, fifteen precognition agents and nine witnesses. While there was an attempt to use a balanced survey sample, it is difficult to say whether or not this was in fact achieved. Accordingly, it is impossible to say whether the views and experiences which have been reported are in fact representative.

Two observations may be made in this regard. First, it is at least arguable that the sample of precognition agents was unrepresentative, containing too many law students and too few ex-police officers. Second, it may be said that the sample of witnesses was also unrepresentative. The sample was comprised solely of Crown witnesses. There were no complainers and no Defence witnesses in the sample and only one witness was under eighteen years of age. Perhaps a disproportionate number of respondents were witnesses to crimes they saw committed at work. None of the respondents appeared to fall into the category of 'vulnerable witnesses' although there are, of course, difficulties in defining that term.

6.2 Models of Good Practice

A problem with using the research methods described in detail in Chapter Two is that it is difficult to use the project findings to present what might be described as good practice models for precognition work. All the contributors to this project were offered confidentiality.

All the respondents to the solicitors' and precognition agents' questionnaires completed their questionnaires anonymously. Many of the witnesses who were interviewed did not know the name of the precognition agent who interviewed them or the name of the instructing solicitor's firm. This makes it difficult, for example, to link a positive experience of a witness with a particular practice of a precognition agent. The best which can be offered here is piecemeal and anecdotal. Witnesses would prefer to have advance notice that the precognition agent is coming to visit them.

They would like to exercise choice over where and when the interview takes place and they want more information about what the precognition agent is there to do. This is a point which shall be looked at in greater detail at 6.7 below. In addition, it seems that most witnesses appreciate openness from the precognition agent about their reasons for taking precognitions.

6.3 Policy Implications

Another limitation of this project is that there are difficulties in coming to any firm conclusions about the implications for policy. Although policy considerations played a large part in the project's investigations, the rate of response is probably too low to reach any definite conclusions in this regard. It is submitted that a much larger survey would be necessary before any major policy changes were made. In addition, the distinction between solemn and summary cases would need to be taken into account, the views of defence witnesses would require to be included and the experience of complainers canvassed. That being said, the research did highlight a number of areas which seem to demand official attention. Four of these will be referred to here. The first concerns the vetting of precognition agents prior to selection. The second relates to the training of precognition agents. The third concerns the provision of information to the Defence by the Crown. The fourth is about the treatment of witnesses during the precognition process.

6.4 The Vetting of Precognition Agents

The vetting of precognition agents is one area which seems to demand urgent attention. This matter was reported at 3.10 above. The research findings show that the vetting of precognition agents is, at best, haphazard and informal. At worst, the vetting is non-existent.

Solicitors do not seem to have adopted any formal vetting procedures when they are selecting precognition agents. None of the respondents to the solicitors' questionnaire had carried out a criminal record check prior to engaging the services of a precognition agent. Most of the respondents had not even carried out an interview.

At present, there are no formal qualifications required to become a precognition agent in Scotland. Nor is there any minimum standard required before precognition agents are allowed to operate. This may provide an opportunity for incompetent precognition agents to undertake precognition work, representing a possible threat to the proper administration of justice. In cases where precognition agents are not able to do their work because they do not have the necessary skills or do not prepare themselves adequately, they may fail to precognosce properly. If that happens, defence solicitors may not be in full possession of all the relevant facts when they are advising their clients. This brings with it the risk of wrong plea decisions and even wrongful convictions. Several solicitors whom we interviewed were concerned about this possibility.

Perhaps even more worrying, the lack of any formal vetting arrangements exposes complainers and witnesses to serious risk. As arrangements presently stand, it would be possible for a child to be precognosced by a convicted child sex offender.

(Of course in cases where such a person was on the Sex Offender Register the police might notify the solicitor of registration, under guidelines arising out of the Sex Offender Act 1997, but this would only arise where the police knew that the sex offender was undertaking precognition work.) There would be nothing to stop that from happening at present. This was an issue of concern to precognition agents whom we interviewed and should be given careful consideration in the interests of protecting children and vulnerable adults. It seems illogical that volunteers supporting victims of crime should have to undergo a fairly rigorous vetting process, including a mandatory criminal record check, while no such requirements exist in the case of precognition agents. It is submitted that solicitors must accept some responsibility for the actions of precognition agents who work for them and who are their agents in legal terms. Apart from the possibility that a solicitor might be vicariously liable for the actions of a precognition agent undertaken within the scope of his or her authority it is not inconceivable that a court might even hold a solicitor personally liable for a failure to vet a precognition agent who caused harm to a witness.

One way of helping to remove that threat would be to have a register of precognition agents. Another way would be to impose a requirement on solicitors to carry out a criminal record check before engaging a precognition agent. (This will become easier with the implementation of Part V of the Police Act 1997 but is probably already possible under the exceptions to the Data Protection Act relating to criminal justice and crime prevention). While neither of these proposals would ensure that precognition agents did not abuse their position such safeguards would nevertheless acknowledge the potential danger and offer some protection. More research would be necessary to establish which method would work best. What seems clear is that the present system carries too much risk for accused people, complainers and witnesses. It is an area which needs to be addressed as a matter of urgency.

6.5 The Training of Precognition Agents

The issue of training has been discussed at 3.12 above. The research findings show that precognition agents receive very little training. What training there is appears to be highly informal and to be conducted on an *ad hoc* basis. The lack of training carries a similar risk to the proper administration of justice as the lack of vetting procedures. Precognition agents who have not been adequately trained may not be doing their jobs properly and the dangers inherent in that include an accused person being unjustly convicted.

Research into this area reveals that most precognition agents are not formally trained at all. Normally, they are sent out to precognosce witnesses after a brief discussion with a solicitor or other precognition agents. Usually, it would appear, they are simply shown the format, given the Crown Witness List and told to get on with it. Many solicitors indicated that they felt this level of training and instruction is adequate. However, the majority of the respondents to the precognition agents' questionnaire

said that they disagreed. Most of the respondents thought that they would benefit from more training and many of those said that they would be willing to fund it themselves. The areas where precognition agents most wanted further training included dealing with vulnerable and difficult witnesses as well as obtaining all the relevant information from the witness.

Clearly, there are gaps in the training of precognition agents. Equally clearly, there is a desire among some precognition agents to have those gaps filled. Perhaps more consideration should now be given to the types of training currently on offer to precognition officers employed in Procurator Fiscals' Offices, where both induction and ongoing training is compulsory. Perhaps this could be adapted and made available to precognition agents. There is also the question of whether training should be made compulsory. If so, should this be linked with a system of accreditation? Whatever option is taken, it seems clear that the present position has little to commend itself and it ought to be reviewed.

6.6 The provision of information to the Defence by the Crown

The White Paper *Firm and Fair: Improving the Delivery of Justice in Scotland* (Cm 2600, 1994 Edinburgh, HMSO) notes that the release by the prosecution of civilian witness statements to the Defence was recommended in the Consultation Paper on the *Review of Criminal Evidence and Criminal Procedure* issued by the Scottish Office in 1993 (see para.2.22). However, it was not proposed that such disclosure be extended to include solemn cases. It is still unusual for such statements to be released, even in summary cases.

Most of the respondents to the solicitors' questionnaire wanted more information from the Crown about the cases in which they were instructed. In particular, most thought that civilian witness statements should be made available to the Defence as of right. Under present arrangements, the Defence can ask the Crown to see these but they have no formal right to insist upon it. In practice, this kind of informal disclosure is relatively rare and happens only where there is a special reason for it, for example, where a witness is particularly vulnerable and does not want to be precognosced by the Defence. Most of the solicitors interviewed thought that there should be more disclosure and that the Crown's civilian witness statements should be released. If this idea were implemented, it would represent a move on the part of the Scottish criminal process towards a rudimentary system of disclosure. England and Wales have operated such a system for many years.

The Scottish Legal Aid Board now openly supports the principle of disclosure. It takes the view that such a move would allow for better case preparation by the Defence and reduce the need for precognition taking. The Board acknowledges that the need for precognitions would not be removed entirely. However, the number of precognitions taken would inevitably fall and those that were taken might be more meaningfully focused.

Most of the respondents to the solicitors' and precognition agents' questionnaires also had clear views about the Crown Witness List. Most thought that it should contain

more information. The most common request was for contact telephone numbers of witnesses. According to the project findings, most contact with witnesses is done over the telephone anyway and one of the respondents expressed the view that sending letters was a futile paper exercise. However, there could be practical difficulties with the idea of including telephone numbers on the Crown Witness List. Some witnesses might not have phones. In addition, the Crown would be required to obtain the consent of witnesses before releasing telephone numbers. Perhaps this might pose a problem but this latter difficulty is surely not insurmountable. Further, it could be argued that such a requirement would be beneficial for witnesses. At least, witnesses would then be told about the likelihood of their being precognosced. This would make them better prepared psychologically for the arrival of the precognition agent. There is perhaps little to justify not including the contact telephone numbers on the Crown Witness List. Everyone knows that the witnesses are going to be contacted anyway. It is surely just a question of by which method. Perhaps more research is needed on this point. How should witnesses be contacted? Which method is most effective? Which method do witnesses find least intrusive?

At present the Crown Witness List does not contain much information about witnesses who might be considered vulnerable. The project findings show that solicitors are able to identify complainers in sexual or domestic violence cases and, occasionally, witnesses who are particularly young or old. Other categories of witnesses - such as people with learning difficulties or mental health problems or simply people who feel frightened or intimidated about giving evidence - cannot generally be identified from the list. Theoretically, the Crown could provide this information and arguably, it should. There was, however, no great clamour among the respondents for this to happen. (Since the completion of the fieldwork for this research a Consultation Paper on *Vulnerable and Intimidated Witnesses in Criminal and Civil Cases* has been issued which recommends that standard mechanisms be put in place for identifying vulnerable adults. However, the paper bases its definition of vulnerable adults on the very restricted categories contained in the 1995 Act and therefore the Crown will not always be aware of all those witnesses who are frightened or intimidated about giving evidence.)

Many of the respondents to the solicitors' and precognition agents' questionnaires did favour the idea of the Crown including a summary of its evidence. It was felt that this would allow for better preparation as it would mean defence solicitors would at least have some rudimentary understanding of what the Crown case was about. Comparison may be drawn with civil court procedure where the pursuer is obliged to produce a writ, giving the defender fair notice of the pursuer's averments. Nothing equivalent exists in criminal procedure. There is just the charge and the list of witnesses.

The idea of a summary of the Crown's evidence also finds favour with the Scottish Legal Aid Board. As with the release of civilian witness statements, the view is that a summary of evidence would allow for better and earlier preparation. It would allow for more meaningful meetings with clients, more focused precognitions and more scope for agreeing evidence with the Crown. It would also lead to fewer precognitions, particularly in cases involving multiple accused.

Research may now usefully be focused on whether this idea is feasible. A predictable response might be that the production of such summaries would take up too much time and effort on the part of the Procurator Fiscal Service, which is widely thought to be underfunded and overstretched. Therefore, any initiative seeking to place another administrative burden on the Crown's shoulders might be thought to be too much to bear. Many of the defence solicitors interviewed for this project expressed sympathy towards their professional adversaries within the Procurator Fiscal Service, regarding them as overworked and underpaid. So the difficulty of adding to the Procurator Fiscal Service's obligations has to be acknowledged.

However, it may be useful in this regard to look at the criminal justice process holistically rather than in terms of the respective budgets of each of its components. Perhaps savings can be made at a systemic level if the process is looked at in this light. Detailed research would be needed to find out if this idea had any financial merit. However, it may be that if evidence summaries were introduced, the overall savings to the criminal justice budget would be greater than the costs to the Procurator Fiscal Service. There may, for example, be savings to the court system through earlier plea decisions and savings to the Legal Aid Bill through fewer precognitions being taken and fewer trials being held. The reduction in inconvenience to witnesses and complainers would be an added bonus.

While perhaps less pressing on social grounds than some of the other ideas mentioned in this chapter, the production of evidence summaries may be an idea with some strong financial arguments behind it. More extensive research is needed on this point.

6.7 The Treatment of Witnesses during the Precognition Process

Discussions with Victim Support Scotland and the Witness Support Services at Ayr and Kilmarnock reveal that for many complainers and witnesses the experience of being precognosced is not a pleasant one. Stories abound of witnesses being frightened and even intimidated.

No such stories were uncovered during the project research though that perhaps is unsurprising given the nature of the small survey sample. What should be borne in mind is that from the nine witnesses who responded to the questionnaire none of them were the complainers in their respective cases. Most of them were witnesses to crimes which were non-violent. Many had been precognosced before and so knew what to expect. At least two of the witnesses might be regarded as professional witnesses. All of these factors may have contributed to the fact that none of the witnesses in the survey sample appear to have been intimidated. However, even in this small sample the respondents found much about the precognition process which they did not like.

Much attention has been given to the way in which witnesses are treated in court. Special provisions have been introduced to protect children who have to give evidence at court. These provisions are set out at section 271 of the Criminal Procedure (Scotland) Act 1995, which provides that child witnesses may in certain circumstances give their evidence to a commissioner (1)-(4), or by means of a live television link (5).

Alternatively, the court may authorise the use of a screen to conceal the accused from the sight of a child witness (6).

These special arrangements for the examination of witnesses in court contrast sharply with the lack of protection for witnesses being precognosced. The treatment of witnesses during precognition is wholly unregulated. There is no statutory or case law to govern how precognitions are carried out. Precognition agents have complete unfettered discretion to interview witnesses as they please. It is a situation which is at least potentially open to huge abuse. All this is made even more worrying by the lack of vetting and training referred to earlier in this chapter.

While none of the witnesses who responded to the questionnaire indicated that they had been bullied or intimidated, many were distinctly unhappy with the process. All except two had something to complain about. Most felt they had not been treated well.

Further research needs to be done here to find out more about the experience of witnesses who have been precognosced. A survey sample of nine respondents can do no more than scratch the surface of the issues which seem likely to arise.

However, one issue which did arise even with this limited survey sample was the issue of information. Most of the respondents to the witnesses' questionnaire indicated that they would have liked to have known more about what was going to happen to them. The most popular idea was for them to be given an information leaflet or a letter from the Procurator Fiscal's Office. There was some evidence in the research findings to indicate that the Procurator Fiscal's Office was seen as a more neutral and impartial source of information than, say, the police.

This very basic idea - that witnesses should know more about the precognition process - was overwhelmingly supported in the other two questionnaires. This was reassuring to note and provides a point of consensus with which to conclude this project. Providing more information to witnesses about the precognition process would seem to have clear benefits, not simply to witnesses themselves, but also to the system as a whole. Informed witnesses will be able to see giving a precognition as a useful exercise from which everyone is likely to benefit, including themselves. Such witnesses will be far more likely to co-operate with the precognition agent and give a statement. So there should be reduced costs as fewer precognition agents are turned away without requiring precognitions on oath to be arranged. Moreover, the statement which a willing witness gives is, of course, likely to be of much better quality allowing better pre-trial advice to be tendered to the accused.

Set in this light, the provision of information to witnesses may be seen to have several important advantages which may be secured at minimal cost. Not only does it allow witnesses to be dealt with in a more sensitive way, it may also be seen as a useful cost-saving initiative and as a positive contribution to the interests of justice. The leaflet *Reporting a Crime: A Guide to Victims And Witnesses*, which it is intended that the police should provide routinely to all complainers when a crime is first reported to the police and to any witnesses to that crime thereafter, should certainly be useful in giving witnesses advance notice of the possibility that they may be precognosced both by the

Crown and the Defence. In general the provision of such information is likely to be welcomed by those solicitors, precognition agents and witnesses who participated in our research. However, it should be noted that this leaflet contains no further details about the precognition process. Since it is not addressed solely to witnesses and already includes a great deal of information this is not surprising. Nevertheless, it would have been useful if witnesses had been advised that, in the case of Defence precognitions, they can make a reasoned choice where and when they wish to be precognosced. In addition, witnesses could usefully be provided with some information by the Crown specifically about precognition-taking in those cases where an accused has been apprehended and charged.

Thought should also be given by the Law Society of Scotland to providing guidance as to the wording of the letter which solicitors send to witnesses and to working with their members to produce a code of practice for precognition agents. Although precognition agents are usually self-employed, the legal relationship of agency which exists between solicitors and precognition agents carries with it important responsibilities for the solicitor as principal.

Other methods of advising the public generally about the criminal justice process, through documentaries and media coverage, for instance, and in education packages for schools, could include the precognition stage and thereby make a useful contribution to citizens' understanding of the important role they play in the proper administration of justice.

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