OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 27 February 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 27 February 2018

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JUSTICE COMMITTEE
7th Meeting 2018, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Maurice Corry (West Scotland) (Con)
*John Finnie (Highlands and Islands) (Green)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Alastair Crerar (Scottish Government)
Annabelle Ewing (Minister for Community Safety and Legal Affairs)
James Kelly (Glasgow) (Lab)
Gordon Lindhurst (Lothian) (Con)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 27 February 2018

[The Convener opened the meeting at 10:00]

Subordinate Legislation

Courts Reform (Scotland) Act 2014 (Consequential and Supplemental Provisions) Order 2018 [Draft]

The Convener (Margaret Mitchell): Good morning, and welcome to the Justice Committee's seventh meeting in 2018. We have received no apologies.

Item 1 is consideration of an instrument that is subject to affirmative procedure—the draft Courts Reform (Scotland) Act 2014 (Consequential and Supplemental Provisions) Order 2018. I welcome Annabelle Ewing, the Minister for Community Safety and Legal Affairs, and her officials from the Scottish Government. Paula Stevenson is from the tribunals policy branch, Gery McLaughlin is from the courts and judicial appointments branch, and Samantha Rore is from the directorate for legal services. I refer members to paper 1, which is a note by the clerk.

The minister will make a short opening statement.

The Minister for Community Safety and Legal Affairs (Annabelle Ewing): Thank you, convener. The draft order will make consequential and supplemental amendments to primary legislation. I understand that the Delegated Powers and Law Reform Committee considered it on 6 February, and that no points were raised.

The order covers two principal areas. First, further to section 130 of the Courts Reform (Scotland) Act 2014, the mechanism for the Scottish tribunal service to join the Scottish Court Service was provided for. That body became the Scottish Courts and Tribunals Service. As a result of that transfer, amendments are necessary to make the payroll function—that is, the payment of remuneration, fees and expenses—the responsibility of the SCTS, rather than of the Scottish ministers. The order will facilitate that by making amendments to various acts to allow the SCTS to make payments to members of the Mental Health Tribunal for Scotland, to justices of the peace and to members of the other Scottish tribunals.

The second area that is covered by the order makes provision for remuneration of temporary sheriffs principal by adding them to the list of judicial officers for whom Scottish ministers may determine the amount of remuneration. That is in order to take account of the possibility that a qualifying former sheriff principal might be appointed on a part-time temporary basis as a sheriff principal and would need to be paid a daily fee.

Although that eventuality has not happened to date, it is considered appropriate to rectify the anomaly that results from no provision having been set forth that would allow payment of a qualifying former sheriff principal. To rectify that anomaly and to include the possibility of making a payment in those circumstances, it is seen as appropriate to include that judicial officer in the list.

The Convener: Members have no questions or comments, so we move to formal consideration of the motion on the affirmative instrument. The Delegated Powers and Law Reform Committee has considered and reported on the instrument and has made no comments on it.

The motion will be moved, then there will be an opportunity for formal debate, if necessary.

Motion moved,

That the Justice Committee recommends that the Courts Reform (Scotland) Act 2014 (Consequential and Supplemental Provisions) Order 2018 [draft] be approved.—[*Annabelle Ewing*]

Motion agreed to.

The Convener: That concludes consideration of the instrument. The committee's report will note and confirm the outcome of the debate. Are members content to delegate authority to me, as convener, to clear the draft report?

Members *indicated agreement.*

10:04

Meeting suspended.

10:04

On resuming—

Proceeds of Crime Act 2002 (Searches under Part 5: Constables in Scotland: Code of Practice) Order 2018 [Draft]

The Convener: Agenda item 3 is consideration of another instrument that is subject to affirmative procedure. I again welcome Annabelle Ewing, the Minister for Community Safety and Legal Affairs, and her officials from the Scottish Government. Alastair Crerar is from the organised crime unit, Alan Nicholson is the Proceeds of Crime Act 2002 policy adviser, and Carla McCloy-Stevens is from the directorate for legal services. I refer members

to paper 2, which is a note by the clerk. The minister will make an opening statement.

Annabelle Ewing: Thank you, convener.

The draft order is consequential on sections 14 and 15 of the Criminal Finances Act 2017, which expand the civil forfeiture regime under part 5 of the Proceeds of Crime Act 2002. The Scottish Parliament consented to the provisions being made for Scotland on 2 March and 25 April 2017. As the powers extend constables' search powers under part 5 of the 2002 act, the Scottish ministers are required to make new codes of practice relating to the exercise of those powers in Scotland.

The draft order will therefore bring into operation a combined code of practice for the exercise by constables in Scotland of the search powers that are conferred by sections 289 and 303C of the Proceeds of Crime Act 2002. Section 289 allows constables to search individuals, premises and vehicles for cash amounting to £1,000 or more that has been obtained through unlawful conduct, or that is intended for use in unlawful conduct. The combined code of practice will revise and replace the existing code of practice for cash searches. Section 14 of the 2017 act widens the definition of cash to include, at the request of the Scottish Government, gaming vouchers, fixed-value casino tokens and betting receipts, so the current order will therefore revoke the order that brought that code into operation.

Section 303C of the 2002 act is a new provision that was added by section 15 of the 2017 act. It confers equivalent search powers on constables in respect of certain listed assets that are obtained through unlawful conduct or that are intended for use in unlawful conduct. The listed assets are precious metals, precious stones, watches, artistic works, face-value vouchers and postage stamps. As with cash searches, a minimum-value threshold of £1,000 will apply.

The search powers under sections 289 and 303C of the 2002 act are subject to certain conditions and limits, and their exercise generally requires a sheriff's prior approval. Because the sections are, in essence, the same, it was considered that it would be simpler and more effective to issue a combined code of practice to ensure that searches for cash and listed assets are carried out appropriately and fairly, and with integrity and respect.

The combined code is, largely, modelled on the "Code of Practice on the exercise by Constables of Powers of Stop and Search of the Person in Scotland", which came into effect on 11 May 2017. The aspects of the combined code that are specific to the 2002 act also align with equivalent codes that have been issued by the United Kingdom Government under part 5 of that act. That is to ensure greater consistency of practice and, in turn, to secure public confidence in the use of search powers under the 2002 act.

I am happy to answer questions.

The Convener: I do not know whether you are aware that the committee has received a submission from the Law Society of Scotland raising two points—on accessibility and on monitoring and review. On accessibility, the Law Society basically says that the code needs to be available and accessible in all formats and languages in order to meet the principles of diversity and equality.

The society also says that paragraph 3.7 "clearly" recognises

"that there is a need to respect and ensure the interests of certain specified categories of persons who may be subject to a search."

It goes on to say that

"What might be better would be to state the principles of interest of justice test rather than appear to be rather restrictive."

In other words, any category should be illustrative and there should be a wider definition. I am happy to give the minister a copy of the submission, which she could perhaps look at later in order that she can address it.

The submission states:

"There is an overriding interest of justice test that is wider than just those specified",

but I think that the Law Society is aware that those categories are intended to be illustrative. The Law Society's second point is a lot easier to understand: it considers that the code should be the subject of a review of how it is working.

Annabelle Ewing: If the Law Society had seen fit to do so and had had the courtesy to submit its submission to the Government, we would be in a better position to respond to its questions. I ask Mr Crerar to say a few words.

The Convener: I think that the Law Society sent the submission in as its response to the Government's consultation, in which case you would have been in receipt of it, minister.

Annabelle Ewing: We proceeded with the consultation and we picked up on certain points that were raised in it. I am sorry: I thought that you were referring to a new submission that you had received this morning and did not realise that it was the society's submission to the consultation, which we have picked up on. Perhaps Mr Crerar can further advise on the issue.

Alastair Crerar (Scottish Government): That certainly sounds very similar to the submission

that we received from the Law Society of Scotland. We would be keen to have a look to check whether there are additional points in it, but officials certainly carefully considered the Law Society's points, including the "interest of justice test" point. We believe that the draft code sets out the key parameters and values that constables should consider, so we did not accept that point.

On accessibility, as the convener has said, the Law Society suggested that the code should be translated into different languages and formats. We were sympathetic to that point, but we were conscious that the code is, above all, for constables.

In working with Police Scotland and other key stakeholders, including equalities groups, we have tried to make the code as clear as possible. We have also made it available online, in police stations and at ports so that people who have been searched can consult the code and share it with advocates or legal advisers and get advice on it.

We consider that we have achieved the right balance. We noted the point, but we considered that the Law Society's suggestion was perhaps a step too far. We have accepted the society's point about reviewing the code, and we have been in touch with Police Scotland about that and suggested that a review of use and working of the code further down the line would be valuable.

The Convener: That would strike the right balance, and you could see whether adjustments are being made. Thank you for that.

Are there any other questions?

Liam Kerr (North East Scotland) (Con): I have a question for Alastair Crerar on that point.

Thank you for that clarification, but your response was predicated on the Law Society's submission to the committee being the one that you have seen.

My substantive question was going to be to ask whether you had seen the Law Society's submission, because I had noted in the committee briefing paper, that following

"the few representations that were made"

to the Scottish Government, it

"modified the draft where appropriate."

I was going to ask whether you had modified the draft instrument pursuant to the law society's representations. The answer seems to be "Possibly"—if the two submissions are the same.

The Convener: They are the same submissions.

Liam Kerr: Are they definitely the same?

The Convener: Yes—the clerks have just confirmed that, so we are all happy.

Liam Kerr: Thank you.

The Convener: As there are no further questions and no comments, we move to agenda item 4, which is consideration of the motion on the instrument. The Delegated Powers and Law Reform Committee has considered and reported on the instrument and made no comments on it. The motion will be moved with an opportunity for formal debate, if necessary.

Motion moved,

That the Justice Committee recommends that the Proceeds of Crime Act 2002 (Searches under Part 5: Constables in Scotland: Code of Practice) Order 2018 [draft] be approved.—[*Annabelle Ewing*]

Motion agreed to.

The Convener: That concludes consideration of the instrument. The committee's report will note and confirm the outcome of the debate. Are members content to delegate authority to me, as convener, to clear the final draft of the report?

Members *indicated agreement.*

The Convener: I suspend the meeting briefly to allow for a changeover of witnesses.

10:14

Meeting suspended.

10:16

On resuming—

Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill: Stage 2

The Convener: Agenda item 5 is consideration of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill at stage 2. Members should refer to their copy of the bill, the marshalled list of amendments and the groupings.

I welcome back to the meeting Annabelle Ewing, Minister for Community Safety and Legal Affairs, and her officials. I also welcome James Kelly, the member in charge of the bill, and his supporters.

Section 1—Repeal of the 2012 act

Section 1 agreed to.

Section 2—Offences

The Convener: The first group of amendments is on effect of repeal on offences occurring before repeal. Amendment 1, in the name of the minister, is grouped with amendments 2, 3 and 5 to 8.

Annabelle Ewing: Amendments 1 to 3 and 5 to 8 adjust sections 2 and 3 to deal with human rights issues in the current drafting of the bill. The amendments in group 1 are intended to ensure that persons cannot be convicted of or punished for an offence under the 2012 act after it has been repealed. This is to ensure that the bill respects the principle of lex mitior, which is guaranteed by article 7 of the European convention on human rights. Lex mitior is the principle that a person should benefit from the application of the more lenient law where the law has changed before a final judgment has been reached in criminal proceedings. Ministers are of the view that the principle applies in the context of repeal of the offences in the 2012 act.

Section 2(3) of the bill as it stands provides that, after repeal of the 2012 act, a person can still be convicted of an offence under the act where there is an appeal against acquittal. Section 3(2) of the bill as it stands provides that the 2012 act continues to have effect after repeal for the purposes of imposing a penalty on a person and for the purposes of an appeal or a petition to the nobile officium. The fact that a person can still be convicted and punished under the 2012 act after its repeal goes against the principle of lex mitior and therefore raises human rights issues. Amendments 1 to 3 and 5 to 8 deal with those issues by removing sections 2(3), 2(4), 3(2) and 3(3) of the bill.

Amendment 1 amends the bill to remove the reference to section 2(3) in section 2(1).

Amendments 2 and 3 make amendments to section 2 so that it states that:

"Despite section 17 of the Interpretation and Legislative Reform (Scotland) Act 2010",

on or after the repeal date

"no person can be convicted of or found to have committed a relevant offence"

and

"no penalty may be imposed on a person in respect of a relevant offence of which that person was convicted prior to the relevant date".

Section 17 of the Interpretation and Legislative Reform (Scotland) Act 2010 would otherwise allow a conviction and a penalty to be imposed after the repeal; these amendments oust that possibility.

Amendment 5 amends the bill so as to remove sections 2(3) and 2(4), which means that a person cannot

"be convicted of or found to have committed a relevant offence"

on appeal against acquittal.

Amendment 6 amends section 3(1) so as to clarify that a person who has had a penalty imposed on them prior to the date of repeal for a relevant offence is still liable for that penalty.

Amendment 7 amends section 3(1) so as to remove reference to section 2(3).

Amendment 8 removes sections 3(2) and 3(3) of the bill, with the result that the 2012 act would not have effect after its repeal for the purposes of imposing a penalty on a person in respect of a relevant offence of which that person was convicted prior to repeal, or for the purposes of an appeal or a petition to the nobile officium.

In light of the amendments, there is no longer any need for section 3(3).

I move amendment 1.

The Convener: I call Liam Kerr—[*Interruption*.] Sorry, I call Liam McArthur. I am looking at Liam McArthur but saying Liam Kerr.

Liam McArthur (Orkney Islands) (LD): You are throwing your voice again, convener.

On the basis that I might be critical of the Government's approach in later amendments, it is probably appropriate to acknowledge and welcome the approach that has been taken in this group of amendments. The minister has set out very clearly why they are necessary. We are all conscious of the need to retain compliance with

the European convention on human rights, and therefore I think that the amendments in this group are to be welcomed.

James Kelly (Glasgow) (Lab): I support all the amendments in this group. As the minister has outlined, they seek to address any potential human rights issue by taking the relevant provisions out of the bill. The amendments are helpful, and I thank the minister for bringing them forward today.

Annabelle Ewing: I welcome the support that has been expressed thus far. The overarching consideration with this group of amendments was to ensure that the bill is compliant with the European convention on human rights, and the various amendments that we propose seek to ensure that very thing.

Amendment 1 agreed to.

Amendments 2 and 3 moved—[Annabelle Ewing]—and agreed to.

The Convener: Group 2 is on on-going proceedings: conviction for alternative statutory offence. Amendment 4, in the name of the minister, is the only amendment in the group.

Annabelle Ewing: Amendment 4 inserts new subsections (2A) and (2B) into section 2 of the bill. It expressly provides that, in proceedings for an offence under the 2012 act that have not been determined by the date of repeal, the court has the power to convict the accused of a different statutory offence, where the facts that are proved in the proceedings amount to that different offence.

That means that a person who is charged under the 2012 act can still be convicted of a serious offence after repeal where the facts that are proved in the trial amount to that offence.

Under the current law, prosecutors can amend the libel so as to substitute an alternative common-law or statutory charge for a charge under the 2012 act. The court can also convict a person of a common-law offence where the facts that are established amount to that common-law offence. However, the court does not have the power to convict a person of an alternative statutory offence unless the charge that was made against them has been amended to libel that statutory offence.

Amendment 4 gives the court a narrow power, which it currently does not have, to convict a person of an alternative statutory offence, on top of the existing power that it has to convict a person of an alternative common-law offence.

I move amendment 4.

The Convener: I would imagine, minister, that a finite number of cases would be affected by that change. There will only be so many cases in the pipeline, many of which will not be affected, and at some point in time all those cases will cease to be.

Annabelle Ewing: Yes.

The Convener: That seems to be a sensible approach.

Daniel Johnson (Edinburgh Southern) (Lab): I take it that, if amendment 4 is not agreed to, there is nothing to prevent the authorities from bringing forward revised charges.

Annabelle Ewing: No. The substance of the amendment is to reflect circumstances in which it might not be possible to amend the libel. After all, if there was the time to do that, we could deal with the issue. We are talking about circumstances in which that is no longer possible for various technical reasons, and amendment 4 gives the court the option in what, as the convener has highlighted, will be narrow circumstances.

Liam McArthur: Just following up on Daniel Johnson's question, I assume that there will be a gap between the bill getting through stage 3, either next month or slightly later than that, and royal assent being given. If the number of cases is going to be fairly limited, what might impede the amendment of libels in that interim period? As I have said, the number of cases that would fall within that and which would not be captured by the court under common-law provisions is likely to be relatively small.

Annabelle Ewing: I will ask my officials to deal with that very technical point—

The Convener: I am afraid that your officials cannot comment at this stage.

Annabelle Ewing: That is why they are looking at me askance, then.

I imagine that the member is correct to say that the number of cases will be limited, but amendment 4 seeks to ensure that an option is available in circumstances in which, for whatever reason—and there could be a number of such reasons—it has not been possible to amend the libel. It also seeks to ensure that, ultimately, people who have committed a serious offence do not escape punishment. I am sure that we would all wish to support that objective.

The Convener: I should say, minister, that you can confer with your officials, if that would be helpful, but we cannot ask them to comment directly.

Annabelle Ewing: I see that my official agrees with what I said, so that is fine.

Liam McArthur: It is helpful to know that you can confer with officials, minister.

As I have said, there will be a number of months between now, royal assent and the bill's implementation. Given that the Parliament's direction of travel has at least been signalled, to what extent is amendment 4 addressing a problem that does not exist? I know that the precautionary principle should generally be adopted in such circumstances, but I wonder whether we are dealing with a problem that has already been addressed by people who have anticipated such an issue and have, as a result, taken steps to avoid it.

Annabelle Ewing: The fact that the court already has the power of substitution with regard to common-law offences suggests that there will always be circumstances in which the exercise of the power for such offences will be required as an option. In the same vein and using the same logic, therefore, there could well be circumstances in which it is necessary to substitute a statutory offence. I take the member's points into account, but surely we would want to ensure that people who have committed serious offences are brought to justice and do not escape punishment. Amendment 4 will allow the court to take a belt-and-braces approach; indeed, if we did not have such a provision, the court might in specific circumstances—albeit in a time-limited period—be unable to do the necessary. The amendment provides a belt-and-braces approach to ensure that the court has the options that it needs. Moreover, after a certain period, it will not be an issue with regard to offences under the 2012 act—assuming, of course, that the Parliament votes to repeal it.

James Kelly: I am not convinced by the arguments in favour of amendment 4. The minister is seeking to enshrine in law a power that, as has transpired in this discussion, she does not actually require.

We also need to be careful that we have a consistent approach in the bill. The previous group of amendments tidied up the appeal provisions, because of a potential inconsistency between what could be dealt with after repeal and what can be dealt with currently. Amendment 4 seems to be going back on that. The minister is seeking a power to amend charges after the bill has been passed.

I also point out that prosecutors should continue to adopt a pragmatic approach in relation to potential prosecutions under the 2012 act. As far back as November 2016, Parliament signalled that it was supportive of full repeal, so prosecutors should have been aware of that and should have taken that pragmatic approach.

I oppose the adoption of amendment 4.

10:30

Annabelle Ewing: I have listened to the comments that have been made and will deal first with Mr Kelly's points.

The 2012 act still remains on the statute book. Parliament is still to vote on whether to repeal it, and we have to deal with the laws that we have.

The Government has no jurisdiction over the Crown in terms of charges brought—that is a matter for the independent Crown Office and Procurator Fiscal Service, as I am sure that Mr Kelly is aware.

As I have said, it is essential to ensure that those who have committed a crime do not escape punishment just because the 2012 act is repealed. We need to ensure that the courts have adequate powers to achieve that and that, in proceedings for an offence under the 2012 act that have not been determined by the date of repeal, the court has the power to convict the accused of a different statutory offence where appropriate, in the way that it currently has in terms of substituting a common-law offence.

I believe that this is simply about ensuring that justice can continue to be served if the 2012 act is indeed repealed.

The Convener: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, George (Paisley) (SNP)
Corry, Maurice (West Scotland) (Con)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

Against

Finnie, John (Highlands and Islands) (Green)
Johnson, Daniel (Edinburgh Southern) (Lab)
McArthur, Liam (Orkney Islands) (LD)

The Convener: The result of the division is: For 8, Against 3, Abstentions 0.

Amendment 4 agreed to.

Amendment 5 moved—[Annabelle Ewing]—and agreed to.

Section 2, as amended, agreed to.

Section 3—Transitional and saving provisions

Amendments 6 to 8 moved—[Annabelle Ewing]—and agreed to.

Section 3, as amended, agreed to.

Section 4 agreed to.

Section 5—Interpretation

The Convener: Group 3 is entitled "Commencement: repeal of section 6 offence postponed for 12 months from Royal Assent". Amendment 9, in the name of the minister, is grouped with amendments 10 and 12.

Annabelle Ewing: Amendments 9, 10 and 12 adjust sections 5 and 6, which deal with the date of commencement for the bill.

The bill currently provides that repeal of the 2012 act will come into force on the day after royal assent. The effect of amendments 9, 10 and 12 is to delay the commencement of the repeal of the section 6 offence by 12 months from royal assent. When combined with amendment 11 in group 4, which we will come to shortly, the amendments also delay the commencement of the repeal of the section 1 offence by two months. That 12-month delay for the section 6 offence would allow the Scottish Government to respond to the concerns of organisations representing minority communities by preparing a new bill to reinstate the provisions of the section 6 offence of sending threatening communications, in order to maintain the protection that those provisions offer, and also to consider what improvements could be made to the offence, such as expanding the range of groups that are covered by incitement to hatred and considering whether the threshold for convictions is too high.

Amendment 9 amends the definition of the relevant date in section 5 so that it takes account of the different commencement dates for the section 1 and the section 6 offences that would result from the amendments, if agreed to.

Amendment 10 amends section 6 of the bill to confine the existing default commencement provision so that it applies only to the repeal of the section 1 offence. Currently, the default commencement provision in the bill is for it to come into force on the day after royal assent. If agreed, our amendment 12, which we will come to shortly, will change that so that the default commencement is two months after royal assent.

Amendment 12 provides that the bill, so far as repealing the rest of the 2012 act—that is, the section 6 offence of sending threatening communications—comes into force at the end of the period of 12 months beginning with the date of royal assent.

I move amendment 9.

Liam McArthur: This is where I start to get a bit grumpy. First, let me say that, as far as I am aware, the email to committee members indicating that the Government's response to our stage 1 committee report had been made available via the website was received yesterday afternoon at 4.30. In terms of custom and practice, that sort of turnaround time is inappropriate and far too short.

The minister will recall that at stage 1 I acknowledged—as I think that we all did—that section 6 of the 2012 act presented a very different set of circumstances from sections 1 to 5, in that section 6 at least had the benefit of being cast across the entire population rather than targeted at a single group—football supporters. Nevertheless, despite that fact and despite assurances that the minister's door was always open, we are presented now with an explanation of these amendments. There was no attempt between stages 1 and 2 to come and discuss with Opposition members the Government's intention, which appears to be to hold on for 12 months until it can reinstate the same powers.

I do not accept that a gap would be created in the law. The Government is perfectly able—and I am sure that it will choose—to introduce a bill in the near future to reinstate those provisions. I am more than a little disappointed by the way in which the Government has gone about trying to deal with this. I thought that the approach that was taken with the amendments in the first grouping was a very constructive engagement to address legitimate concerns about the bill. However, the approach that has been taken to section 6 of the 2012 act falls far short of that. I will not be supporting the amendments in this group.

Mairi Gougeon (Angus North and Mearns) (SNP): I take the polar opposite view, because I think that the amendments that the minister has lodged are vital. That was something that we teased out in the stage 1 debate. I disagree with Liam McArthur, because I think that there will be a gap in the law. We heard that in evidence that was given directly to the committee. The Crown Office told us about three specific areas where there will be a gap in the law if the 2012 act is repealed. We need to have the time to ensure that there is no such gap. We heard some examples during our evidence, and it is an area that I do not think we can let go. None of the concerns that were expressed in the stage 1 debate were addressed during that debate. We need to take adequate time to address all the concerns that were raised about section 6 of the 2012 act and to do it right. That is why I will be supporting the amendments.

Rona Mackay (Strathkelvin and Bearsden) (SNP): To back up what my colleague Mairi Gougeon said, I think that it is eminently sensible to have that delay, given the importance of section 6 of the 2012 act. It will fill the gap until a new bill can be introduced.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I will be supporting the amendments for similar reasons. There was some debate about other sections of the 2012 act in our stage 1 evidence, but there was an almost unanimous view that the repeal of section 6 would create a gap in the law. For the stakeholders who were concerned about section 6, I think that preserving the provisions until a replacement can be found is a very sensible approach.

The Convener: Does anyone else have any comments? My only comment is that I do not accept that there would be a gap in the law and therefore I consider that the act should be repealed in its entirety. Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 has been proposed as an alternative. There is also concern that the bar was set so high—with intent being the test—that it was very rarely used. I am certainly not in favour of the amendments.

James Kelly: First of all, I did not agree with Ben Macpherson when he implied that it was almost universally accepted in evidence to the committee that there would be a gap in the law with the repeal of section 6. That was not the view of the Law Society of Scotland or Professor Leverick.

Liam McArthur: I think that Ben Macpherson's point was that the committee was unanimous but, as the convener has pointed out, she disagreed that there would be a gap in the law. I accept that the committee was unanimous that section 6 presents a different set of circumstances from sections 1 to 5, but that is not the same as a unanimous opinion that there would be a gap in the law if section 6 were repealed. I hope that that clarification is helpful.

James Kelly: I thank Liam McArthur for that. The issue was discussed in the stage 1 debate, when Mairi Gougeon made some cogent points. After that debate, I reflected on the arguments and looked seriously at whether there would be a gap in the law. The specific issue that Mairi Gougeon raised related to the sentencing powers in section 6, under which cases can be brought in which people can be sentenced up to five years—a provision that does not exist in the Communications Act 2003. However, the Law Society has pointed out that section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 provides for cases to be brought on indictment, with sentences up to five years for threatening and abusive behaviour, and there is case law that backs that up. HM Advocate v McGinley is a breach of the peace on indictment.

My second point is on cover for crimes of religious hatred. Religious aggravation can be added to section 38, as was the case in Love v Procurator Fiscal, Stirling. Having seriously considered the issues raised in the stage 1 debate, I am content that not only is legislation in place to avoid a gap in the law but case law backs that up—a point that was made by the Law Society and Professor Leverick in evidence.

On the minister's point about protection of minorities, section 6 is an unused provision. There was only one prosecution in the most recent year for which statistics are available. It is not correct to argue that section 6 offers protection to communities when it is unused, so therefore—

Fulton MacGregor (Coatbridge and Chryston) (SNP): Would the member accept that the committee heard evidence from other sources, including the Crown Office and Procurator Fiscal Service, that there would be a gap in the law? Further, a lot of protected groups and minorities came to the committee and told us that they felt that section 6 was a protection.

James Kelly: Since the Offensive Behaviour at Football and Threatening Communications Act 2012 came into force, there have been 4,655 prosecutions for hate crimes relating to sexual orientation, only eight of which have resulted from the act. As I said, there has been only one conviction in the past year under the act, so section 6 is an unused provision.

On the Procurator Fiscal Service's point that there would be a gap in the law, I have gone through, in substantial detail, why I believe that there is legislation in place and case law to prove that there is not a gap in law. I do not believe that proper protection can be given to minorities by a provision in an act that has not been used because the legal threshold is too high. On that basis, I oppose amendment 9.

10:45

The Convener: I invite the minister to wind up.

Annabelle Ewing: Thank you, convener. There is no question about the fact that there would be a gap. We need to remind ourselves of the evidence from the Crown Office and Procurator Fiscal Service, which clearly indicated what the factual position is—of course the Crown Office and Procurator Fiscal Service deals with such matters day in and day out. Repealing section 6 without allowing the Government any time to mitigate the negative impact of that would take away from Scots law the specific statutory offence of the incitement of religious hatred. That repeal would take us backwards rather than forwards and would put us out of kilter with the rest of the UK. That threat was responded to very strongly by a number of organisations of which the committee will be well aware—the Equality Network, Stonewall Scotland, Victim Support Scotland, the Scottish Women's Convention, the Church of

Scotland, the Scottish Council of Jewish Communities and the Equality and Human Rights Commission, to name but some—and they all had serious concerns about the issue. Further, the Crown Office pointed out that the section 6 provision allows extraterritorial effect.

Liam McArthur: The minister is right about the evidence that we heard from a range of groups. That is why all of us were seized of the need to approach section 6 and its repeal in a way that was different from how we approached the potential repeal of sections 1 to 5. However, it is also incumbent on us to test the evidence that we hear against what appears to be the case in practice. As James Kelly has highlighted from his discussions with the Law Society, statutory provisions and case precedent exist, so there appear to be protections in this regard. The concern that was expressed vividly by the range of organisations to which the minister referred was about the message being sent out that repeal of section 6 would remove protection. Is the minister not then complicit in reinforcing the message that somehow there is a gap and that there will be an absence of protection, given that James Kelly has pointed out that that will not be the case because of the other provisions that are in place and case precedent?

Annabelle Ewing: No, I do not accept that. Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 does not provide a statutory offence of stirring up religious hatred, and it is simply wrong to say that it does. It is important to remember a specific example that the evidence session with the Crown Office and Procurator Fiscal Service threw up. It said:

"Section 6 also provides for greater sentencing powers than those in the"

Communications Act 2003.

"we have had a case in which an accused person posted comments that were supportive of a proscribed terrorist organisation—ISIS—and the view of the sentencer was that the severity of those actions should be reflected in a starting point of 24 months' imprisonment. That starting point for the sentencer would not have been available in the alternative charge under the 2003 act."—[*Official Report, Justice Committee,* 3 October 2017; c 7.]

I think that that states the position very strongly indeed.

James Kelly: Yes, but provision for that sentencing exists in section 38 of the 2010 act, as does provision for bringing forward a relevant charge in relation to threatening communications. Although the minister's comparison with the 2003 act is valid, it is not valid in relation to section 38 of the 2010 act.

Annabelle Ewing: Section 38 does not contain the specific statutory offence of the incitement of religious hatred. That is the key issue with section 6 and that is why all those equalities bodies—

James Kelly: Will the minister take an intervention?

Annabelle Ewing: I would like to finish my point.

As I said, that is why all those equalities bodies and certain faith bodies put forward their very strongly held concerns. I say to Mr McArthur that I am not complicit in stirring up concerns; I am saying how it is. As a responsible Scottish Government minister, I am doing my best to mitigate the negative impact of the move to repeal section 6 and to ensure some continuity of protection.

James Kelly: Again, just for the record, the Law Society has pointed out that a charge of religious aggravation can be added to the section 38 offence, so that gives cover in relation to religious hatred and deals with the arguments that the minister is trying to submit.

Annabelle Ewing: At the moment, we have a specific statutory offence of incitement of religious hatred. Mr Kelly is proposing to take that specific offence out of Scots law, putting us out of kilter with the rest of the UK. That would be a step backwards, not a step forwards.

We have had a good debate and a thorough one. The 12 months' continuity of protection that we seek is entirely reasonable. We have not plucked the period of 12 months out of the air. Someone suggested that alternative legislation could be drummed up overnight, but that is not the case. We have had advice that, at the very least, a period of 12 months would be required to come up with an alternative legislative provision to deal with the circumstances covered by section 6 of the 2012 act. Therefore if the amendment were to be agreed to, we would be narrowing the gap in continuity of protection by at least 12 months.

In response to Liam McArthur's point, I say that my door has been open from the outset, but no one has sought to come through it.

Liam McArthur: It now transpires that amendments 9, 10 and 12 are not about avoiding the creation of a gap—the existence of which we disagree on—but about narrowing the period during which there will be a gap in the law. Your argument is that 12 months at the very least will be needed and you are suggesting that the amendments will not achieve what you say they intend, which leaves us scratching our heads. It may be that you want to bring the amendments back at stage 3, but you do not appear to be in a position to argue for them convincingly at stage 2.

Annabelle Ewing: We are trying very hard to respect the will of Parliament at the same time as

acting as a responsible Government. We accept that, if we had proposed an amendment today to deal with the specific issue by introducing a provision that would remain in place for two years, it would have been anathema to at least some members of the committee. We were trying to have a reasonable position and consider what was the shortest period of time that might be required to come up with alternative legislation. We decided on 12 months and working very hard to ensure that we met that timescale.

That is the position of the amendment. If we had proposed a much longer period, I am sure that Mr McArthur would have come up with other arguments against that and said that it did not respect the will of Parliament. We are trying both to respect the will of Parliament and to mitigate the negative impacts on some of our most vulnerable communities by ensuring continuity of protection.

It is simply foolhardy to repeal section 6 without putting an alternative in place. Amendment 9 would allow us to ensure that continuity of protection.

The Convener: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, George (Paisley) (SNP)
Gougeon, Mairi (Angus North and Mearns) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)

Against

Corry, Maurice (West Scotland) (Con)
Finnie, John (Highlands and Islands) (Green)
Johnson, Daniel (Edinburgh Southern) (Lab)
Kerr, Liam (North East Scotland) (Con)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of division is: For 5, Against 6, Abstentions 0.

Amendment 9 disagreed to.

Section 5 agreed to.

Section 6—Commencement

Amendment 10 moved—[Annabelle Ewing].

The Convener: The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, George (Paisley) (SNP)
Gougeon, Mairi (Angus North and Mearns) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)

Against

Corry, Maurice (West Scotland) (Con)
Finnie, John (Highlands and Islands) (Green)
Johnson, Daniel (Edinburgh Southern) (Lab)
Kerr, Liam (North East Scotland) (Con)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of division is: For 5, Against 6, Abstentions 0.

Amendment 10 disagreed to.

The Convener: The next group is on commencement generally postponed for two months from royal assent. Amendment 11, in the name of the minister, is the only amendment in the group.

Annabelle Ewing: Amendment 11 adjusts section 6 of the bill, which deals with the commencement date of the act. The current default commencement provision in the bill is that the act should come into force on the day after royal assent. Amendment 11 would change that such that the act would commence at the end of two months beginning from the date of royal assent. An implementation gap of two months between royal assent and commencement is standard practice.

The reason why an implementation gap of two months is standard practice is that the date on which royal assent is received is not easily predictable. Linking commencement to a specific period after royal assent therefore provides for greater predictability as to the date of commencement, which, in turn, provides certainty and time for all those affected by the bill to take account of its provisions and make all reasonable adjustments that are required of them before the date on which the new legislation comes into force.

I move amendment 11.

James Kelly: I oppose amendment 11. If we look at the timetable, it is important to understand that—obviously, the scheduling of a stage 3 debate is a matter for the Parliamentary Bureau—the normal time period between a bill being passed at stage 3 and receiving royal assent is around two months, although we cannot be exact. If stage 3 was before the end of March, that would take us to the end of May. Crucially, that is the end of the football season. After that, there would still be a two-month period for prosecutors and the police to carry out any preparatory work that the minister argues is necessary. Amendment 11 is therefore not necessary.

I have argued throughout the bill process that the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012

has been discredited. It has been argued against not only by supporters but by legal experts. I have therefore sought to repeal it as quickly as possible. I do not support amendment 11.

Annabelle Ewing: Seeking a two-month period from royal assent is not odd or unusual; in fact, it will ensure that the bill is brought into line with accepted, tried and tested practices. Until the stage 3 debate has been concluded, it is perhaps slightly presumptuous to assume the outcome, so those who are affected by the changes in the law need time to take account of those changes. The date of royal assent is not certain, so a two-month period will give everyone a clear date to work to and ensure the orderly management and administration of our justice system.

Our aim is to ensure that any transition from the current legal framework to a new set of circumstances is achieved as smoothly as possible, and it is right that organisations on which the change will impact have time for a period of adjustment to ensure that their houses are in order and they are ready for the implementation of the change on a fixed and clearly identified date. That the repeal bill will take away rather than add legislation does not make any difference to the fact that those who need to take account of the changes need time to ensure that policies, procedures and operations are amended in good time in order to fully enact the new legislation from the day that it comes into force. As the date on which royal assent is given is never certain, it is entirely reasonable that those who need to prepare for the repeal can work to a known date and have due notice of it.

The Convener: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, George (Paisley) (SNP)
Gougeon, Mairi (Angus North and Mearns) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)

Against

Corry, Maurice (West Scotland) (Con)
Finnie, John (Highlands and Islands) (Green)
Johnson, Daniel (Edinburgh Southern) (Lab)
Kerr, Liam (North East Scotland) (Con)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 11 disagreed to.

Amendment 12 moved—[Annabelle Ewing].

The Convener: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, George (Paisley) (SNP)
Gougeon, Mairi (Angus North and Mearns) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)

Against

Corry, Maurice (West Scotland) (Con)
Finnie, John (Highlands and Islands) (Green)
Johnson, Daniel (Edinburgh Southern) (Lab)
Kerr, Liam (North East Scotland) (Con)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 12 disagreed to.

Section 6 agreed to.

Section 7 agreed to.

Long title agreed to.

The Convener: I suspend the meeting briefly to allow for a change of participants.

10:59

Meeting suspended.

11:04

On resuming—

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: Stage 2

The Convener: Agenda item 6 is consideration of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill at stage 2. Members should refer to the bill, the marshalled list of amendments and the groupings. For the last time today, I welcome Annabelle Ewing, the Minister for Community Safety and Legal Affairs, and her officials.

We move straight to consideration of the amendments.

Section 1—Success fee agreements

The Convener: Group 1 is on success fee agreements: claims management services. Amendment 18, in the name of the minister, is grouped with amendments 19, 20, 20A, 21 to 26, 30 and 65.

Annabelle Ewing: At the outset, I refer members to my entry in the register of members' interests, where they will find that I am a member of the Law Society of Scotland and that I hold a current practising certificate, albeit that I do not currently practise.

Amendments 20 and 22 are intended to clarify that the provisions of part 1 on success fee agreements apply to claims management companies as well as to solicitors, as providers of relevant services. Concerns had been expressed that that was not clear. There are a wide range of ways in which claims management companies operate or may operate in future, and that sometimes may be in association with firms of solicitors. It is claims management companies rather than law firms that currently offer damages-based agreements in Scotland, although the bill will provide for solicitors also to offer damages-based agreements.

The approach taken is to define success fee agreements as agreements for the provision of "relevant services" rather than just "relevant legal services" and to define that master concept as including legal services and claims management services respectively. Amendment 20 defines "legal services" and "claims management services" in a similar way to that in proposed section 419A of the Financial Services and Markets Act 2000, which is to be inserted by the Westminster Financial Guidance and Claims Bill. It seems appropriate to draw on the definition of "claims management services" that will be applied by the Financial Conduct Authority, which the Parliament has agreed through a recent legislative consent motion should be the regulator of claims management companies in Scotland in the near future.

The definition of "claims management services" includes advising claimants as to funding options, such as success fee agreements or commercial funding for commercial cases. It also includes services in relation to legal representation, which means getting everything in place in terms of paperwork and witnesses so that, when a case is handed over to a lawyer, the amount of time and cost spent by lawyers doing non-legal work is minimised.

The purpose of amendment 20 is to ensure that part 1 applies to claims management companies. However, amendment 20A, in the name of Daniel Johnson, would amend the definition of "claims management services" in amendment 20 so that only "regulated" claims management services would be caught by the definition. That would therefore mean that the provisions of part 1 on success fee agreements would not apply to claims management companies as providers of relevant services until such companies are regulated by the Financial Conduct Authority. In other words, it would not stop claims management companies offering success fee agreements in the regulatory gap; instead, it would negate Government amendment 20, which brings such companies within the ambit of part 1. They would therefore have a free-for-all, because none of the restrictions and protections under part 1 would apply. In particular, that would mean that claims management companies would not be subject to the cap on success fees that will be brought forward in regulations.

I understand that Daniel Johnson does not intend amendment 20A to have that effect. If the inspiration for the amendment was to be clear that providers of success fee agreements would all be regulated persons, I am happy to put it on the record that a provider of a success fee agreement under the Government's amendments will be either a regulated law firm or a regulated claims management service provider, once the Financial Conduct Authority assumes its full rather than its transitional powers. For that reason, I ask Daniel Johnson not to move amendment 20A.

Amendment 65, in the name of Gordon Lindhurst, would delay the commencement of parts 1 to 4 until claims management companies are regulated by the Financial Conduct Authority. Members should be clear that the amendment would delay not only the commencement of QOCS—qualified one-way costs shifting—but every single provision set forth in parts 1 to 4. A balance needs to be struck between the benefits of increased access to justice and the risk of

increased unscrupulous operations of claims management companies in Scotland during the so-called regulatory gap. The Scottish Government does not consider that there will be a flood of rogue claims management companies moving north from England in the period between commencement of the provisions of parts 1 and 2 and the commencement of full regulation of claims management in Scotland by the FCA. Sheriff Principal Taylor was quite clear in his evidence that he did not believe that that would happen. Although there will be a gap between implementation of the bill and full FCA regulation, the gap is expected to be relatively short.

There have been certain developments since stage 1. Specifically, the Financial Guidance and Claims Bill, as amended, which is now going through the House of Commons, has transitional clauses that will give the FCA the power, on a transitional basis, to obtain reports, information and documents from claims management companies operating in Scotland in advance of full commencement of the FCA's regulation. Further, the UK bill has also recently been amended to ban cold calling for claims management services, and that provision is to apply in Scotland. In fact, I wrote to the convener on 8 February about those important amendments at the Palace of Westminster, and I hope that all committee members have had an opportunity to look at that information.

Although that does not mean immediate regulation, the FCA will be able to clamp down on errant companies the moment that regulation starts. Any rogue companies that are contemplating a move to Scotland will know that regulation is coming and that any such operations will be short lived. Any delay in implementing the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill will delay its access-to-justice benefits to anyone in Scotland who is contemplating civil litigation. Kim Leslie, the convener of the civil justice committee of the Law Society of Scotland, was clear that the Law Society did not want to delay implementation until there is full regulation of claims management companies in Scotland.

Gordon Lindhurst will be unsurprised to hear that I am unable to support his amendment to delay commencement of all the substantive provisions of the bill until FCA regulation of claims management companies is in place. First, that does not take into account the latest developments, which I have referred to in some detail, with respect to the amendments to the UK Financial Guidance and Claims Bill. Secondly, to do so would be to delay the real access-to-justice benefits that the bill that we are considering delivers.

I reiterate that amendment 65 would not only delay QOCS but would delay the other provisions of the bill, such as group procedure, third-party funding, solicitors being able to offer damages-based agreements, a sliding cap on success fees and so on. Consequently, I ask Mr Lindhurst, in light of those latest developments, not to move amendment 65.

Amendments 18, 19, 21, 23 to 26 and 30 are all consequential on amendments 20 and 22.

I move amendment 18.

Daniel Johnson: I lodged amendment 20A as a probing amendment, because although I fully acknowledge the minister's comments and recognise that pressing my amendment might have consequences, it is important that we address the possibility of a regulatory gap for claims management companies. Indeed, the committee asked the Government to look at that in our stage 1 report, and it continues to be a concern. I recognise that, in the fullness of time and as the UK legislation comes forward, that would cease to be an issue, but at the moment there is a gap that is not clear or certain. It is important that the Government looks at how it could use the precautionary principle to provide for interim regulation of claims management companies for the period of the gap.

For those reasons, I thought that it was important to lodge my probing amendment, but I also fully support the bill. I acknowledge that Gordon Lindhurst's amendment may well be in the same broad space as mine and may have the same broad intent, but I would not support delaying the bill overall. I hope that that explains and clarifies my intentions behind amendment 20A.

Gordon Lindhurst (Lothian) (Con): I refer to my entry in the register of members' interests, and to the fact that I am a member of the Faculty of Advocates and a practising advocate.

I do not need to go into detail about the wording of amendment 65, in light of the fact that the minister has covered that. The purpose of my amendment is to ensure that protection for those who are seeking access to justice under the terms of the bill, by regulation of claims management companies, is in place before the bill is brought into force.

That would anchor in the bill the committee's recommendation in paragraph 326 of its stage 1 report, which says:

"The Committee considers that the Bill's provisions should not be brought into force until such regulation is in place."

As committee members are aware, amendment 65 also has the support of the Association of British

Insurers, which, in its stage 2 briefing to the committee, said:

"This would ensure that there is no regulatory gap to the detriment of Scottish consumers and safeguard against a further increase in CMC activity in Scotland."

11:15

I take on board the minister's comments, but with regard to the suggestion that the bill's principal provisions need to be brought into force urgently—indeed, immediately—I point out that the Taylor report was published in October 2013, and that it has, quite properly, taken a number of years for us to get to this stage. I submit, therefore, that there is no urgency to bring the principal provisions into force immediately, in light of what the minister has said about the minimal delay that will be caused. The comment that regulation is coming is not, in my view, good enough, given that minimal delay and, because quite a number of years have been spent bringing the bill to this stage, it is important that claims management company regulations are in force and the bill is brought into force in tandem with them.

Liam McArthur: It is a happy timetabling coincidence that we move from the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill and our debate over whether there is a gap in that respect, and the desirability of closing any such gap, to this instance, in which the minister seems to be taking a slightly more relaxed position. I not only accept her points about the wider benefits of the bill's provisions and the desirability of not delaying their implementation but acknowledge the steps that she and her officials have taken to link into the process at UK level and try to address the problem of claims management companies that was raised with us at the outset of stage 1.

On the amendments in this group, I was probably more taken with Daniel Johnson's approach to addressing the issue—I am sure that he is happy to accept that the idea originally came from Sheriff Principal Taylor as a way of addressing that hiatus—than with the approach that, for very genuine reasons, Gordon Lindhurst has suggested. I accept some of the shortcomings or problems that are inherent in the approach in Daniel Johnson's amendment 20A, but I think that we will need to look at the matter again at stage 3 to ensure not only that we are doing everything possible to deliver the bill's wider benefits but that this very serious concern, which has been raised with us pretty much across the board and from the get-go, is dealt with as best as it can be.

The Convener: I would add that we raised the concern that there would be a period in which the claims management companies would not be covered by regulation and the fear that, in that interim period, they might gravitate towards Scotland and its less stringent regime. It would be very much appreciated if the minister could address that in her comments.

Annabelle Ewing: The purpose of the Government amendments in the group is to ensure and remove any doubt that the bill's provisions apply to both solicitors and claims management companies as providers of success fee agreements. As I have said, those providers will be regulated either by the Law Society of Scotland, in the case of solicitors, or by the Financial Conduct Authority, in the case of claims management companies.

Gordon Lindhurst, quite rightly, referred to the committee's stage 1 report, but I would note that the developments at the Palace of Westminster that I have mentioned postdate it. They will give the FCA on a transitional basis the power to demand information, reports and documents from claims management companies and, very importantly, will introduce a ban on cold calling, which will also apply to Scotland. As I have said, given those further moves to ensure that claims management companies operate in a reasonable fashion, it is for us to weigh them up with where we ourselves have reached and where we are with the important provisions in the bill, which indeed emanate from Sheriff Principal Taylor's excellent review.

However, given that the review is dated 2013, I would have thought that that might be a reason to crack on and ensure that the bill contains the important provisions concerning group proceedings, that solicitors will be able to offer damages-based agreements that will not just be within the purview of claims management companies, and that there will be a sliding cap on success fees and qualified one-way costs shifting and many other provisions. We will allow the bill to go ahead to ensure that individuals in Scotland feel that they have a remedy to enforce their rights in civil litigation.

Amendment 18 agreed to.

Amendment 19 moved—[Annabelle Ewing]—and agreed to.

Amendment 20 moved—[Annabelle Ewing].

Amendment 20A not moved.

Amendment 20 agreed to.

Amendments 21 to 24 moved—[Annabelle Ewing]—and agreed to.

Section 1, as amended, agreed to.

Section 2 agreed to.

Section 3—Expenses in the event of success

Amendments 25 and 26 moved—[Annabelle Ewing]—and agreed to.

Section 3, as amended, agreed to.

Section 4 agreed to.

Section 5—Exclusion for family proceedings and other proceedings

The Convener: Group 2 is entitled "Success fee agreements: exclusion of certain matters". Amendment 27, in the name of the minister, is grouped with amendments 28 and 29.

Annabelle Ewing: Amendments 27 and 29 will remove the exclusion of family proceedings for success fee agreements generally. However, amendment 28 will permit a more nuanced approach by allowing the Scottish ministers to make regulations setting out what kinds of success fee agreement will be prevented from being used in certain kinds of litigation.

The Scottish Government agrees with Sheriff Principal Taylor that family proceedings should not be financed by damages-based agreements. However, section 5 of the bill will currently prevent any type of success fee agreement from being used to finance family proceedings. Success fee agreements can be either speculative fee agreements or damages-based agreements. Those terms are not defined in the bill and the Scottish Government does not propose to introduce definitions because that would add unnecessary complexity.

The Faculty of Advocates submitted to the Justice Committee evidence to the effect that speculative fee agreements are sometimes, if rarely, used in family proceedings, and argued that such a funding option should, where appropriate, remain available to litigants. Amendment 28 will therefore extend the existing power of Scottish ministers to provide by regulations the kinds of litigation that might or might not be financed by certain types of success fee agreements.

The risk in dealing with the matter in the bill is that either too many types of funding arrangements will be excluded, as the bill does currently, or too few. Primary legislation could prove to be inflexible in that regard.

The approach that we suggest will allow for future proofing, because regulations can change as practice changes. Such regulations would be the subject of public consultation before being presented to Parliament, and would be subject to affirmative procedure. Amendments 27 and 29 will remove from the bill the exclusion of family proceedings.

The Government remains committed to prohibiting the use of damages-based agreements in family proceedings, as was recommended by Sheriff Principal Taylor. Equally, it is concerned to ensure that speculative fee agreements should continue to be available, where those are appropriate and will assist litigants in pursuing cases. The amendments in the group will permit that, and the expanded delegated power will ensure sufficient flexibility to react to changes in success fee agreement practice in the years ahead.

I move amendment 27.

Liam McArthur: I understand the rationale for the amendments, and it is helpful that the minister has set out the position further. I suppose that there is always a slight anxiety in moving measures from primary legislation into secondary legislation, but as I said, I understand the rationale. Is it the minister's understanding that the amendment on post-legislative scrutiny of the bill that we will debate later would capture those provisions and allow us an opportunity, at a later stage, to review how the provisions are working?

Annabelle Ewing: Yes. My understanding is that the post-legislative scrutiny proposals are sufficiently wide to allow how—assuming that the bill is passed—the act operates in practice to be looked at.

Liam McArthur: Thank you.

Amendment 27 agreed to.

Amendments 28 and 29 moved—[Annabelle Ewing]—and agreed to.

Section 5, as amended, agreed to.

Section 6—Personal injury claims

Amendment 30 moved—[Annabelle Ewing]—and agreed to.

The Convener: Group 3 is entitled "Personal injury claims: use of damages for future loss in calculation of success fee". Amendment 57, in my name, is grouped with amendments 58, 59 and 31.

Amendment 57 would ensure that damages for future loss are effectively ring fenced and cannot be included in a success fee agreement, so those would not form part of the overall damages that would be awarded in a claim for the purpose of calculating a success fee agreement.

Amendments 58 and 59 are consequential on amendment 57.

The committee heard evidence at stage 1 about the term "future loss". The committee report states that future loss can cover damages awarded for

"lost earnings while an injured person is off work recovering, or travel expenses for expected future hospital appointments. In more serious personal injury cases, it could cover loss of all future earnings, as well as the costs of future care and specialist equipment which may be needed."

The bill will allow for damages awarded

"for future loss to be included when calculating a solicitor's success fee, provided certain conditions are met".

In summary, the conditions state that the damages are

"paid in a lump sum"

and that

"if damages for future loss are for a lump sum"

exceeding

"£1 million, then ... damages will only be included if ... the solicitor has"

advised the client to accept the lump sum and

"either the court (where damages are awarded by the court) or an independent actuary (where damages are obtained by settlement) has confirmed that it is in the client's best interests that payment be in a lump sum."

It is fair to say that witnesses had conflicting views on the issue. The Association of British Insurers and the Forum of Insurance Lawyers both argued—because damages for future loss are awarded to pay for the pursuer's care and support, including accommodation and equipment that they may need for the rest of the lives—that that money should not be included in the fee agreement.

Taking the opposite position, pursuer representatives

"argued against ring-fencing damages for future loss"

and said that they considered that the bill

"struck the right balance between protecting the pursuer and ensuring that a solicitor is paid fairly for the work involved".

11:30

In its stage 1 report, the committee voiced its concerns about

"damages for future loss"

being "included", and it asked

"the Scottish Government to reflect on this evidence and to reconsider whether damages for future loss should be ring-fenced when calculating a solicitor's success fee."

Having considered the evidence from defender, insurer and pursuer representatives, I am persuaded that damages for future loss should be ring fenced from the calculation of a solicitor's success fee. Quite simply, that money has been specifically awarded to the pursuer for their future care and support in whatever form that might take. Some aspects might, for example, be necessary immediately at the time of the award, but it is evident that they will be required over time.

Furthermore, the pursuer's representatives can still be paid through a variety of methods, including through recovering judicial expenses, claiming from any part of the award that does not include damages for future loss and, possibly, claiming an additional fee in complex cases. The committee heard that those fees could be

"a multiple of three or four times the judicial expenses."

In conclusion, I believe that amendments 57, 58 and 59 not only strike the right balance in calculating a success fee, but are necessary to ensure that the appropriate measures are in place to protect a pursuer's entitlement for an award for future loss.

I should say that I support the definition of "actuary" in amendment 31.

I move amendment 57.

Annabelle Ewing: The group of amendments is about damages for future loss. From the outset, it is important that we do not lose sight of the fact that we are considering people who have been victims of very tragic circumstances and who have received catastrophic injuries through no fault of their own.

Sections 6(4) to 6(8) make provision for the future element of damages awards. The system in the bill as drafted would be, as Sheriff Principal Taylor recommended, that damages for future loss

"will be included in the amount of damages"

from which the success fee will be calculated if, but only if, the

"future element ... is to be paid in a lump sum".

If the future element is to be paid by periodical payment, it will not be included in the calculation. In other words, in the bill as drafted, it will be ring fenced.

Following the change to the discount interest rate, and in the light of the provisions in the forthcoming damages bill, it seems to be much more likely that, in the future, the element of damages payment relating to future loss will be made by means of a periodical payment order. Sheriff Principal Taylor considered the position in England, where all of the future element of the award is ring fenced and is not included in the calculation of the success fee. The bill faithfully implements Sheriff Principal Taylor's recommendations on success fees and lump-sum payments, including future loss, when calculating the success fee.

Alongside that, the bill contains a number of safeguards in sections 6(5), 6(6) and 6(7). If the future element is more than £1 million, the court

will have to agree that it is in the client's "best interests" that the payment be made by lump sum rather than by periodical payment order. If the award is agreed by settlement, an actuary would have to agree that the payment relating to future loss should be paid by lump sum.

Margaret Mitchell's amendment 57, and the consequential amendments 58 and 59, go further than Sheriff Principal Taylor's recommendations. Amendment 57 would change the effect of the provisions in section 6(4) of the bill in relation to the calculation of a success fee. It would mean that no success fee could be taken from the future-loss element of an award if it is to be paid as a lump sum. Under the bill's existing provisions, the future element of an award is already excluded from the calculation of the success fee if the future element of an award of damages is to be paid by periodical payment order.

In that light, and having considered the issues that the committee raised in its stage 1 report, the Government is prepared to support the amendments, which will make the position the same when the future element of an award of damages is paid by lump sum. If the committee supports the amendments, the Government will consider whether any changes will be needed as a consequence. If they are, the Government will lodge appropriate amendments at stage 3.

Amendment 31 responds to concerns that were raised by Stewart Stevenson—a former member of the committee—at stage 1 about the need for an appropriate definition of "actuary" to be provided in section 6. However, the intention of amendment 31 will be overtaken by the changes that amendment 58 seeks to make, so I intend at this point not to move amendment 31. I will wait to find out the result of the debate on the convener's amendments.

However, as I will not have another opportunity to speak on this group of amendments, I will quickly explain the intention behind amendment 31, just in case the committee votes against amendment 58.

In his evidence, Sheriff Principal Taylor suggested that the actuary should be a chartered actuary. Amendment 31 provides that the reference to an actuary in section 6(6)(b) would mean

"an Associate or Fellow of the Institute and Faculty of Actuaries."

The Institute and Faculty of Actuaries has advised that the approach should be future proofed, because even if the concept of "chartered actuary" emerges in the future, the concepts of "associate" and "fellow" would be retained.

I will not move amendment 31, because its intent would be overtaken by the changes that the convener's amendment 58 seeks to make.

John Finnie (Highlands and Islands) (Green): I want to speak briefly in support of amendment 58. The minister mentioned the client's best interests, which I think should be at the forefront of our deliberations. A lot of what we do here can be very dry, and we have to think about the practical implications. I do not for a second doubt that the very able individuals who deliver the important sums of money for personal care and so on that we are discussing will use appropriate methods to ensure that people are properly remunerated, but I think that it is wholly appropriate that the money be ring fenced.

Liam McArthur: We were all seized by the fact that there appears to be an incongruity with regard to the use of lump-sum payments as opposed to periodic payments, and I welcome the fact that the minister accepts that amendments 57 to 59 will address that concern.

I am slightly concerned about the fact that the minister does not intend to move amendment 31, which I see as an attempt to stave off attempts by Stewart Stevenson to set himself up as an actuary, but I am reassured that she thinks that amendment 58 will achieve the same objective. I therefore whole-heartedly support amendment 58.

The Convener: I note that the minister said that it is likely that the proposed damages bill will provide for payments for future loss to be made in instalments, but that is by no means certain. In the meantime, lump sums will still be recommended and will continue to be awarded. Moreover, £1 million is a colossal amount of money; indeed, for some pursuers, £1,000 is a colossal amount of money. There is a danger that a pursuer could, under what is proposed in section 6, lose out even in relation to a payment of damages for future loss of £1,000, so I will press amendment 57.

Amendment 57 agreed to.

Amendments 58 and 59 moved—[Margaret Mitchell]—and agreed to.

Amendment 31 not moved.

Section 6, as amended, agreed to.

Section 7—Form, content etc

The Convener: We move to group 4, which is on independent advice about success fee agreements. Amendment 63, in my name, is the only amendment in the group.

Amendment 63 seeks to address a potential conflict of interests with regard to success fee agreements, which is an issue that was raised by Professor Alan Paterson during stage 1. Professor

Paterson stated that success fee agreements had to be subject to appropriate protections and that in some cases there might be a need for clients to receive advice, independent from their original solicitors, on the terms of success fee agreements. He considered that that would protect both solicitors and clients from underlying potential conflicts of interest. Although it would not be necessary for every speculative fee agreement and every damages-based award, there is an argument for it in some situations.

Amendment 63 therefore allows further discussion to ascertain from the minister her views on the independent review issue and how best to ensure that the necessary protections are in place. The amendment would allow the Scottish ministers to make regulations about

"the circumstances in which the provider ('A') must ensure that, prior to the agreement being entered into, the recipient receives advice"

from an independent provider as to whether the agreement is

"in the recipient's best interests".

However, I am aware that, thereafter, the question would be what those circumstances were.

Since lodging the amendment, I have spoken further with Professor Paterson, who pointed out that all lawyers are required to act in good faith and in the objective best interests of their clients. Currently, fee agreements regarding property transactions are voidable if there is either an actual or a potential conflict of interest, unless the transaction was fair and reasonable in the circumstances, there was no undue influence, the client gave his or her informed consent following disclosure of all the relevant facts, and another independent solicitor would have advised it.

At present, such tests are applied in property cases but not in the basic lawyer-client fee contract. Therefore, to ensure that vulnerable potential clients have a level of protection and that success fee agreements are fair, I propose that those tests be applied to such agreements in personal injury cases. That is on the basis that a success fee agreement involves a lawyer taking a share of the client's damages, which is their property. It therefore follows that, in certain success fee agreement cases, we need more than the normal protection in a client retainer contract. The onus should be placed on the lawyer to show that those two tests—first, that the agreement is fair and reasonable, with no undue influence, and, secondly, that there has been informed consent—have been met. If those tests have not been met as provided for, the agreement would be voidable.

I look forward to hearing the minister's comments, and I would be grateful for a commitment from her to work with me to look at those tests with a view to putting them in the bill.

I move amendment 63.

Annabelle Ewing: Amendment 63, in the convener's name, as drafted—which is all that I can deal with as that is all that is in front of me today—provides that the Scottish ministers may make regulations about the circumstances in which a services provider must furnish a pursuer with advice from another independent provider before the pursuer enters into a success fee agreement.

I find it difficult to know when such a check might be required. I take into account what the convener has just said but, as has also been said, many providers will be solicitors, who are professionally required to act in the best interests of their clients at all times. It is therefore difficult to see whether there is any need to provide the pursuer with a second opinion—if that is still what is being contemplated—with attendant costs and the questions of who should bear them, what the process should be, what steps would be required and how long all that would take.

Of course, one of the overarching objectives of the bill is to make costs more predictable. The pursuer will be able to go to a lawyer who can offer, for example, a damages-based agreement, no up-front costs and so on, and there will be QOCS in personal injury actions. That is the straightforward approach of the bill, and it seems to me that the proposed process could unintentionally lead to a more cumbersome approach in circumstances in which the solicitor is duty bound under their practising certificate to act in the best interests of their client.

11:45

With regard to the theoretical conflict that has been mentioned, solicitors have been able to offer speculative fee agreements since, I think, the early 1980s—[*Interruption*.] Sorry—it is since the 1990s. Although there has been a theoretical conflict of interests with regard to the provision by solicitors of speculative fee agreements, that has not presented any problem in practice. We can take some comfort from the fact that that arrangement has been in operation for some decades now without any need for the additional process that is set out in the amendment.

Further, the setting of professional standards rules for solicitors, for example, is a matter for the Law Society of Scotland, as the professional regulator. As I said during the stage 1 evidence session that I attended, it is not for the Scottish Government to direct the Law Society of Scotland to take particular actions, although, of course, we can have discussions with it. Therefore, the

member's concerns might more properly be addressed by having discussions with the Law Society of Scotland, as the regulator, to see what its view is.

I hope that that is helpful.

The Convener: Thank you for those comments. There are potential conflicts of interest with regard to success fee agreements and the bill does not address them. I endorse the two-test provision that Professor Paterson set out in our discussions, which involve the lawyer or solicitor proving that the arrangement is fair and reasonable, with no undue influence being exerted, and that the client has given their informed consent. I believe that Sheriff Principal Taylor said that the provision concerning informed consent in particular would mean that the solicitor would say that they charge a certain amount per hour, set out the reasons for that and say that other rates are available, which would allow the client to make an informed choice about whether to engage the solicitor or look elsewhere. The provision seems to work in the interests of the client and of access to justice.

I am aware that, as drafted, amendment 64 does not do what I want the review of the success fee agreement to do. For that reason, I will seek leave to withdraw the amendment. However, I will do what the minister suggests and speak to the Law Society, and I hope that she will engage with me to consider what might be brought forward at stage 3 to ensure that vulnerable clients and others are not disadvantaged as a result of not benefiting from the two tests for success fee agreements that have been suggested.

Amendment 63, by agreement, withdrawn.

The Convener: Group 5 is entitled "Success fee agreements: multiple providers". Amendment 32, in the name of the minister, is the only amendment in the group.

Annabelle Ewing: Amendment 32 is intended to address a potential problem that was identified by members of the committee, particularly John Finnie and Rona Mackay, during stage 1 evidence, which concerned the possibility that attempts might be made to charge more than one successive fee in relation to a case, thus circumventing the caps to be imposed on success fees under section 4.

The suggestion was that a firm of solicitors and a claims management company might both take a success fee, and that the combined charge to the client might exceed the proposed caps on success fees to be paid out of damages awarded or agreed.

Pursuer representatives gave evidence to the committee that that does not happen in practice. Nevertheless, we wish to ensure that it can never happen in practice, and amendment 32 will give ministers the power to ensure that it will not. It will allow regulations to be made, under the existing delegated power in section 7(3), that will prevent a pursuer from being liable to pay two or more success fees. Those regulations will engage the affirmative procedure.

By referring to more than one provider rather than more than one agreement, we intend to allow the provision to deal with cases, first, in which there is more than one party to an agreement and, secondly, in which there are multiple agreements.

In addition, the committee will be pleased to learn that the Law Society of Scotland's working group on success fee agreements proposes to develop a model success fee agreement. That model should make it clear that only one success fee is payable, which will further reduce the risk of abuse.

I move amendment 32.

Amendment 32 agreed to.

The Convener: Group 6 is on the power to make further provision about success fee agreements. Amendment 33, in the name of the minister, is the only amendment in the group.

Annabelle Ewing: The Delegated Powers and Law Reform Committee's report on the bill at stage 1 expressed concern about the breadth of the power that section 7(4) gives to the Scottish ministers to modify part 1. Amendment 33 responds to those concerns by restricting that power so that it will apply just to section 7, rather than to part 1 as a whole. The amendment also contains a restriction that the regulations can add to section 7 or modify text that is added by the regulations, but they cannot otherwise alter section 7. In other words, none of the text of section 7 that the Parliament agrees to at stage 3 may be removed by regulations.

It might be helpful if I explain the kind of addition and modification that is envisaged. As the Government explained in its response to the DPLRC, the purpose of sections 7(3) and 7(4) is

"to augment the current provisions of the Bill in relation to success fee agreements",

where it is considered to be desirable to have future provision about the mandatory terms of success fee agreements or their enforcement. Such provision would be brought forward only after consultation on the regulation of success fee agreements with stakeholders and thus it cannot be included in the bill at present. The regulations would mean that any new provisions could be set out in section 7, rather than in freestanding regulations, which would mean that all the mandatory terms that relate to success fee

agreements would be found in the primary legislation.

I move amendment 33.

Amendment 33 agreed to.

Section 7, as amended, agreed to.

Section 8—Restriction on pursuer's liability for expenses in personal injury claims

The Convener: Group 7 is on the restriction of the pursuer's liability for expenses in environmental proceedings. Amendment 60, in the name of John Finnie, is the only amendment in the group.

John Finnie: I wish to speak on the implications of the Aarhus convention, which is now 20 years old. I have not talked about the subject continuously throughout that intervening period, but I have certainly done so frequently, with the minister and her predecessors in her position and with ministers in environmental portfolios.

The bill introduces qualified one-way costs shifting in personal injury cases, including those with an environmental aspect—so-called toxic torts. That is seen as first-class protection, because we know that costs are a huge barrier to justice. We also know that the Scottish Government has consistently been criticised for its perceived failure to comply in full with the convention, although I accept that that is not the Government's position. Amendment 60 would go some way toward addressing that issue, although it would not do so completely. I am keen to hear what the minister has to say; I am always keen to engage on this subject.

I move amendment 60.

Annabelle Ewing: Amendment 60, in the name of John Finnie, is intended to give pursuers or petitioners in environmental cases that fall under the Aarhus convention the protection of qualified one-way costs shifting, under section 8.

At present, protective expenses orders, or PEOs, limit a party's liability for paying the expenses of an opponent or third party up to a particular sum, whatever the outcome of the case. That limit gives a degree of certainty and predictability in relation to litigants' potential exposure to an opponent's expenses.

Rules of court currently regulate the award of protective expenses orders in judicial review cases and statutory reviews that fall within the scope of the public participation directive—broadly, Aarhus cases. Last year, the Scottish Civil Justice Council consulted on further draft rules in relation to protective expenses orders. Following the consultation, the Scottish Civil Justice Council has set up a working group to consider protective expenses orders. We await its final conclusions and it would be wrong to pre-empt them now.

During Sheriff Principal Taylor's two-and-a-half-year review of expenses and civil litigation, he examined in some detail the need to restrict certain litigants' liability for expenses in judicial review applications, which would cover most Aarhus cases. He stated:

> "To an extent, the judiciary are already embracing the concept of QOCS, albeit under the guise of PEOs."

Sheriff Principal Taylor rejected an extension of QOCS to other types of case that he considered did not always involve a weak pursuer against a powerful defender. The Scottish Government considers that that argument applies to environmental cases, given that well-funded charities, wealthy landowners or businesses might be the ones seeking to judicially review Scottish ministers' decisions on energy consents, for example.

The post-legislative review paper on the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which introduced QOCS in England and Wales, did not suggest that QOCS should be extended to any other area of civil proceedings beyond personal injury. We should also recall that there has been no consultation on the matter, given that the extension of QOCS beyond personal injury claims was not a recommendation of Sheriff Principal Taylor in his review. Furthermore, no environmental non-governmental organisation made any submission to the consultation on the bill on that issue and nor did any other respondent to the consultation suggest any extension of QOCS beyond personal injury claims.

I consider that the best approach is for the Scottish Civil Justice Council to continue to keep the matter of costs in environmental proceedings under review as part of its civil justice remit. As I have already pointed out, Sheriff Principal Taylor did not recommend QOCS for environmental cases or any other types of civil litigation beyond personal injury actions, and the post-legislative scrutiny of the 2012 act that introduced QOCS in England and Wales did not recommend extending QOCS to anything other than personal injury.

Later today, or perhaps next week, we will debate a group of amendments that provide for post-legislative review of the act, including QOCS.

John Finnie: Will the minister take an intervention?

Annabelle Ewing: Certainly.

John Finnie: Thank you. I was not sure whether you were about to reach the end of your speech and I wanted to give you the opportunity to comment on the criticisms that have been made—

legitimate or otherwise—and how you intend to address those. Most recently, the First Minister spoke in Paris and there was criticism about what was seen as a shortfall in the Scottish legal system's compliance with Aarhus. Can you comment on that and on your willingness to discuss the matter further?

Annabelle Ewing: Scotland has made progress on the implementation of Aarhus and that should be recognised—to be fair, Mr Finnie recognised that in his first comments on the matter. Recently, certain changes have been made to the protective expenses order regime. It is clear that those do not go far enough for Mr Finnie. However, that is properly a matter for the Scottish Civil Justice Council, which has a working group on the issue and it would be wrong to pre-empt the result of its work.

In conclusion, the consultation on the bill was not about QOCS in environmental cases; it was about QOCS in personal injury cases. No respondent suggested an extension of QOCS and nor did any NGO make a submission suggesting the extension of QOCS to environmental cases.

I appreciate the member's long-standing interest in the matter and I fully expect him to raise the matter with me on many more occasions. I am always happy to discuss that or any other issue. However, I ask him to consider not pressing his amendment and to allow the Scottish Civil Justice Council to continue with its work.

John Finnie: I thank the minister for her comments and note what she said. I do not intend to press the amendment.

Amendment 60, by agreement, withdrawn.

12:00

The Convener: The next group is on pursuer's liability for expenses in personal injury claim: circumstances of pursuer and defender. Amendment 1, in the name of Liam Kerr, is grouped with amendments 2, 3 and 9.

Liam Kerr: I would suggest that, fundamentally, the amendments that I have proposed to section 8(1) strike the appropriate balance. Qualified one-way costs shifting is to be introduced as a means of improving access to justice. That is a good thing, but it should not apply in cases in which there is no David and Goliath relationship. We heard a great deal about the importance of mitigating any such relationship, and what I am proposing is that the QOCS amendments should not apply where there is no such relationship.

My view is that there is a lack of protection in the bill for defenders who are uninsured and/or of limited means. The amendments that I am proposing reflect my view that QOCS should not apply where there is a funder—and amendment 9 clarifies what a funder would be—or where a defender is uninsured, is not a public body, is a person who is legally aided and/or is a person who gets third-party funding. That is what my amendments seek to achieve.

I move amendment 1.

Liam McArthur: I welcome Liam Kerr's clarification of his amendments and recall the debate that we had at stage 1. My anxiety about trying to limit the QOCS provisions—or where they apply, in this instance—is that we need to guard against introducing unhelpful incentives into the system. One example would be providing an incentive for people not to take out insurance in order to escape liability or the prospect of personal injury cases being brought. I will listen carefully to what the minister has to say, but I think that concerns were raised during stage 1 about where we would get to if we try to define the provisions in the way that Liam Kerr has quite legitimately sought to do.

Daniel Johnson: I likewise hear what Liam Kerr is saying regarding David and Goliath situations, but I am worried that his amendments do not strike the right balance. I question whether the indicators that he is using—such as whether defendants have insurance or pursuers have third-party funding—would actually exclude the situations that he is concerned about. With regard to third-party funding, I am particularly concerned that that would exclude people who are pursuing claims with the backing of a trade union, which would clearly not be right. That is a useful relationship and, indeed, one that enhances the intent behind the legislation. Therefore, while I understand the intent behind them, I will not support the amendments.

Annabelle Ewing: During the stage 1 evidence sessions, some concern was raised by the Faculty of Advocates and defenders' solicitors about the operation of QOCS in what was termed a David versus David case—in other words, where the defender was, for example, ostensibly an uninsured individual—and I refer to the points made by Mr McArthur a moment ago. Amendments 1 to 3, in the name of Liam Kerr, attempt to address that issue, but go further in a way that risks seriously undermining the operation of QOCS in Scotland when it is introduced. Indeed, the amendments appear to have the intention of watering down QOCS from what Sheriff Principal Taylor proposed to the point that it would offer little benefit to personal injury pursuers.

The effect of amendment 1 is that section 8 would only apply if the pursuer has no funder. We wonder whether that is an attempt to remove pursuers benefiting from success fee agreements

from the effect of section 8. That would be a significant departure from Sheriff Principal Taylor's proposals, because success fee agreements and QOCS were intended to be complementary measures for personal injury pursuers.

Under amendment 1, section 8 would apply only when it appears to the court that the defender is insured in respect of the claim, when the defender is not insured but the Motor Insurers' Bureau is liable to make payment, or when the defender is a public body. In other words, QOCS would only be available if the pursuer had no funding and the defender was insured or, if not insured, was a person for whom the MIB would pick up the tab, or was a public body.

The committee heard evidence from Sheriff Principal Taylor and from Patrick McGuire of Thompsons Solicitors that pursuers do not in practice sue uninsured defenders. As Sheriff Principal Taylor said:

"if the defender is a man of straw the pursuer will not raise proceedings. After all, there is no point in obtaining a court award that cannot be enforced."

In his stage 1 evidence, Sheriff Principal Taylor also pointed out some of the drawbacks of further restricting QOCS:

"The difficulty with that is that you could end up with parties not bothering to insure themselves when they ought to or with parties taking on a much higher excess in order to pay a much lower premium and thereby making themselves, in effect, self-insured. You could find parties who have policies—so QOCS would apply—but who have breached the terms of their policy with the insurers, such as the obligation for fidelity. As a consequence, one-way costs shifting would not be available in circumstances in which it should be available."—[*Official Report, Justice Committee,* 31 October; c 9, 10.]

I think that Liam McArthur picked up on those points in Sheriff Principal Taylor's evidence.

QOCS is part of a raft of measures introduced by the bill to provide more certainty about the cost of litigation for those with a meritorious claim. The bill makes it clear that the pursuer will not be liable for the expenses of the defender if the case is lost. Sheriff Principal Taylor quoted statistics from England, where it was noted that defender insurers claim expenses only in 0.1 per cent of the cases that they win. Sheriff Principal Taylor had no doubt that the situation was the same in Scotland.

Amendments 2 and 9 would have similar effects in restricting QOCS where the pursuer was separately funded—I think that Daniel Johnson's concern dealt with that.

The effect of amendment 3 would be to disapply QOCS where the pursuer was legally aided. It is not, however, envisaged that personal injury claimants will be legally aided if they have a success fee agreement. It is, of course, absolutely right that there should be no benefit if the claim is pursued inappropriately—we will discuss shortly fraud and other grounds on which QOCS protection may be lost—but to add the further restrictions that Liam Kerr seeks through his amendments would just add uncertainty about costs to the process of litigation. That would be in direct contradiction to the bill's overarching principle, which is to increase the predictability of the costs of civil litigation such that we can promote access to justice on the part of the citizens of this country; and it would reduce the bill's effectiveness and remove an essential element of the carefully constructed framework of recommendations made by Sheriff Principal Taylor. Again, I cite the fact that QOCS was introduced in legislation in England and Wales in 2012 without such restrictions being in place. Moreover, no problems in that regard were identified in the recent post-legislative scrutiny of that legislation.

A number of stakeholders have cautioned against any reforms that could invite satellite litigation. I fear that Liam Kerr's amendments could increase the likelihood of such disputes. It is for the foregoing reasons that I ask Liam Kerr to consider withdrawing amendment 1 and not moving amendments 2, 3 and 9.

The Convener: I invite Liam Kerr to wind up and to say whether he will press or withdraw amendment 1.

Liam Kerr: I am grateful for the arguments that have been made and I will respond to some of the points. On the situation in England and Wales, I think that I am right in saying that there are some significant differences. That is not to say that I disagree with the minister; I simply think that there is more to be investigated in that regard. Mr McArthur's point about insurance, which the minister also made, is concerning. Again, I would be interested in looking at that further, although I am not convinced that it is a reason to withdraw amendment 1.

I am not attempting to remove success fee agreements, although I am interested in the minister's point. The minister pointed out that some evidence suggests that, as a matter of practice, pursuers do not pursue the uninsured, but I do not know whether that is a good basis on which to legislate with regard to a person with an interest. On that note, I declare my interest as a registered member of and practising solicitor with the Law Society of England and Wales and the Law Society of Scotland.

The minister talked about introducing uncertainty around costs, but it is arguable that relying on a practice whereby a pursuer does not pursue an uninsured person provides even more uncertainty than would be the case were my amendments agreed to. I want my amendments to

be put to the vote, so I am pressing amendment 1 and will move amendments 2, 3 and 9.

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Corry, Maurice (West Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)

Against

Adam, George (Paisley) (SNP)
Finnie, John (Highlands and Islands) (Green)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Johnson, Daniel (Edinburgh Southern) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 1 disagreed to.

Amendment 2 moved—[Liam Kerr].

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Corry, Maurice (West Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)

Against

Adam, George (Paisley) (SNP)
Finnie, John (Highlands and Islands) (Green)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Johnson, Daniel (Edinburgh Southern) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 2 disagreed to.

Amendment 3 moved—[Liam Kerr].

The Convener: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Corry, Maurice (West Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)

Against

Adam, George (Paisley) (SNP)
Finnie, John (Highlands and Islands) (Green)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Johnson, Daniel (Edinburgh Southern) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 3 disagreed to.

The Convener: The next group is on the grounds on which a pursuer may be liable for expenses in a personal injury claim. Amendment 34, in the name of the minister, is grouped with amendments 4, 35, 5, 36, 6 to 8, 10, 40, 47 to 49 and 17.

Annabelle Ewing: This group of amendments provides for the circumstances in which the protection of qualified one-way costs shifting, or QOCS, will be lost by a pursuer in personal injury proceedings.

Amendment 34 makes it clear that failure to conduct proceedings in an appropriate manner by the pursuer's legal representative as well as by the pursuer may lead to the loss of benefit of QOCS. When Sheriff Principal Taylor gave evidence to the committee, he said that

"'Fraudulent representation' involves word of mouth"

but that fraud can also

"take place through actions."—[*Official Report, Justice Committee,* 31 October 2017; c 11.]

Amendment 34 faithfully reflects Sheriff Principal Taylor's suggested wording for the test of fraud in relation to QOCS. It ensures that actions as well as representations will be considered by the court in deciding whether the benefit of QOCS should be lost.

Amendment 4, in the name of Liam Kerr, is very similar to the Government's amendment 35 but relies on a further amendment, which is amendment 5. Although the Government's amendment is simpler from a drafting point of view, the amendments have the same aim. I am, therefore, willing to support Liam Kerr's amendments 4 and 5, as they have the same effect as amendment 35. I do not intend to move amendment 35 if the committee supports amendment 4. If amendments 4 and 5 are agreed to, the Government will, of course, consider whether any drafting changes may be required at stage 3.

Amendment 36 makes it clear that the test of reasonableness in section 8(4)(b) is tantamount to that of Wednesbury unreasonableness. The original drafting was intended to reflect the

Wednesbury test, but it was clear that stakeholders wished the Government to revisit its drafting approach. Amendment 36 broadly follows the wording that was suggested to the committee on 26 September by Simon di Rollo QC of the Faculty of Advocates and that Sheriff Principal Taylor endorsed in his evidence to the committee on 31 October. It means that any "manifestly unreasonable" behaviour by the person bringing the proceedings or a legal representative will result in QOCS protection being lost. The concept of manifest unreasonableness delivers in substance the Wednesbury test. Sheriff Principal Taylor said in his review that there has to be a high test, because otherwise the benefits of QOCS might be lost as pursuers might not have the confidence to litigate.

Amendment 6, in the name of Liam Kerr, would mean that the benefit of QOCS would be lost if the pursuer failed to beat a tender that was made during the court proceedings or an offer of compensation to settle that was made before the court proceedings started. The question of tenders—that is, whether a pursuer should lose the benefit of QOCS—was raised in written submissions by much of the insurance lobby. Other groups that responded to the call for evidence, such as the Law Society of Scotland and Brodies LLP, considered it to be the kind of issue that may be dealt with in rules of court. I agree with Sheriff Principal Taylor that the benefit of QOCS should be lost if a pursuer fails to beat a tender. However, I also agree that it is more appropriate to deal with tenders through secondary legislation.

Members will have noted that that is the firm position of the Lord President, who recently wrote to the committee on the issue. If, as the Lord President indicated, tenders and settlement offers are to be dealt with in rules of court, that is the appropriate place for any provision on the failure to beat a tender or a settlement offer. Section 8(6) clearly states that QOCS are subject to such exceptions as may be provided for in an act of sederunt—that is, in court rules. The Lord President has stated that having a reference to tenders in primary legislation, which would be the effect of Mr Kerr's amendment 6, would restrict the courts' ability to regulate in the area. Indeed, it would preclude the Scottish Civil Justice Council from coming up with straightforward terminology rather than using the word "tender", which may have other connotations.

12:15

Liam Kerr's amendment 7 is similar. The benefit of QOCS would be lost if the pursuer was, in the court's opinion, being unreasonable in refusing to accept an offer under a pre-action protocol. Again, I consider that that should be left to the rules of court. In his letter of last week to the convener, Lord Carloway, the Lord President, commented that the committee might take the view that amendment 7 would be

"anomalous in both its operation and effect",

and I agree with the Lord President. Pre-action protocols are a matter for rules of court.

Amendment 8, in the name of Liam Kerr, would mean that the pursuer would be deemed to have acted in an inappropriate manner and so would lose the benefit of QOCS if the proceedings were summarily dismissed by the court. I am not aware that the term "summarily dismissed" is used in primary legislation, and there appears to be some doubt about whether the Court of Session has powers to dismiss a case summarily. However, I am aware that the Scottish Civil Justice Council is considering the matter and that rules are likely in the foreseeable future.

Whether those rules will use the term "summary dismissal" or some other phrase, such as "strike out" as is used in England and Wales, is not yet known. Again, the Lord President has emphasised that Parliament should be slow to tie the Scottish Civil Justice Council's hands. In his letter, Lord Carloway also noted that the general power of summary dismissal that is referred to in amendment 8

"will be considered as part of the current rules rewrite project."

Amendment 10, in the name of Liam Kerr, defines what is meant by "proceedings" in section 8(4) to the effect that it means all actions of the pursuer in a damages claim before and after proceedings have been served. The amendment will be unnecessary if the Government's amendments succeed, as the phrase

"in connection with the proceedings"

will cover behaviour by the pursuer or their lawyer in the pre-litigation period as well as in the civil proceedings proper.

Amendments 40, 47 and 49 are consequential drafting amendments. Amendment 49 inserts a new section after section 12 that provides the definition of "legal representative" for the whole of part 2 of the bill.

Amendment 40 is a consequential amendment that removes the definition from its previous place in the bill at section 9(4). The definition is not changed. That change is necessary because the definition of "legal representative" is now relevant to section 8, on QOCS, as well as to section 9, on third party funding, and section 11, on the award of expenses against legal representatives.

Amendment 47 is another consequential amendment that removes the reference in section 11 to the definition of "legal representative" in the now defunct section 9(4).

Amendment 48 is a minor consequential amendment to the Courts Reform (Scotland) Act 2014. It relates to section 81(5)(b) of that act, which provides that only in the case of unreasonable behaviour will a party lose the benefit of fixed expenses in civil procedure cases in the sheriff court.

Amendment 17, in the name of Liam Kerr, requires the Court of Session to make rules for a new pre-action protocol for clinical negligence cases. The amendment also provides that clinical negligence cases would not have the benefit of QOCS until those rules come into force. We consider that the extension of pre-action protocols to medical negligence cases is for the Lord President and the Scottish Civil Justice Council to consider. We do not consider it appropriate that there should be a delay in extending the benefit of QOCS to pursuers in such cases. We do not consider that that would be in accordance with the spirit of the bill.

I move amendment 34.

Liam Kerr: I hope that you will forgive me, convener, as I have not done this before.

My amendments deal with where the benefit of QOCS should be lost pursuant to section 8(4). I am grateful to the minister for clarifying that my intention in amendment 4 is in the same vein as the intention of amendment 35 and for clarifying that, if amendment 4 is agreed to, amendment 35 will not be moved.

The benefit of QOCS should be lost when, on the balance of probability, a claimant has acted fraudulently in connection with a claim or proceedings. Again, I am grateful for the clarification that it is a wider category of proceedings. Many claims will never reach court, so the test should include the behaviours and actions prior to litigation, because that will deter more spurious claims. That accords with Sheriff Principal Taylor's recommendations.

On amendments 6 and 7, which, as the minister has said, rather go together, the bill's provisions on QOCS do not take account of the tender process. As we have heard throughout the evidence taking, tenders are a very important aspect of this type of litigation, and it is my view that the bill should refer specifically to them. Indeed, if I recall correctly, that was a recommendation of the Taylor report. Certainly, Sheriff Principal Taylor stated in evidence to the committee:

"I am persuaded that qualified one-way costs shifting should not be available, and should be specified as not being available, in the event that the pursuer has failed to beat a tender."—[*Official Report*, *Justice Committee*, 31 October 2017; c 12.]

At present, when a pursuer fails to beat a pre-litigation offer, they must beat the offer at the conclusion of the action or be liable for the defender's judicial expenses from the date of the offer. My view is that that discourages unnecessary litigation and ensures that courts and parties to lawsuits can focus on claims that can genuinely not be settled. However, if QOCS protection was not lost if a pursuer failed to beat a defender's tender, that would seriously undermine the tender process and dilute the current incentive to resolve cases before they go to court. My amendment therefore covers tenders made prior to the commencement of court proceedings to encourage early settlement of claims to the benefit of the parties.

On amendment 8, which relates to summary dismissal, I do not necessarily agree that the provision should not be in the bill. I have tried to make it clear that QOCS protection should be lost when a pursuer's claim is summarily dismissed, which I think is in line with Sheriff Principal Taylor's recommendations and, indeed, his evidence to the committee. That would be a key protection against the bringing of frivolous claims.

I think—if I heard correctly—the minister clarified that, if the Government amendments were to be agreed to, there would be no need for amendment 10. In that case, I would not seek to move it. Amendment 17 proposes that clinical negligence claims should not fall under section 8 until a pre-action protocol is in place. Sheriff Principal Taylor recognised in his evidence the vital importance of pre-action protocols in that, inter alia, they incentivise settlement and allow a focus on claims that cannot be settled by the court. As members will remember, I was concerned about the cost of clinical negligence claims, and it is certainly my view that a pre-action protocol is required before implementing something—in this case, QOCS—that, by its own definition, will increase the number of claims.

On that basis, I will move amendment 4 and other attendant amendments at the relevant time.

Liam McArthur: I, too, welcome the progress that we appear to be making on ensuring that the provisions adhere to the Wednesbury principle. I think that the minister said that amendments 4 and 5, in the name of Liam Kerr, do so. Amendment 36 reinforces that, too, and I very much welcome the progress in that respect.

On the points that Liam Kerr has rightly made about pre-action protocols and tenders, I read with interest the Lord President's submission. Given

the questions that he has raised about my own amendments, I have some reservations about siding with him in this instance; however, I think that the concerns that he has raised are perhaps legitimate.

The point that the minister made about orders of court seems to be not unreasonable. If amendment 55 is agreed to, we will have the potential to have post-legislative scrutiny of the matter. In that respect, we might be able to say to the Lord President and colleagues that there will, over the coming years, be an opportunity through orders of court and subordinate legislation to address the legitimate concerns that not just Liam Kerr but Sheriff Principal Taylor has expressed. If, when she winds up, the minister could be more explicit in that regard, it might give some of us who are sympathetic to what Liam Kerr is trying to drive at in amendments 6 to 8 comfort that the issues will be addressed not in the fullness of time but in a timespan that recognises the importance of getting this right.

Annabelle Ewing: As I have said, I am happy to support amendments 4 and 5, in the name of Liam Kerr, but I cannot support his other amendments in this group.

I appreciate that the provisions in section 8 do not include some of the criteria that Sheriff Principal Taylor recommended should lead to a person losing the benefit of qualified one-way costs shifting. However, as the Lord President has clearly indicated in his letter to the committee, matters relating to tenders, settlement offers, pre-action protocols and summary dismissal are much better dealt with in rules of court—indeed, that is the normal practice. I hope that the committee agrees with the Lord President in that regard.

I am fairly confident that the provisions on post-legislative scrutiny that are particular to the bill—we will get on to that when we get to that section—will serve as a spur to action within a timetable that is not the same as the initially scheduled timetable.

Amendment 34 agreed to.

Amendment 4 moved—[Liam Kerr]—and agreed to.

Amendment 35 not moved.

Amendment 5 moved—[Liam Kerr]—and agreed to.

Amendment 36 moved—[Annabelle Ewing].

The Convener: The question is, that amendment 36 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, George (Paisley) (SNP)
Finnie, John (Highlands and Islands) (Green)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Johnson, Daniel (Edinburgh Southern) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)

Against

Corry, Maurice (West Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 8, Against 3, Abstentions 0.

Amendment 36 agreed to.

Amendment 6 moved—[Liam Kerr].

The Convener: The question is, that amendment 6 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Corry, Maurice (West Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)

Against

Adam, George (Paisley) (SNP)
Finnie, John (Highlands and Islands) (Green)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Johnson, Daniel (Edinburgh Southern) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 6 disagreed to.

Amendment 7 moved—[Liam Kerr].

The Convener: The question is, that amendment 7 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Corry, Maurice (West Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)

Against

Adam, George (Paisley) (SNP)
Finnie, John (Highlands and Islands) (Green)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Johnson, Daniel (Edinburgh Southern) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 7 disagreed to.

Amendment 8 not moved.

Amendment 9 moved—[Liam Kerr].

The Convener: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Corry, Maurice (West Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)

Against

Adam, George (Paisley) (SNP)
Finnie, John (Highlands and Islands) (Green)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Johnson, Daniel (Edinburgh Southern) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 9 disagreed to.

The Convener: I call amendment 10 in the name of Liam Kerr.

Liam Kerr: Forgive me, convener. Can I have some clarification? The minister was clear that, if certain amendments were agreed to, I would not need to move amendment 10. Have we agreed to those amendments?

The Convener: I will get some advice.

Annabelle Ewing: I understand that it is now not necessary for you to move amendment 10.

Liam Kerr: That is what I am trying to get at.

Amendment 10 not moved.

Section 8, as amended, agreed to.

The Convener: That ends today's consideration of the bill. We will continue next week.

12:29

Meeting suspended.

12:31

On resuming—

European Union Reporter (Appointment)

The Convener: Agenda item 7 is the appointment of a European Union reporter. I refer members to paper 3, which is a note by the clerk. Paragraph 5 of that paper outlines the role of the EU reporter. Are there any volunteers or nominations to take up the appointment?

Rona Mackay: I nominate Mairi Gougeon.

The Convener: There being no further nominations, I am very pleased to say that Mairi Gougeon is now the Justice Committee's EU reporter.

Justice Sub-Committee on Policing (Report Back)

12:32

The Convener: Agenda item 8 is feedback from the Justice Sub-Committee on Policing on its meeting of 22 February 2018. Following the verbal report, there will be an opportunity for brief comments or questions.

I refer members to paper 4, which is a note by the clerk, and invite John Finnie to provide feedback.

John Finnie: Thank you, convener.

The Justice Sub-Committee on Policing met last Thursday and took evidence on Durham Constabulary's reports on its investigations into Police Scotland's former counter-corruption unit. We heard evidence from Chief Constable Michael Barton and Darren Ellis, who is a senior investigator from Durham Constabulary.

Mr Barton told the committee that he had concerns about Police Scotland changing the remit from an investigation to an inquiry and about obstruction, particularly from Police Scotland's legal department. He expressed the view that Police Scotland is "risk averse" and that it had adopted an unnecessarily prolonged process.

The Justice Sub-Committee on Policing intends to take further evidence. We will hear from Police Scotland on the issue on 15 March.

We wrote to Police Scotland and the Scottish Police Authority to seek an urgent assurance that Police Scotland will not destroy any evidence or data until the applicants have consented. That relates to the information that underpins much of what we discussed.

I am happy to take questions.

The Convener: Do members have any questions or comments?

Daniel Johnson: The evidence that we took was quite extraordinary in three key regards. First, it was refreshing to receive such blunt and straightforward evidence. Secondly, there were a number of issues relating to prior police conduct, and the observation was made that evidence had simply been invented, which was quite extraordinary. Thirdly, Police Scotland's conduct with regard to its help or otherwise in Durham Constabulary's work was quite extraordinary.

For those reasons, I encourage all members who are not members of the Justice Sub-Committee on Policing to read the evidence that we took in the meeting, which is in the *Official Report*, because it was very significant.

Liam McArthur: I agree whole-heartedly with Daniel Johnson. We went into the meeting with the impression that the evidence that we would receive would be quite striking, but what we heard and the way in which it was presented took many of us a bit by surprise. I think that the evidence of future witnesses will be judged by the Bartonmeter.

There are serious questions for Police Scotland and, by extension, for the SPA. As Daniel Johnson said, it would be useful for colleagues who are not members of the sub-committee to have sight of the responses, because I am sure that they would be of interest to them.

The Convener: Yes. Most concerning of all was that what had been set up as an inquiry turned out, at the end of the day, to be a review because of police interference. Clearly, that is not acceptable.

It is a matter of huge concern that the complainants—who were the reason for the probe—seemed to be an afterthought. There are multiple areas for the sub-committee to review following last week's evidence-taking session.

John Finnie: On what the chief constable of Durham Constabulary, perhaps reasonably, expected to be the scope of what he was doing, it is fair to record that that is not—and never has been—the position of Police Scotland. The investigation role was undertaken ultimately by the Police Service of Northern Ireland. However, there is a need to consider whether the process is unduly cumbersome.

Comments were made about risk aversion. I highlight the impact that that had on the victims of what was acknowledged to be illegal behaviour by Police Scotland. We have to look at that aspect, as well as what was said about the lack of co-operation from Police Scotland's legal department.

As we know, the main people involved are no longer part of Police Scotland and a new regime is in place. However, we will certainly want full and frank disclosure of all the information and not selective disclosure as we have had historically.

Liam McArthur: John Finnie's points are entirely reasonable. On the additional concern, to which the convener referred, about pastoral care for those who were, as Mike Barton suggested, "gravely wronged" by what happened, no steps seem to have been taken in the interim to engage with the complainants and to provide—or even to identify—the support that might be appropriate for them. That was left to Durham Constabulary.

We have heard consistently from Deputy Chief Constable Livingstone about police wellbeing being a priority and a concern that is laced through

the policing 2026 strategy. However, it is difficult to reconcile that with what we have seen here.

I think that we will have an opportunity to return to all those issues.

The Convener: Thank you for those comments, which are duly noted.

That concludes our seventh meeting in 2018. The committee will next meet on 6 March, when it will continue stage 2 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill and take evidence on alternate dispute resolutions.

Meeting closed at 12:37.

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