



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# JUSTICE COMMITTEE

Tuesday 8 November 2011

Session 4

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**Tuesday 8 November 2011**

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**JUSTICE COMMITTEE**

**13<sup>th</sup> Meeting 2011, Session 4**

**CONVENER**

\*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

**DEPUTY CONVENER**

\*James Kelly (Rutherglen) (Lab)

**COMMITTEE MEMBERS**

\*Roderick Campbell (North East Fife) (SNP)

\*John Finnie (Highlands and Islands) (SNP)

\*Colin Keir (Edinburgh Western) (SNP)

\*John Lamont (Ettrick, Roxburgh and Berwickshire) (Con)

\*Alison McInnes (North East Scotland) (LD)

\*Graeme Pearson (South Scotland) (Lab)

\*Humza Yousaf (Glasgow) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Aileen Bearhop (Scottish Government)

Kevin Gibson (Scottish Government)

Kenny MacAskill (Cabinet Secretary for Justice)

**CLERK TO THE COMMITTEE**

Peter McGrath

**LOCATION**

Committee Room 2



## Scottish Parliament

### Justice Committee

*Tuesday 8 November 2011*

[The Convener *opened the meeting at 10:33*]

### Decision on Taking Business in Private

**The Convener (Christine Grahame):** Good morning. I welcome everyone to the Justice Committee's 13th meeting of this session, and I ask everyone to switch mobile phones and other electronic devices off completely. They interfere with the broadcasting system even when switched to silent. No apologies for absence have been received.

I welcome to the public gallery and the meeting pupils from across Scotland who are attending an advanced higher modern studies seminar in the Parliament today. I look forward to speaking with them later this afternoon.

We turn now to item 1 on our agenda. The committee is invited to agree to consider in private at future meetings a draft report on the legislative consent memorandum for the Terrorism Prevention and Investigation Measures Bill.

**Members** *indicated agreement.*

## Terrorism Prevention and Investigation Measures Bill

10:34

**The Convener:** We turn now to item 2. As members will see from the clerks' paper, which is paper J/S4/11/13/1, the legislative consent memorandum on the Terrorism Prevention and Investigation Measures Bill, which is a United Kingdom bill, was lodged by the Scottish Government on 1 November, to enable the LCM to be considered by the Scottish Parliament in advance of the final amending stage in the UK Parliament, which is expected to be on 23 November. The committee is required to agree its report on the LCM at its meeting next week.

In view of the short timescale, I thought that it would be useful to invite the Cabinet Secretary for Justice to today's meeting to give members of the committee an opportunity to ask any questions or to raise any issues of concern in relation to the legislative consent motion. I welcome the cabinet secretary, Kenny MacAskill, and his officials: Aileen Bearhop, principal policy officer in the Scottish Government police division; and Kevin Gibson, from the Scottish Government legal directorate. I thank Mr MacAskill and his officials for attending at such short notice. I understand that the cabinet secretary wishes to make a short opening statement.

**The Cabinet Secretary for Justice (Kenny MacAskill):** Before us today is the draft legislative consent motion on provisions in the Terrorism Prevention and Investigation Measures Bill. The bill was introduced in Westminster on 23 May 2011. It will repeal control orders, which were provided for in the Prevention of Terrorism Act 2005, and related provisions in other legislation. It will replace them with a new system of terrorism prevention and investigation measures, or TPIMs, which are designed to protect the public from the risk posed by suspected terrorists.

The LCM relates specifically to provisions around the seizure of evidence and the use of DNA and other forensic samples. It also covers provisions for making a temporary enhanced TPIM order in exceptional circumstances.

Schedule 5 introduces powers of entry, search and seizure. The powers in relation to entry and search are clearly reserved. The provisions on seizure, however, include the power to seize anything found in the course of a TPIM-related search of premises that the police reasonably suspect is connected with an offence. The offence might be in a devolved area, such as theft, assault and so on. Officers can already use common-law powers to seize evidence if they believe that an

offence has been committed. We believe that it is important, however, to clarify the position with regard to seizure of evidence relating to TPIMs. That is so that the law can be consistently applied and is less susceptible to challenge.

Schedule 6 concerns use of forensic data. Powers for the collection and retention of forensic data in Scotland are set out in the Criminal Procedure (Scotland) Act 1995. Existing Scottish procedures and practices are reflected in the TPIM bill. Common-law powers may allow police to use forensic data taken from those subject to TPIMs for devolved purposes, such as the prevention and detection of crime or the identification of a deceased person. However, it is important to put the matter beyond doubt. The police agree.

The powers for the making of a temporary enhanced TPIM order ensure that enhanced TPIMs could be introduced during the dissolution of Parliament. At all other times, equivalent powers would be introduced by way of an emergency bill for enhanced TPIMs. At our request, the bill will include provision for the consent of Scottish ministers to be sought in cases where UK ministers wish to use the enhanced order-making powers, where those powers fall within the competence of the Scottish Parliament or confer functions on the Scottish ministers. That will help to ensure that the interests of the Scottish Parliament are considered.

The Terrorism Prevention and Investigation Measures Bill will reach its third reading in the House of Lords later this month. The bill has a number of complex provisions that have been the subject of detailed discussion at official and ministerial levels. Those have resulted in amendments being tabled at a late stage, which has allowed us only now to bring forward the motion. I recommend that the committee approves the motion.

**The Convener:** Thank you. Do committee members have any questions?

**Humza Yousaf (Glasgow) (SNP):** Thank you for your statement, cabinet secretary. I wonder whether you share some of the reservations that have been expressed. TPIMs are a replacement for control orders, and a number of organisations, political parties and others had serious reservations about the illiberal nature of control orders, which struck at the heart of our principles of justice. However, the civil rights organisation Liberty says in a briefing that it would prefer control orders to TPIMs, because at least control orders are temporary measures. TPIMs reflect some of the worst aspects of control orders—the most illiberal parts—and, if the bill is passed, it will put them permanently on the statute book.

Do you share any of those civil liberties concerns? Is there a discussion to be had, or do you approve of the bill as it stands?

**Kenny MacAskill:** Individuals have understandable concerns, and the balance has to be right. The current coalition down south felt that the 2005 act went too far, and considerable worries about control orders were expressed. As a Government, our view is that there has to be legislation on terrorism. In due course, we hope that such matters will be dealt with by the Scottish Government and the Scottish Parliament, but at present they are dealt with by Westminster.

As Cabinet Secretary for Justice, I have two questions. First, how do we ensure that we get legislation that is fair and appropriate and which works? Secondly, how do we ensure that our involvement is maintained when the legislation impacts on devolved matters? I have left it to Westminster colleagues to argue the rights and wrongs of the bill as such, while I have looked at what matters to Scotland. It seems to me that there is an obligation to ensure that where there is the potential for prosecutions, there is clarity in the law. The police have said to us that there would be a gap, in that common-law powers would be inadequate, which might lead to lengthy cases that would not be conducive to the safety of Scotland. It would therefore be best for the police if the law on the collection and use of forensic and other evidence is uniform across the country.

Equally, if draconian emergency powers are to be used, we should have a say in that. If I did not move for that to happen, it is not that the powers would not come in; they would come in, but the Scottish Parliament and the Scottish Government and ministers, of whatever political party, would have no say in that. We have sought as a Government to amend the bill in that regard to ensure that the Scottish Parliament and Scottish ministers are consulted on matters that would impact on devolved issues. We cannot affect terrorism decisions per se, because those are reserved. However, there is merit in having clarity on the finer details of the law on evidence and forensics, which the police support. Although common-law powers could be used, that might lead to extensive legal cases. Such cases could be avoided if we had a clearer definition in law.

I share Humza Yousaf's doubts on the broader issue, but that discussion is for a future in which the Scottish Parliament has greater powers. Until then, it is a matter for south of the border. At present, I am required to ensure that the law works well, which is why we need clarity, as the police say, on forensics and evidence. In addition, the consent aspect is necessary to ensure that the Scottish Parliament and Government, no matter

what party is in power, are consulted on devolved matters.

**Humza Yousaf:** I appreciate your point.

If the amendment is accepted and Scottish Government ministers and the Scottish Parliament are consulted before TPIMs take place, do you envisage engaging with the Scottish Human Rights Commission and other human rights bodies to ensure that TPIMs do not unduly restrict somebody's civil liberties?

**Kenny MacAskill:** Consultation would not be on individual TPIMs but on the further powers that might be taken. Our door is always open and we meet regularly with the human rights commissions from both north and south of the border. Indeed, I spoke to Baroness Kennedy earlier today. We will continue such meetings because I think that every jurisdiction in the world accepts that there must be special measures for terrorism, given what is happening in the world.

I put on record the fact that this Administration has no difficulties with colleagues south of the border in that regard. The police work with their colleagues south of the border and we work with the Home Secretary and others. We work together for the common good, not just in the United Kingdom but beyond, because terrorism knows no boundaries. Whether the terrorism is in Madrid or Pakistan, we must try to deal with those who perpetrate it.

Equally, there must be a balanced approach to terrorism measures, and their use must be regularly reviewed in line with the level of terror threat that we face. We keep such matters under continual review, which is why the official terrorism threat level varies. It is important that terrorism legislation should be reviewed, which is why we welcomed the changes from the 2005 act. As part of such reviews, it is important that we speak not just to the forces of law and order but to those who represent people who are sometimes unfairly or disproportionately affected by terrorism measures. As I said, our door is always open in that regard. This Administration constantly reviews such matters, and we continue to work with law and order agencies not just south of the border but across the globe.

10:45

**John Finnie (Highlands and Islands) (SNP):** Paragraph 15 of the legislative consent memorandum relates to the power of seizure of evidence. It says:

"The powers of entry and search and some of the powers of seizure in the Bill are reserved but this is not the case for the power of seizure of evidence relating to devolved offences."

You talked about our involvement in investigations and gave the example of theft. Will you help me to understand a situation in which a reserved offence and a devolved offence occur at the same location? Who would be in charge, and if there were any resulting prosecution, where would the person be prosecuted?

**Kenny MacAskill:** The Scottish police would be in charge, subject to the direction of the Lord Advocate. We have talked about minor matters, but I return to the regrettable situation that we faced after the previous election, with the terrorist incident at Glasgow airport. The case was directed, ultimately, by the Lord Advocate but matters were ceded, if I can use that phraseology, to the authorities south of the border because the charges related not simply to the incident at Glasgow airport, but to much greater carnage that had been anticipated the evening before in the city of London.

The investigation into the Glasgow airport attack was carried out by Strathclyde Police and supported by other forces. It was directed by the Lord Advocate. Ultimately, the prosecution took place south of the border, but assurances had been given and rights reserved so that, if the prosecution had not been pursued south of the border, the Lord Advocate could have brought the accused back up to Scotland to deal with them here.

The scenario that we envisage under the bill is that of a Scottish police officer coming across something related to terrorism in the investigation of a theft or a breach of the peace, for example. There is a good argument in law that the police officer who was investigating the matter used the common law and that it is legitimate to use it to deal with terrorism. However, highly paid lawyers who, unfortunately in some respects, have a human rights industry might challenge that. Although we preserve human rights—and I pay tribute to the people and organisations to whom Humza Yousaf referred—it sometimes seems that there is a mini industry in making human rights challenges in the Scottish courts.

It is important that we have clarity, so that, if Scottish police officers are dealing with an incident—even a humdrum road traffic incident, a breach of the peace or a theft—and, all of a sudden, it emerges that it is related to terrorism, we do not have a situation six months down the line in which the argument is made that we cannot use the evidence because we do not have powers in relation to terrorism under the common law. There is a good legal argument that says that common-law powers will suffice, but the police believe that it is important that they have the powers in the bill and I believe that it is important that there is clarity north and south of the border in

relation to these specific offences. Therefore, we are bolting the door and—if I may mix my metaphors—providing a belt and braces.

**John Finnie:** Terrorism is clearly an international matter. What if it was the other way around: what if the initial catalyst for a search was terrorism related and it unearthed a substantial theft? Where would the primacy lie in such a case? Is there any potential for those conducting an inquiry on a Scottish case to be anything other than Scottish officers?

**Kenny MacAskill:** In any offence in Scotland—even an offence that ultimately results in somebody being extradited—primacy always rests with the Lord Advocate. The investigation would be carried out by the police. There may be instances when some assistance may be sought, perhaps from the security services, but that is for others to comment on. As the Lord Advocate of the time made clear when we faced challenges in relation to the incident at Glasgow airport, primacy on all such matters in Scotland rests with the Lord Advocate. The people who act on the Lord Advocate's behalf are the Scottish police. Other agencies may be involved, but the only people with the statutory powers would be members of the Scottish police service.

**John Finnie:** Can the Lord Advocate direct the security services?

**Kenny MacAskill:** On criminal prosecutions, the short answer is both yes, because he is in charge of criminal prosecution, and no, because the security services do not bring criminal prosecutions. Beyond that, you would need to get the Home Secretary or others from south of the border to advise on whether the Lord Advocate can direct the security services. I cannot comment on that because I do not have the knowledge about matters that are reserved to Westminster.

Investigations and prosecutions in Scotland are ultimately the Lord Advocate's call. Others would not have the powers to do anything related to those without his consent.

On the relationships between me and the Home Secretary, between the Lord Advocate and the Lord Chancellor or Attorney-General, and between the Scottish police and special branch, we are all on the same side in such issues. As a matter of courtesy, both the First Minister and I meet the security services, and I should put it on record that we have not felt it necessary to raise any issues with them. We recognise that there is a job that they have to do, and they co-operate fully with the Scottish police.

If you are looking for a power to direct the security services, you will need to ask someone south of the border how such matters are dealt with. Suffice it to say that, in Scotland, we have

acted on the basis of working co-operatively, and that approach has been successful to date.

**John Finnie:** Could a search take place in Scotland without the involvement of Scottish police officers?

**Kenny MacAskill:** I do not see where the security services would have the power to do that. A warrant has to be applied for and given, and I do not see how a warrant could be given to a third party who is not a Scottish police officer. I will write to the committee with the chapter and verse, but I cannot for the life of me think who else would be involved.

As you will know from your 30 years' experience, when someone is granted the office of constable, that gives them certain powers. Other office-holders, such as sheriff officers, are given powers by the court, but the power to search is given only when a warrant has been applied for. I am trying to track back through my limited 20 years of practice as a lawyer and my four years at the University of Edinburgh, but I cannot think of a situation in which others would have the power to apply for and be given such a warrant. That power lies with the sheriff officers and constables.

**Aileen Bearhop (Scottish Government):** That is my understanding.

**Kevin Gibson (Scottish Government):** There are cross-border search powers for English and Welsh officers who are investigating offences that have occurred in England and Wales but in relation to which the evidence lies up here.

**Kenny MacAskill:** Mr Finnie will know that we have always had the concept of hot pursuit: the deluded individual who thinks that they can avoid detection, for drink driving or theft for example, if they just put their foot to the floor when they come to the M74 soon realises that Scottish police officers have the power to continue down the M74 on to the M6. Officers from Cumberland have equal powers to pursue suspects north and to intercede. That procedure has always existed—certainly for all the time that I practised law.

Such matters are fundamental when we discuss warrants. To some extent, that is why we are bringing the LCM—to ensure that we do not end up with people saying, "The warrant was for a routine stop and search and you moved on to terrorism so you shouldn't bring in this evidence." We want to ensure that any relevant evidence can be brought—that is what the police want. Equally, we know the nuances that if the warrant is not properly applied for—if the wrong officer's name or the wrong house is designated, for example—a whole case load of matters come out, as happened with Cadder, sons of Cadder and grandsons of Cadder.



We will write to the committee with profound clarity but, as I said, I cannot think of any way in which somebody who is not an authorised officer could apply for a warrant, and I cannot think of a situation in which a search could take place without the involvement of Scottish police officers. The exception is the situation that Kevin Gibson described—which already exists and has been the case even for officers coming to detain people who are to be returned on warrant to, for example, Manchester or London.

**Aileen Bearhop:** I will add one thing. The powers for search under the TPIMs might be about checking compliance with the restrictions or to serve a notice. The cross-border issue should not arise, but we will make further inquiries and confirm the exact position for the committee. The officers should be involved for the specific reasons given in the TPIMs, and the devolved issue would come in only if other evidence was found at the same time.

**The Convener:** I have a supplementary question. The proposed amendment states:

“The Secretary of State must obtain the consent of the Scottish Ministers to the inclusion in a temporary enhanced TPIM order of any provision ... which would be within the legislative competence of the Scottish Parliament”.

Cabinet secretary, I think that you might have referred to the Scottish Parliament earlier. Can I clarify that the provision relates to the Scottish ministers and not the Parliament?

**Kenny MacAskill:** Yes, that would be the position.

**The Convener:** The second point I wanted to ask you about is the reference to “must obtain the consent”. What would the process for that be? Would it be informal or formal? How would it operate?

**Aileen Bearhop:** It would be formal, with the secretary of state approaching Scottish ministers for consent.

**The Convener:** Would the Parliament be made aware of that? That is what I am driving at: would it be a public matter?

**Kenny MacAskill:** I should have thought that any minister would feel obliged to make that information available. This is an enhanced procedure to deal with a case of special urgency that we hope will never arise and we thought it essential to ensure that Scottish ministers are consulted so that the Scottish Parliament’s dignity and status are preserved. I would certainly feel that those matters should be brought to its attention.

Equally, the situation would probably already be in the news, given that Westminster would be seeking to do such a thing and we would simply

be wanting to okay it here. I find it hard to think of a circumstance in which it would be dealt with surreptitiously and would not already have been raised at Westminster. We would be seeking to do what we needed to do here as matters went through there and I would certainly feel obliged to bring the matter to the attention of Parliament.

**The Convener:** I do not want to put words into your mouth, but I am thinking that a statement to Parliament or something of that order might be one of the options. Would it?

**Kenny MacAskill:** Although we hope that such circumstances will never arise, I would have thought that a statement would have been made already in Westminster and clearly we would be required to make clear the implications for Scotland. Obviously, whether a statement can be made is not a matter for ministers. Ministers can ask to make them, but it is ultimately for the Parliamentary Bureau to decide. I cannot imagine the bureau refusing.

My view is that these matters are all to do with facts and circumstances. You have an assurance that nobody would seek to hide matters and I do not think that they would be hidden because some scenario would presumably trigger the process, as we have seen in previous instances with flights being grounded. If emergency legislation was sought, there would have to be some trigger. I have no doubt that the Home Secretary would make a statement down south, as we have seen her do on the UK Border Agency. We would have to make Scotland’s position clear and whether to do so through a statement to Parliament or a letter to the committee would be a judgment call at the time.

**The Convener:** That is very helpful.

**Roderick Campbell (North East Fife) (SNP):** I have just a small question on the national security determination. Obviously, I have not read the full bill, but it refers to a chief constable determining

“that it is necessary for ... material to be retained for the purposes of national security.”

Do you have any comments on the impact of the possible reform of the police service on that?

**Kenny MacAskill:** In practice, it will make little difference. In the main, although the bill refers to a chief constable, we have lead agencies that tend to deal with such matters. The lead special branch unit tends to be located in Strathclyde and, south of the border, the Metropolitan Police Service takes the lead. You will find that with the single service you will have greater clarity because, to some extent, such matters are already being dealt with on a more specialised basis by individual services.

**The Convener:** Thank you. I have no other questions. Do you wish to add anything, cabinet secretary?

**Kenny MacAskill:** No, thank you.

**The Convener:** Thank you, and I thank your officials for attending at such short notice. I shall suspend for 30 seconds to allow witnesses to leave.

10:58

*Meeting suspended.*

10:58

*On resuming—*

## Petitions

**The Convener:** We move on now to item 3 on the agenda. There are three petitions for the committee to consider today. This is the first time in this session that the committee has had the opportunity to consider petitions referred to us and I thought it might be helpful for new members to know why petitions are referred. Perhaps you do not need me to tell you. Do you want me to?

**Members:** Yes.

**The Convener:** The Public Petitions Committee only refers a petition to another committee when there is an anticipated benefit in doing that, such as when referral could create an opportunity for more detailed scrutiny or when the subject committee anticipates undertaking work in a relevant area. Decisions by the Public Petitions Committee are made on a case-by-case basis and, of course, any subsequent course of action is entirely up to the lead committee, which in this case is us.

### Legal System (Fee Arrangements) (PE1063)

10:00

**The Convener:** The first petition is PE1063, by Robert Thomson, on the apparent conflict of interest between solicitors or advocates and clients in the present system of speculative fee arrangements known as no win, no fee.

Members will see from paper J/S4/11/13/2 that the Justice Committee in session 3 considered Mr Thomson's petition and mentioned it in its legacy paper. Our options, other than taking no action and closing the petition are: to write to Sheriff Principal Taylor's review of expenses and funding of civil litigation in Scotland, to inform the review group of the petitioner's concerns, and then close the petition; or to take any other action that members suggest. I am in your hands.

**Roderick Campbell:** I declare an interest as a member of the Faculty of Advocates. In view of the review that Sheriff Principal Taylor is undertaking, the proper course is to write to him.

**The Convener:** Do members agree with that approach?

**Members** *indicated agreement.*

**The Convener:** Thank you. I heard someone say, "That is sensible"—we are a sensible committee. Do members agree to close the petition on that basis?

**Members** *indicated agreement.*

### Fatal Accident Inquiries (PE1280)

**The Convener:** PE1280, by Julie Love and Dr Kenneth Faulds, calls for the amending of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to require the holding of a fatal accident inquiry when a person from Scotland dies abroad.

As members will see from paper J/S4/11/13/3, the petition was recently referred to the Justice Committee by the Public Petitions Committee. Other than taking no action and closing the petition, one option is to keep the petition open and write to the Cabinet Secretary for Justice to request further details of when the Scottish Government intends to introduce legislation to amend the 1976 act. Do members want to suggest alternatives? Perhaps we should keep the petition open.

**James Kelly (Rutherglen) (Lab):** The petitioners have raised a relevant issue. There is a difference between Scotland and England, in that an inquiry can be held when someone from England dies abroad. It would make sense to flag up the issue to the cabinet secretary and ask him whether he plans to amend the legislation.

**Humza Yousaf:** Has that issue not already been addressed? In our briefing, I think that it says that the cabinet secretary does not have plans to amend the legislation, but there is a possibility that the Lord Advocate will be given powers to push forward with a fatal accident inquiry in exceptional cases. I will need to have another look at the paper. It says:

"Government officials have advised that the Scottish Government currently has no plans for any further extension of the FAI regime to deaths occurring outwith Scotland".

Is there any point in writing to ask the Government if it has plans to legislate?

**The Convener:** The advice is two years old. The least that we can do is to ask whether that remains the Government's position. I suggest that we keep the petition open in the meantime. Do members agree?

**Members** *indicated agreement.*

### Justice for Megrahi (PE1370)

**The Convener:** PE1370, which was lodged by Dr Jim Swire, Professor Robert Black QC, Mr Robert Forrester, Father Patrick Keegans and Mr Iain McKie, on behalf of Justice for Megrahi, calls on the Scottish Parliament to urge the Scottish Government to open an independent inquiry into the conviction of Abdelbaset Ali Mohamed al-Megrahi for the bombing of Pan Am flight 103 in December 1988.

I declare an interest. As members are aware, I am a member of the Justice for Megrahi campaign and I have had a fairly high profile in arguing that Mr al-Megrahi's conviction was unsound. I invite comments from members before I speak about the petition myself.

**James Kelly:** I refer the committee to my entry in the register of members' interests and point out that my brother, Tony Kelly, has had a long-standing interest in the case.

I will comment on two issues. The petitioners assert that Mr al-Megrahi's conviction is unsound. The place for the conviction to be tested is in the courts. As members know, the previous appeal from Mr al-Megrahi was withdrawn shortly before the granting of his release on compassionate grounds. I note that the Scottish Criminal Cases Review Commission has said that it can consider a previously abandoned appeal and refer it to the High Court. That is the correct route for testing the soundness of Mr al-Megrahi's conviction.

In addition to some of the other issues referred to in the further paper that was submitted to the committee by the petitioners, the situation in Libya is fluid, particularly after recent events, and new information continues to come to the fore. The relevant place for that information to be considered is by the Scottish police and Scottish prosecutors. As such, I do not think that there is a role for the Justice Committee in considering the petition further.

**Humza Yousaf:** Is it not the case that the Scottish Government intends to bring forward legislation fairly imminently to release some of the documentation from the commission? Would it not be sensible to keep the petition open until we see what the Scottish Government comes forward with?

**John Finnie:** Options are provided in the paper and I certainly favour keeping the petition open pending that legislation coming forward.

**Roderick Campbell:** I agree with James Kelly that the proper place to test the soundness of a conviction is in the courts. That said, we do not know at this stage what the Scottish Criminal Cases Review Commission's grounds were and I would hedge my bets and keep the petition open until we have more information.

**John Lamont (Ettrick, Roxburgh and Berwickshire) (Con):** I share James Kelly's concerns and his analysis. It is important as a matter of principle that we establish that it is for the courts to determine the validity of a conviction. I hear what Roderick Campbell has said and what others have said, but I think that we should maintain that principle.

**Colin Keir (Edinburgh Western) (SNP):** Just for the record, I agree with my colleagues, in particular Roderick Campbell.

**Graeme Pearson (South Scotland) (Lab):** Again, just for the record, I agree with James Kelly that the courts are the proper place for this to be examined. I have reservations about whether the committee has the ability and the resources to properly test the elements that we would want to examine.

**Humza Yousaf:** I do not think—

**The Convener:** Please, do not respond.

**Alison McInnes (North East Scotland) (LD):** That would be my view, too.

**The Convener:** The Justice Committee is not being asked to conduct a public inquiry; that would not be done by the committee. We are asked to ask the Government to consider whether there should be a public inquiry.

I have several issues. The committee may not agree, but this is unfinished business. We had the abandonment of the second part of the appeal, with the whole SCCRC report untested, in extraordinary circumstances. We have Lord Carloway reviewing the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. Those of us who were there the day that we passed the emergency bill—that would be all of us—will recall that I tried to get a section deleted that took away powers from the Scottish Criminal Cases Review Commission and from the High Court. Prior to that, if the SCCRC decided that there had been a possible miscarriage of justice, it would refer the case to the High Court and the High Court had to accept it.

That has changed. Under the 2010 act, it became the case that there was a second test at the SCCRC: not only that there may have been a miscarriage of justice, but that it was in the interest of finality and certainty that it was then referred. Even if the case—not just the case that we are considering, but any case—passed that test and was referred to the High Court, the High Court would not have to hear it. The High Court has a further test: is it in the interest of finality and certainty that the case be heard? I was very concerned that something had slipped in through emergency legislation that required to be fully tested. Lord Carloway is looking at that and should report in November. That is very important for all SCCRC cases that follow.

As we know, legislation will also come to the committee that will permit, subject to data protection, the publication of SCCRC reports where appeals have been abandoned. That is another issue that requires to be considered.

**John Finnie:** Could you repeat that last bit, please?

**The Convener:** At the moment, the SCCRC report is not being published because the appeal was abandoned. However, there is legislation coming to this committee that will allow SCCRC reports to be published, in abandoned cases, subject to data protection considerations. Data protection is a matter for the Westminster Government, so negotiations will have to take place between the cabinet secretary and the Home Secretary on the data protection issues in that legislation. Those are important issues relating to the role of the SCCRC.

Finally, I should note that the submission from the SCCRC says that an appeal can be proceeded with, in cases of abandonment, in very specific circumstances.

I agree with James Kelly that there are routes through the courts, but they are by no means certain at the moment. My suggestion is that we keep the petition open until all the parts of the jigsaw come together. The courts might or might not be the route forward. That is a matter for another time, once the other parts have been dealt with and once we can see, when the report has eventually been published, what happens with the SCCRC's referrals—whether they go back to how they were or whether the second test, which would lie with the High Court, is kept. All that is important, with regard to serving the interests of justice.

I think that the committee is split on the course of action, unless I have convinced James Kelly and others.

**Alison McInnes:** I am persuaded by your arguments and am happy to keep the petition open.

**James Kelly:** I am afraid that I am not persuaded by your arguments, convener. I am not in favour of keeping the petition open.

**Graeme Pearson:** I am with James Kelly.

**The Convener:** To ensure that we have clarity, we will vote on the matter. The question is, that the petition be kept open.

#### **For**

Campbell, Roderick (North East Fife) (SNP)  
 Finnie, John (Highlands and Islands) (SNP)  
 Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)  
 Keir, Colin (Edinburgh Western) (SNP)  
 McInnes, Alison (North East Scotland) (LD)  
 Yousaf, Humza (Glasgow) (SNP)

#### **Against**

Kelly, James (Rutherglen) (Lab)  
 Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)  
 Pearson, Graeme (South Scotland) (Lab)

**The Convener:** The result of the division is For 6, Against 3, Abstentions 0. The petition remains open.

I suspend the meeting for a moment.

11:12

*Meeting suspended.*

11:13

*On resuming—*

## **Subordinate Legislation**

### **Act of Adjournal (Criminal Procedure Rules Amendment No 6) (Sexual Offences Prevention Order) 2011 (SSI 2011/355)**

**The Convener:** The final item concerns a Scottish statutory instrument that is not subject to any parliamentary procedure. The Subordinate Legislation Committee has not drawn the Parliament's attention to the instrument on any of the grounds within its remit. Are members content simply to note the instrument?

**Members** *indicated agreement.*

**The Convener:** We move into private session to discuss the Scottish Government's draft budget.

11:13

*Meeting continued in private until 12:26.*



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